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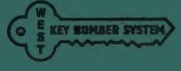
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CALIFORNIA REPORTER REFERENCES

143 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App. Page	P.2d Vol.	P.2d Page
1	299	353
11	299	296
17	299	285
20	299	678
24	300	349
35	300	356
41	300	360
46	299	682
53	299	318
59	299	307
60	299	401
64	300	110
79	299	389
83	299	966
93	299	697
99	299	985
100	299	414
103	299	881
114	299	908
119	299	391
123	299	344
129	299	668
146	299	374
152	299	325
158	299	701
162	300	25
172	299	707
180	299	686
184	299	721
191	299	315
195	299	294
198	300	119
215	300	329
224	299	398
230	300	255
256	299	362
264	299	347
272	299	404
277	299	367
288	299	14
289	299	661
293	300	151
299	300	31
305	299	716
313	300	177
327	299	689
330	299	931
333	299	691
343	300	35
352	300	210
360	299	986
368	299	712
374	299	937
379	299	897
385	299	977
395	300	366
402	300	130
424	299	321
430	300	335
441	299	1025
453	299	952
470	299	890
474	300	159
480	300	14
488	299	944
496	300	97
501	299	994
506	299	1057
509	299	905
514	299	941
520	300	295
527	299	991
531	300	40
537	299	900
544	299	1005
554	300	106
558	299	1010
561	299	912
564	299	916
570	300	44
580	299	983
583	300	279
592	300	312
606	299	950
609	300	251
615	300	242
628	300	216
636	300	84
646	299	928
650	299	1022
656	300	855
661	300	19
671	300	68
675	300	371
691	299	964
696	300	271
702	300	197
715	300	78
724	300	204
733	299	1043
745	300	163
755	300	102
762	300	57
767	299	913
771	300	71
775	300	155
781	300	275
787	300	74
794	300	60
799	300	54
804	299	888
807	299	1013
820	300	342
833	299	30
836	300	384
840	300	382
843	300	760



CALIFORNIA REPORTER

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307 P.2d—308 P.2d

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Cal.Rep. 307-308 P.2d
2-1967

TABLE OF CONTENTS

	Page
Judges and Officers	V
Table of Cases Reported	XIII

JUDGES AND OFFICERS

SUPREME COURT

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APPELLATE DEPARTMENT, SUPERIOR COURT —Continued

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JUDGES

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E. PERRY CHURCHILL Ventura

CASES REPORTED

Vols. 307–308 P.2d

	P.2d Vol.	Page
Adler v. Thomas Distributing Co., App.	307	14
Advance Hardware Co. v. Comras, App.	307	962
Alameda; Vasquez v., App.	308	857
A. L. Castle, Inc. v. Stevenson, App.	308	744
Alloway v. Litten, App.	307	90
Alpine County v. Tuolumne County, App.	308	354
Amavisca v. City of Merced, App.	308	380
American Alloy Steel Corp. v. Baker Metal Products, App.	308	494
American Alloy Steel Corp. v. Ross, App.	308	494
American President Lines, Limited; Jones v., App.	308	393
American Trust Co. v. Fallon, App.	308	389
Anderson v. Handley, App.	308	368
Angell v. Town of West Brookfield, Mass., App.	307	395
Antoyan; Grainger v., App.	308	453
Arakelian; Bank of America Nat. Trust & Sav. Ass'n v., App.	307	746
Arakelian; California Home for the Aged v., App.	307	746
Arnke; Freeman v., App.	308	897
Asamblea Apostolica De La Feen Christo Jesus; Vind v., App.	307	85
Ayako Ishimaru; Sepulveda v., App.	308	809
Ayala; People v., App.	307	418
Baker Metal Products; American Alloy Steel Corp. v., App.	308	494
Baldwin v. Kubetz, App.	307	1005
Bank of America Nat. Trust & Sav. Ass'n v. Arakelian, App.	307	746
Bank of America Nat. Trust & Sav. Ass'n; Behr v., App.	307	937
Bank of America Nat. Trust and Sav. Ass'n; Most Worshipful Grand Lodge of Free and Accepted Masons of Cal. v., App.	308	502
Bardin; People v., App.	307	384
Barrera v. De La Torre, Sup.	308	724
Barry; People v., App.	308	915
Baumbach v. Jorgensen, App.	308	799
Baumbach v. Jorgensen Farms, App.	308	799
Bean; People v., App.	308	27
Behr v. Bank of America Nat. Trust & Sav. Ass'n, App.	307	937
Behr's Estate, In re, App.	307	937
Bell v. Watson, App.	307	728
Bender v. Schneider, App.	308	527
Bertch v. Social Welfare Dept. of Cal., App.	308	397
Board of Ed. of Richmond School Dist. v. Mathews, App.	308	449
Board of Medical Examiners; Furnish v., App.	308	924
Bogatin; Swanson v., App.	308	918
Bogert v. Clawson, App.	308	880
Bolen v. Parks, App.	308	521
Bonwell v. Justice Court for Tulare Judicial Dist., App.	307	716
Bowman v. Bowman, App.	308	906
Boyd, In re, Sup.	307	625

	Vol.	Page
Boyd's Estate, In re, App.	307	754
Braly v. Mettler, App.	307	419
Brittain; People v., App.	308	38
Brown v. Friesleben Estate Co., App.	307	388
Brown; People v., App.	307	949
Buck; Sternbeck v., App.	307	970
Burroughs, Application of, App.	307	709
Byson v. City of Los Angeles, App.	308	765
California Compensation Ins. Co.; Contractor's Safety Ass'n v., Sup.	307	626
California Home for the Aged v. Arakelian, App.	307	746
Califro; Epley v., App.	307	641
Califro; Retailers Credit Ass'n v., App.	307	641
Calor Const. Co. v. Witt, App.	308	415
Campbell v. Republic Indem. Co. of America, App.	308	425
Carswell; People v., App.	308	852
Carter v. Carter, App.	307	630
Carter; People v., App.	307	670
Cassidy; Martin v., App.	307	981
Castle, Inc. v. Stevenson, App.	308	744
C. C. Moore & Co. v. Quinn, App.	308	781
Chalmers; West Covina Enterprises, Inc. v., App.	308	508
Chambers v. Southern Pac. Co., App.	307	662
Chapin v. City Commission of Fresno, App.	307	657
Chavez v. Industrial Acc. Commission, App.	307	985
Chernabaeff; Martin v., App.	308	470
Chong Wing Louie; People v., App.	307	929
Citizens Nat. Trust and Sav. Bank of Los Angeles; Kirkwood v., Sup.	308	14
City and County of San Francisco; Woods v., App.	307	698
City Commission of Fresno; Chapin v., App.	307	657
City of Berkeley; Glaeser v., App.	307	61
City of Berkeley; Mansfield v., App.	307	61
City of Berkeley; Sickler v., App.	307	61
City of Glendale v. Jarmer, Sup.	308	1
City of Glendale v. Tisdale, Sup.	308	1
City of Glendale v. Trondsen, Sup.	308	1
City of Glendora v. Faus, App.	307	976
City of King; Van Winkle v., App.	308	512
City of Los Angeles; Byson v., App.	308	765
City of Merced; Amavisca v., App.	308	380
City of Redwood City; McCammon v., App.	308	831
City of Redwood City; McCammon-Wunderlich Co. v., App.	308	831
City of San Carlos; Klassen v., App.	308	413
City of San Mateo; Jackson v., App.	307	451
Clawson; Bogert v., App.	308	880
Collopy; Minardi v., App.	308	744
Compania Harinera De La Baja California v. Western Belting & Equipment Co., App.	307	70
Comras; Advance Hardware Co. v., App.	307	962
Conlon; People v., App.	308	402
Contractor's Safety Ass'n v. California Compensation Ins. Co., Sup.	307	626
Crimmins v. Gould, App.	308	786
Crocker; Rouda v., App.	308	531
Crocker; Zamucen v., App.	308	384
Crocker Co. v. McFaddin, App.	307	429
Crow v. Yosemite Creek Co., App.	308	421
Dauenhauer v. Superior Court In and For Sonoma County, App.	307	724

	Vol.	Page
Davis v. Joseph, App.	307	958
Deady v. Morgan, App.	307	686
De Felice v. Tabor, App.	308	377
De La Torre; Barrera v., Sup.	308	724
Dennis v. Overholtzer, App.	307	1012
Department of Alcoholic Beverage Control; George v., App.	308	773
Department of Public Works, People By and Through, v. Sammis, App.	307	416
Department of Social Welfare; Merced County v., App.	307	46
De Wit v. Glazier, App.	307	1031
Diamond v. Diamond, App.	308	909
Di Michele; People v., App.	308	365
Dopplmaier; Farmland Irr. Co. v., Sup.	308	732
Douglass v. Douglass, App.	307	674
Dow; Hutchinson v., App.	308	475
Dow; Hutchinson v., App.	308	488
Dow; Hutchinson v., App.	308	489
Dow; Hutchinson v., App.	308	492
Dow's Estate, In re, App.	308	475
Dow's Estate, In re, App.	308	488
Dow's Estate, In re, App.	308	489
Doyle v. Lewis, App.	307	965
Dreher v. Fidelity & Cas. Co. of N. Y., App.	307	407
Easley; People v., App.	307	10
Eclipse Fuel Engineering Co. v. Superior Court In and For City and County of San Francisco, five cases, App.	307	739
Ellis; Jannis v., App.	308	750
Epley v. Califro, App.	307	641
Exley Produce Exp., Inc. v. Pacific Finance Corp., App.	307	65
Exley Produce Exp., Inc.; Remy v., App.	307	65
Fallon; American Trust Co. v., App.	308	389
Fallon's Estate, In re, App.	308	389
Farmland Irr. Co. v. Dopplmaier, Sup.	308	732
Farrar; People v., App.	308	33
Faus; City of Glendora v., App.	307	976
Fidelity & Cas. Co. of N. Y.; Dreher v., App.	307	407
Firato v. Tuttle, Sup.	308	333
Fischer v. Moldovan, App.	308	844
Forgeron Inc. v. Hansen, App.	308	406
Fosselman's Estate, In re, Sup.	308	336
Fredericksen v. McCosker, App.	308	836
Fredericksen v. McCosker, App.	308	840
Freeman v. Arnke, App.	308	897
Freeman v. La Morte, App.	307	734
Freeman Adjustment Bureau v. La Morte, App.	307	734
Friesleben Estate Co.; Brown v., App.	307	388
Friis-Hansen & Co. v. Imperatrice, App.	307	20
Frye; Harrison v., App.	307	76
Furnish v. Board of Medical Examiners, App.	308	924
Futlick v. F. W. Woolworth Co., App.	308	405
Futrell; Norton v., App.	308	887
F. W. Woolworth Co.; Futlick v., App.	308	405
Gardner v. Rubin, App.	308	892
George v. Department of Alcoholic Beverage Control, App.	308	773
Gewirtz v. Marback, App.	308	453
Gilbert's Estate, In re, App.	307	395
Glaeser v. City of Berkeley, App.	307	61

	Vol.	Page
Glazier; De Wit v., App.	307	1031
Glendale, City of, v. Jarmer, Sup.	308	1
Glendale, City of, v. Tisdale, Sup.	308	1
Glendale, City of, v. Trondsen, Sup.	308	1
Glendora, City of, v. Faus, App.	307	976
Goldstrass v. Security-First Nat. Bank of Los Angeles, App.	308	801
Gore v. Witt, App.	308	770
Goss; Southern California Gas Co. v., App.	308	41
Gould; Crimmins v., App.	308	786
Government Emp. Ins. Co.; Wildman v., Sup.	307	359
Grainger v. Antoyan, App.	308	453
Greenblatt v. State Bd. of Equalization, App.	307	379
Grimes; People v., App.	307	932
Grundy; Inman v., App.	307	953
Guerrera; People v., App.	307	940
Hailey; People v., App.	308	517
Hall v. Napa County Title Co., App.	308	903
Hallinan, In re, Sup.	307	1
Handley; Anderson v., App.	308	368
Hansen; Forgeron Inc. v., App.	308	406
Harrison v. Frye, App.	307	76
Hartford Ins. Co. v. Standard Oil Co. of Cal., App.	308	350
Harvey; Sitton v., App.	307	654
Heard's Estate, In re, App.	308	502
Heckford; People v., App.	308	497
Herda v. Herda, Sup.	308	705
Heynemann; Sperisen v., App.	308	436
Hill v. Matthews Paint Co., App.	308	865
Holland; People v., App.	307	703
Howard v. Howard, App.	307	412
H. S. Crocker Co. v. McFaddin, App.	307	429
Hubbard & Johnson Lumber Co.; Moore v., App.	308	794
Hudak; People v., App.	307	942
Hughes; Richards v., App.	307	404
Hughes' Estate, In re, App.	307	404
Hutchinson v. Dow, App.	308	475
Hutchinson v. Dow, App.	308	488
Hutchinson v. Dow, App.	308	489
Hutchinson v. Dow, App.	308	492
Hutchinson v. Superior Court In and For City and County of San Francisco, App.	308	492
Imperatrice; M. Friis-Hansen & Co. v., App.	307	20
Industrial Acc. Commission; Chavez v., App.	307	985
Inman v. Grundy, App.	307	953
Inman's Estate, In re, App.	307	953
Insurance Commissioner; Williams v., App.	308	52
International Alliance of Theatrical Stage Emp. and Moving Picture Mach. Operators of U. S. and Canada; Thorman v., App.	307	1026
Ivancovich v. Sullivan, App.	307	989
Jackson v. City of San Mateo, App.	307	451
Jannis v. Ellis, App.	308	750
Jarmer; City of Glendale v., Sup.	308	1
Johnston; People v., Sup.	307	921
Johnston v. Superior Court In and For Los Angeles County, App.	307	946
Jones v. American President Lines, Limited, App.	308	393
Jorgensen; Baumbach v., App.	308	799

	Vol.	Page
Jorgensen Farms; Baumbach v., App.	308	799
Joseph; Davis v., App.	307	958
Justice Court for Tulare Judicial Dist.; Bonwell v., App.	307	716
Kearns; People v., App.	307	1015
Keller v. Morrison-Knudsen Co., App.	308	370
Kendall v. Southward, App.	308	915
Kingen v. Weyant, App.	307	369
Kingsley; MacDonald v., App.	308	46
Kiplinger v. Kiplinger, App.	307	677
Kirchhubel v. Munro, App.	308	432
Kirkwood v. Citizens Nat. Trust and Sav. Bank of Los Angeles, Sup.	308	14
Klassen v. City of San Carlos, App.	308	413
Kleinman; Liberty Mut. Ins. Co. v., App.	308	347
Kovacik v. Reed, App.	308	342
Kubetz; Baldwin v., App.	307	1005
La Morte; Freeman v., App.	307	734
La Morte; Freeman Adjustment Bureau v., App.	307	734
La Verne; People v., App.	307	31
Lawrence; People v., App.	308	821
Lewis v. Doyle, App.	307	965
Lewis & Queen v. N. M. Ball Sons, Sup.	308	713
Liberman; Shigeru Yamamoto v., App.	307	695
Liberty Mut. Ins. Co. v. Kleinman, App.	308	347
Litten; Alloway v., App.	307	90
Litten; Quinn v., App.	307	90
Littlejohn; People v., App.	307	425
Lloyd; McNulty v., App.	307	706
Los Altos School Dist., Santa Clara County; Watson v., App.	308	872
McCammon v. City of Redwood City, App.	308	831
McCammon-Wunderlich Co. v. City of Redwood City, App.	308	831
McClanahan v. Trans-America Ins. Co., App.	307	1023
McConnell; Steadman v., App.	308	361
McCosker v. Fredericksen, App.	308	836
McCosker; Fredericksen v., App.	308	840
MacDonald v. Kingsley, App.	308	46
McFaddin; H. S. Crocker Co. v., App.	307	429
McNulty v. Lloyd, App.	307	706
McPhillips; People v., App.	308	929
Makaroff; Smith v., App.	308	912
Mangiameli; People v., App.	308	762
Mann; People v., App.	307	684
Mansfield v. City of Berkeley, App.	307	61
Marback; Gewirtz v., App.	308	453
Martin v. Cassidy, App.	307	981
Martin v. Chernabaeff, App.	308	470
Martin; Mortimer v., App.	308	840
Mathews; Board of Ed. of Richmond School Dist. v., App.	308	449
Matthews Paint Co.; Hill v., App.	308	865
Matthews Paint Co.; Pacific Bronze Co. v., App.	308	865
Merced County v. Department of Social Welfare, App.	307	46
Mettler v. Braly, App.	307	419
M. Friis-Hansen & Co. v. Imperatrice, App.	307	20
Miller v. Schell, App.	308	445
Minardi v. Collopy, App.	308	744
Minnie L. Watson v. Newman, App.	307	56
Mitchell; People v., App.	307	411

	Vol.	Page
Moldovan v. Fischer, App.	308	844
Moore v. Hubbard & Johnson Lumber Co., App.	308	794
Mooore v. Trinity Oil & Gas Co., App.	308	31
Moore & Co. v. Quinn, App.	308	781
Morgan; Deady v., App.	307	686
Morgan; People v., App.	307	717
Morgan's Estate, In re, App.	307	686
Morrison-Knudsen Co.; Keller v., App.	308	370
Mortgage Finance Corp. v. Strizek, App.	307	638
Mortimer v. Martin, App.	308	840
Most Worshipful Grand Lodge of Free and Accepted Masons of Cal. v. Bank of America Nat. Trust and Sav. Ass'n, App.	308	502
Mudd v. White, App.	307	754
Munro; Kirchhubel v., App.	308	432
Napa County Title Co.; Hall v., App.	308	903
Newman; Minnie L. Watson v., App.	307	56
Newman; Stockton v., App.	307	56
N. M. Ball Sons; Lewis & Queen v., Sup.	308	713
Norman v. Tully, App.	308	875
Norton v. Futrell, App.	308	887
O'Gara; Rousseau v., App.	307	376
O'Malley, Application of, Sup.	308	9
O'Malley v. Petroleum Maintenance Co., Sup.	308	9
Oregon Cedar Products Co. v. Ramos & Kohler, App.	307	447
Otterman; People v., App.	308	887
Otto Sales Co.; Shafford v., App.	308	428
Overholtzer; Dennis v., App.	307	1012
Overman; People v., App.	307	1000
Owens; Strauss v., App.	307	81
Pacific Bronze Co. v. Matthews Paint Co., App.	308	865
Pacific Finance Corp.; Exley Produce Exp., Inc. v., App.	307	65
Palma v. Watson Surplus Lines Agency, Inc., App.	307	689
Pancoast v. Russell, App.	307	719
Parks; Bolen v., App.	308	521
Penson; People v., App.	307	24
People v. Ayala, App.	307	418
People v. Bardin, App.	307	384
People v. Barry, App.	308	915
People v. Bean, App.	308	27
People v. Brittain, App.	308	38
People v. Brown, App.	307	949
People v. Carswell, App.	308	852
People v. Carter, App.	307	670
People v. Chong Wing Louie, App.	307	929
People v. Conlon, App.	308	402
People v. Di Michele, App.	308	365
People v. Easley, App.	307	10
People v. Farrar, App.	308	33
People v. Grimes, App.	307	932
People v. Guerrera, App.	307	940
People v. Hailey, App.	308	517
People v. Heckford, App.	308	497
People v. Holland, App.	307	703
People v. Hudak, App.	307	942
People v. Johnston, Sup.	307	921
People v. Kearns, App.	307	1015

	Vol.	Page
People v. La Verne, App.	307	31
People v. Lawrence, App.	308	821
People v. Littlejohn, App.	307	425
People v. McPhillips, App.	308	929
People v. Mangiameli, App.	308	762
People v. Mann, App.	307	684
People v. Mitchell, App.	307	411
People v. Morgan, App.	307	717
People v. Otterman, App.	308	887
People v. Overman, App.	307	1000
People v. Penson, App.	307	24
People v. Peters, App.	308	42
People v. Pierson, App.	307	994
People v. Pigg, App.	308	884
People v. Reynolds, App.	308	48
People v. Robinson, App.	308	442
People v. Robinson, App.	308	461
People v. Ross, App.	308	37
People v. Sanchez, App.	307	79
People v. Snowden, App.	308	815
People v. Steinberg, App.	307	634
People v. Superior Court In and For Placer County, App.	307	375
People v. Whitehead, App.	307	442
People v. Williams, App.	307	48
People v. Williams, App.	307	373
People, By and Through Department of Public Works v. Sammis, App.	307	416
Peters; People v., App.	308	42
Petroleum Maintenance Co.; O'Malley v., Sup.	308	9
Pierson; People v., App.	307	994
Pigg; People v., App.	308	884
Plumer v. Plumer, App.	307	26
Qualls v. Smyth, App.	307	29
Quinn; C. C. Moore & Co. v., App.	308	781
Quinn v. Litten, App.	307	90
Quiring v. Zamboni, App.	307	650
Radovich's Estate, In re, Sup.	308	14
Ramos & Kohler; Oregon Cedar Products Co. v., App.	307	447
Record Mach. & Tool Co.; Schertz v., App.	308	753
Reed; Kovacik v., App.	308	342
Reed; Williams v., Sup.	307	353
Remy v. Exley Produce Exp., Inc., App.	307	65
Republic Indem. Co. of America; Campbell v., App.	308	425
Retailers Credit Ass'n v. Califro, App.	307	641
Reynolds; People v., App.	308	48
Reynolds v. Reynolds, App.	308	921
Reynolds v. Salmonson, App.	307	672
Reynolds v. Willson, App.	308	464
Richards v. Hughes, App.	307	404
Rickards; Smith v., App.	308	758
Robinson; People v., App.	308	442
Robinson; People v., App.	308	461
Rodela v. Southern California Edison Co., App.	307	436
Ross; American Alloy Steel Corp. v., App.	308	494
Ross; People v., App.	308	37
Roth v. Schaaf, App.	307	421
Rouda v. Crocker, App.	308	531

	Vol.	Page
Rousseau v. O'Gara, App.	307	376
Rousseau v. Tobin, App.	307	378
Rubin; Gardner v., App.	308	892
Rude v. Rude, App.	307	679
Russell; Pancoast v., App.	307	719
Salmonson; Reynolds v., App.	307	672
Sammis; People, By and Through Department of Public Works v., App.	307	416
Sanchez; People v., App.	307	79
San Diego County v. San Diego Gas & Elec. Co., Sup.	307	365
San Diego Gas & Elec. Co.; San Diego County v., Sup.	307	365
Santa Clara County; Teilhet v., App.	308	356
Schaaf; Roth v., App.	307	421
Schell; Miller v., App.	308	445
Schertz v. Record Mach. & Tool Co., App.	308	753
Schneider; Bender v., App.	308	527
Security Finance Co., In re, App.	308	531
Security-First Nat. Bank of Los Angeles; Goldstrass v., App.	308	801
Sepulveda v. Ayako Ishimaru, App.	308	809
Shafford v. Otto Sales Co., App.	308	428
Shepherd v. State Personnel Bd., Sup.	307	4
Shigeru Yamamoto v. Liberman, App.	307	695
Sickler v. City of Berkeley, App.	307	61
Sitton v. Harvey, App.	307	654
Sitton's Estate, In re, App.	307	654
Smith v. Makaroff, App.	308	912
Smith v. Rickards, App.	308	758
Smith v. Smith, App.	307	644
Smyth; Qualls v., App.	307	29
Snowden; People v., App.	308	815
Social Center Hall Ass'n of Stockton; Westbrook v., App.	307	640
Social Welfare Dept. of Cal.; Bertch v., App.	308	397
Southern California Edison Co.; Rodela v., App.	307	436
Southern California Gas Co. v. Goss, App.	308	41
Southern Pac. Co.; Chambers v., App.	307	662
Southward; Kendall v., App.	308	915
Sperisen v. Heynemann, App.	308	436
Stafford; Ware v., App.	307	950
Standard Oil Co. of Cal.; Hartford Ins. Co. v., App.	308	350
Standard Oil Co. of Cal.; Webb v., App.	308	350
State Bd. of Equalization; Greenblatt v., App.	307	379
State Personnel Bd.; Shepherd v., Sup.	307	4
Steadman v. McConnell, App.	308	361
Steinberg; People v., App.	307	634
Sternbeck v. Buck, App.	307	970
Stevenson; A. L. Castle, Inc. v., App.	308	744
Stockton v. Newman, App.	307	56
Strauss v. Owens, App.	307	81
Strizek; Mortgage Finance Corp. v., App.	307	638
Sullivan; Ivancovich v., App.	307	989
Superior Court, Contra Costa County; Wilson v., App.	307	37
Superior Court In and For City and County of San Francisco; Eclipse Fuel Engineering Co. v., App.	307	739
Superior Court In and For City and County of San Francisco; Hutchinson v., App.	308	492
Superior Court In and For Los Angeles County; Johnston v., App.	307	946
Superior Court In and For Placer County; People v., App.	307	375

P.2d

	Vol.	Page
Superior Court In and For Sonoma County; Dauenhauer v., App.	307	724
Swanson v. Bogatin, App.	308	918
Swift v. Winkler, App.	307	666
Tabor; De Felice v., App.	308	377
Tapscott v. Tapscott, App.	308	399
Teilhet v. Santa Clara County, App.	308	356
Thomas Distributing Co.; Adler v., App.	307	14
Thorman v. International Alliance of Theatrical Stage Emp. and Moving Picture Mach. Operators of U. S. and Canada, App.	307	1026
Tisdale; City of Glendale v., Sup.	308	1
Tobin; Rousseau v., App.	307	378
Town of West Brookfield, Mass.; Angell v., App.	307	395
Trans-America Ins. Co.; McClanahan v., App.	307	1023
Trinity Oil & Gas Co.; Moore v., App.	308	31
Trondsen; City of Glendale v., Sup.	308	1
Tully; Norman v., App.	308	875
Tuolumne County; Alpine County v., App.	308	354
Tuttle; Firato v., Sup.	308	333
Van Winkle v. City of King, App.	308	512
Vasquez v. Alameda, App.	308	857
Vind v. Asamblea Apostolica De La Feen Christo Jesus, App.	307	85
Vowels v. Witt, App.	308	415
Ware v. Stafford, App.	307	950
Watson; Bell v., App.	307	728
Watson v. Los Altos School Dist., Santa Clara County, App.	308	872
Watson v. Newman, App.	307	56
Watson Surplus Lines Agency, Inc.; Palma v., App.	307	689
Webb v. Standard Oil Co. of Cal., App.	308	350
Westbrook v. Social Center Hall Ass'n of Stockton, App.	307	640
West Covina Enterprises, Inc. v. Chalmers, App.	308	508
Western Belting & Equipment Co.; Compania Harinera De La Baja California v., App.	307	70
Weyant; Kingen v., App.	307	369
White; Mudd v., App.	307	754
Whitehead; People v., App.	307	442
Wildman v. Government Emp. Ins. Co., Sup.	307	359
Williams v. Insurance Commissioner, App.	308	52
Williams; People v., App.	307	48
Williams; People v., App.	307	373
Williams v. Reed, Sup.	307	353
Willson; Reynolds v., App.	308	464
Wilson v. Superior Court, Contra Costa County, App.	307	37
Winkler; Swift v., App.	307	666
Witt; Calor Const. Co. v., App.	308	415
Witt; Gore v., App.	308	770
Witt; Vowels v., App.	308	415
Woods v. City and County of San Francisco, App.	307	698
Wren, Ex parte, Sup.	308	329
Yamamoto v. Liberman, App.	307	695
Yosemite Creek Co.; Crow v., App.	308	421
Zamboni; Quiring v., App.	307	650
Zamucen v. Crocker, App.	308	384

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48 Cal.2d 52

In re Vincent W. HALLINAN, Member of The State Bar of California.

S. F. 19053.

Supreme Court of California,
In Bank.
Feb. 19, 1957.

Disciplinary proceeding. The Supreme Court held that punishment in accordance with Board of Bar governors' recommendation that petitioner be suspended from practice of law for three years was not excessive.

Order in accordance with opinion.

1. Attorney and Client ⇐53(2)

In disciplinary proceeding, evidence, which revealed that attorney had been convicted of willfully and knowingly filing false and fraudulent income tax returns, was sufficient to sustain Board of Bar Governors' finding that the facts and circumstances surrounding commission of the offense involved moral turpitude. 26 U.S. C.A. (I.R.C.1939) § 145(b).

2. Attorney and Client ⇐57

In disciplinary proceeding, petitioner, who was seeking review of Board of Bar Governors' recommendation, had burden of showing that board's findings were not supported by the evidence or that its recommendation was erroneous or unlawful.

3. Attorney and Client ⇐39

Criminal acts which involve intentional dishonesty for purpose of personal gain are acts involving "moral turpitude".

See publication Words and Phrases, for other judicial constructions and definitions of "Moral Turpitude".

4. Attorney and Client ⇐58

In disciplinary proceeding punishment in accordance with Board of Bar Governors' recommendation that petitioner be suspended from practice of law for three years was not excessive.

James C. Purcell and Benjamin Dreyfus, San Francisco, for petitioner.

Leo M. Cook, John E. Nelson, Ukiah, and Garrett H. Elmore, San Francisco, for respondent the State Bar.

PER CURIAM.

Vincent W. Hallinan was convicted of violating section 145, subdivision (b), of the Internal Revenue Code, 26 U.S.C. § 145, subd. (b), by "wilfully and knowingly filing false and fraudulent income tax returns." He did not appeal, and the time for appeal having elapsed, The State Bar filed with this court a certified copy of the indictment and judgment of conviction and asked that he be disciplined.

After a hearing before this court the matter was referred to the Board of Governors of The State Bar for hearing and recommendation on the question whether the facts and circumstances surrounding the commission of the offense of which he was convicted involved moral turpitude. In re Hallinan, 43 Cal.2d 243, 272 P.2d 768.

After a hearing before a subcommittee of the Board of Governors the matter was reviewed by the Board of Governors of

The State Bar, who (a) found that the facts and circumstances surrounding the commission of the offense of which petitioner was convicted involved moral turpitude, and (b) recommended his suspension from the practice of law for a period of three years.

[1–3] These two questions are presented for our determination:

First: *Does the evidence sustain the finding of the Board of Governors that the facts and circumstances surrounding the commission of the offense of which petitioner was convicted involve moral turpitude?*

Yes. The following rules are pertinent here:

(1) The burden is upon petitioner seeking a review of the Board of Bar Governors' recommendation to show that the findings are not supported by the evidence or that their recommendation is erroneous or unlawful. Tonini v. State Bar, 46 Cal. 2d 491 [2], 297 P.2d 1.

(2) Criminal acts involving intentional dishonesty for the purpose of personal gain are acts involving moral turpitude. In re Hallinan, 43 Cal.2d at page 247 [4], 272 P.2d 768, supra.

An examination of the record in accordance with the above rules discloses ample evidence that petitioner intentionally and for the purpose of personal gain filed false income tax returns for the years 1947 to 1950 inclusive.

The evidence discloses that petitioner was a member of a law firm consisting of himself, James M. MacInnis and Archer Zamloch during the years 1947, 1948, 1949 and 1950; that all professional income was not deposited in the firm account but that the three sometimes deposited funds in individual private accounts from which checks to the others were drawn and that sometimes fees were received and divided in cash. On other occasions fees received would be used to purchase cashier's checks and after being cashed the proceeds would be divided among the partners. No report of fees received in this manner by petitioner was ever made to the federal government.

The record discloses that petitioner during the period mentioned reported as his income from the partnership the sum of $15,647.79, when in fact he had received an additional sum amounting to $60,197.95, none of which was ever shown in any of his returns to the federal government as income received by him from the practice of law.

The evidence showed a consistent failure of petitioner to report his income and a planned pattern of taking fees in cash with an intent not to report receipt of these fees as required by the Internal Revenue Act. It appeared that petitioner, over a period of at least four years, had intentionally pursued a course of conduct whereby he refused to report the total amount of his income from the practice of law to the federal government and endeavored, by failing to keep appropriate records and other practices, to prevent the federal government from ascertaining the true amount of his professional income.

Evidence was introduced to show that petitioner had received "side fees" for 1947 as high as $12,260.02 which were not reported as income.

No useful purpose would be served by setting forth in detail the voluminous evidence in the record. Suffice it to recite that for the year 1947 petitioner filed an income tax return in which he showed the receipt of $4,784.54 as "¼ of wife's net income for services as per agreement" under Schedule E—"Income from partnerships, estates and trusts, and other sources"; reported a loss of $3,258.47 as "loss on stock market speculation" under Schedule D—"Gains and losses from sales or exchanges of capital assets, etc.," without filling out the required additional Schedule D for detail. Under Schedule C—"Profit (or loss) from business or profession," the return reported petitioner was a "lawyer" and his business address as "465 California St., San Francisco." The space for "business name" was left blank. There was no reference

to the firm name of "Hallinan, MacInnis & Zamloch" nor the firm name of "Hallinan & MacInnis." Under Schedule C, the single figure $8,300 appears, indicating, in context, a reported income of $8,300 from this source. The return ignores the lines in the accompanying printed schedule for "total receipts," "net profit," and other itemization. No itemization was otherwise given. On another page of the return, personal deductions such as contributions to charity and excise taxes were claimed in the total of $956.80. Resulting net income, overall, was $8,869.27.

That the foregoing acts were done intentionally, knowingly and for the purpose of defrauding the government is demonstrated by evidence in the record of two conversations between petitioner and an office associate, Mr. Bruce Werhlof, who testified that petitioner told him "not to keep records" on cash which the firm received "because of tax problems," and that "they didn't keep records and they didn't keep accounts, and whatever bills had to be paid they just gave the girl enough money to pay the bills and they split the rest of the money"; further, that petitioner stated, "If there weren't any records there would be no way to check on taxes, the income, reported taxes." The witness also testified he had seen the partners divide cash fees among themselves.

Clearly the foregoing evidence supports the finding of the Board of Bar Governors, and it is unnecessary to set forth numerous other details in the record which support the questioned finding.

Petitioner presents a novel argument to the effect that the most that can be said of his conduct is that it constituted a violation of a federal criminal statute and that moral turpitude is not involved in the evasion of income taxes wherein the offender is "penalized for keeping his own money, not for taking someone else's."

Suffice it to say that this court in In re Hallinan, supra, held that such argument is devoid of merit in this state. We said 43 Cal.2d at page 248 [5], 272 P.2d at page 771: "We see no moral distinction between defrauding an individual and defrauding the government [citation], and an attorney, whose standard of conduct should be one of complete honesty [citation], who is convicted of either offense is not worthy of the trust and confidence of his clients, the courts, or the public * * * since his conviction of such a crime would necessarily involve moral turpitude." See also In re Crosby, 281 App.Div. 801, 119 N.Y.S.2d 478, 479; Rheb v. Bar Ass'n of Baltimore City, 186 Md. 200, 46 A.2d 289, 291 [2]; In re Diesen, 173 Minn. 297, 215 N.W. 427, 217 N.W. 356, 357; In re Burrus, 364 Mo. 22, 258 S.W.2d 625, 626.

[4] Second: *Was the punishment recommended by the Board of Bar Governors excessive?*

No. In 1949 petitioner was suspended from the practice of law for three months for acts of deceit practiced upon a fellow attorney.

The record discloses a callous and brazen indifference to the obligations of an attorney with the object of personal gain. Under these circumstances petitioner should be removed from the practice of law for a substantial period of time in order that he may realize the error of his ways and rehabilitate himself before again resuming a place in the ranks of the legal profession.

In Townsend v. State Bar, 32 Cal.2d 592, 197 P.2d 326, an attorney who had been previously disciplined for making false statements in a sworn declaration of candidacy for judicial office and earlier for "ambulance chasing" was suspended for three years for advising a client to conceal assets from creditors.

In Alkow v. State Bar, 38 Cal.2d 257, 239 P.2d 871, an attorney was suspended for three years for having made misrepresentations in connection with employment by a collection agency, failing to give financial accountings, and issuing bad checks.

In Mayer v. State Bar, 2 Cal.2d 71, 39 P.2d 206, an attorney who persisted in advertising for divorce business during a one-

year suspension for such conduct was disbarred.

It is ordered that petitioner be suspended from the practice of law in this state for a period of three years, commencing 30 days after the date of the filing of this order.

CARTER, J., did not participate herein.



48 Cal.2d 41

Harry SHEPHERD, Plaintiff and Appellant,

v.

STATE PERSONNEL BOARD of the State OF CALIFORNIA et al., Defendants and Appellants.

Sac. 6746.

Supreme Court of California.
In Bank.
Feb. 19, 1957.

Proceeding by state employee for mandamus to compel state personnel board to reconsider an order dismissing employee from state civil service position. The Superior Court, Sacramento County, Ralph McGee, J., ordered reconsideration and personnel board appealed. The Supreme Court, Gibson, C. J., held that basis of board's decision approving employee's dismissal partially failed and case would be remanded to administrative agency so that it might reconsider penalty to be imposed.

Reversed with direction.

Opinion, 299 P.2d 333, vacated.

1. Administrative Law and Procedure ⇐744, 791

Factual determination of a state-wide administrative agency which derives adjudicating power from the Constitution is not subject to re-examination in a trial de novo but is to be upheld by a reviewing court if it is supported by substantial evidence.

2. Officers ⇐72(2)

State personnel board has been vested with adjudicating power, and findings of fact by board must be upheld if they are supported by substantial evidence. West's Ann.Const. art. 24, §§ 2(a), 3(a); West's Ann.Gov.Code, §§ 18500 et seq., 19578, 19582.

3. States ⇐77

Under statute prohibiting state employees from engaging in incompatible activities, amendment providing for determination of activities which will be considered inconsistent with duties as state employees is intended to require designation of incompatible activities in specified manner and notice to employee of the action taken. West's Ann.Gov.Code, § 19251.

4. Officers ⇐69.1

From and after effective date of amendment providing for determination of what shall constitute incompatible activities by state employees, punishment of state employees for acts incompatible with and inimical to public service is dependent upon compliance with statute by appointing power. West's Ann.Gov.Code, §§ 19251, 19572(s).

5. Officers ⇐69

State employee could not be disciplined for incompatible and inimical services occurring between date of amendment to statute providing for a determination by appointing power of what activities constitute incompatible services and date on which such a duly approved list was received by the employee. West's Ann.Gov. Code, §§ 19251, 19572(s).

6. Officers ⇐72(1)

In dismissal proceeding against supervising veterinary meat inspector who had duty of inspecting construction of meat packing plants, evidence was sufficient to sustain finding that inspector was guilty of acts which were incompatible with and inimical to public service. West's Ann. Gov.Code, § 19572(s).

7. Officers ⇐72(1)

In dismissal proceeding against supervising veterinary meat inspector who had

duty of inspecting construction of meat packing plants and was accused of accepting money from private parties for drawing plans for construction of such plants, there was no substantial evidence to support finding of inexcusable neglect of duty. West's Ann.Gov.Code, § 19572(d).

8. Officers ⇐72(1)

Where state personnel board instituted proceeding against supervising veterinary meat inspector which culminated in order dismissing him from state civil service position, finding that inspector was guilty of violation of Civil Service Act was too vague and uncertain to be a ground for punitive action. West's Ann.Gov.Code, §§ 18500 et seq., 19572.

9. Officers ⇐69.7

Under statute providing for punitive action against state civil service employee for any other failure of good behavior or acts either during or outside duty hours which are incompatible with or inimical to public service, "failure of good behavior" is not an independent ground but is qualified by words "incompatible with or inimical to public service." West's Ann.Gov. Code, § 19572(r, s).

See publication Words and Phrases, for other judicial constructions and definitions of "Failure of Good Behavior".

10. Officers ⇐72(2)

Where basis of state personnel board's decision approving state employee's dismissal partially failed, case would be remanded to administrative agency empowered to act in matters of discipline so that it might reconsider penalty to be imposed. West's Ann.Gov.Code, §§ 18500 et seq., 19572.

James H. Phillips, Sacramento, for plaintiff and appellant.

Edmund G. Brown, Atty. Gen., Paul M. Joseph and Willard A. Shank, Deputy Attys. Gen., for defendants and appellants.

GIBSON, Chief Justice.

Dr. H. E. Shepherd, a civil service employee holding the position of a supervising veterinary meat inspector with the California Department of Agriculture, was dismissed in January of 1952 by the director of the department, and, after a hearing, the State Personnel Board approved the dismissal. In this mandamus proceeding, the superior court, after determining that some of the findings and conclusions of the board were warranted but that others were not, entered judgment ordering the board to set aside its decision and to reconsider the penalty imposed. Both Shepherd and the board have appealed.

For the most part, Shepherd's official duties consisted of reviewing, correcting and passing upon plans for the remodeling or construction of meat slaughtering and processing plants to assure that they satisfied California sanitary and building requirements. In that connection, he assisted architects and contractors in preparing such plans and visited construction projects to see that they met state standards. His duties also included supervising the work of state veterinary meat inspectors, surveying meat plants to determine whether their operating methods met state requirements, recommending changes in such establishments, compiling records, and reporting to the central office.

It was shown at the administrative hearing that on four occasions Shepherd received compensation from private parties for preparing plans to be used in the construction or remodeling of meat plants. The first of these transactions occurred in 1946 and involved the People's Meat Market in Calistoga, a slaughtering plant which was operated under California inspection service. Shepherd inspected the market, found that it did not comply with state sanitary standards, and reported this fact to his superiors. He advised the owners that construction of a new establishment at another location would be necessary because the existing plant could not be remodeled to meet the requirements. The owners hired a building contractor to investigate the possibilities of constructing a new plant, and Shepherd prepared plans outside of duty hours, furnished them to

the contractor, knowing whom he represented, and received $500 from him. The proposed plant was not built, and the old one continued to operate under unsanitary conditions for a considerable time.

Another of the transactions concerned the Grass Valley Meat Company, which was subject to California meat inspection service. In 1947, at the request of the company, Shepherd prepared remodeling plans outside of duty hours which, if adopted, would have qualified the plant for federal meat inspection service but would also have been suitable for state purposes. He was paid a total of $850 for this work. After the plans had been furnished, the company decided not to change from state to federal meat inspection service and asked Shepherd to prepare simpler plans which would meet California requirements. He drew a second set of plans in 1949 which were used in remodeling the plant, and, in the course of his duties, he inspected the work being done. During 1949 and 1950, 104 barrels of tallow belonging to Shepherd were stored by the company without charge. He removed the tallow after another inspector determined that it was creating an unsanitary condition at the plant.

With respect to the third transaction, it was shown that the Union Packing Company in Vernon, which was subject to federal meat inspection service but was contemplating applying for state service, made a request to one of Shepherd's superiors that Shepherd visit the plant to conduct an inspection and to discuss remodeling the premises. In September of 1949, Shepherd came to the plant, conferred with the manager, at least in part during duty hours, and took measurements the following weekend. The manager requested him to prepare remodeling plans, and he did so outside of duty hours. He supplied them to the company and received $500 in payment. The company did not use the plans and did not change from federal to state inspection.

The fourth transaction involved Shepherd's dealings in August and September of 1950 with the owner of a trailer manufacturing business in San Jose. The owner agreed with a meat company that he would convert his premises into a meat processing plant which would then be leased to the company. After plans for converting the premises were obtained from a third party, Shepherd's assistance was sought with respect to structural changes which were necessary because the smokehouse and cooler of the proposed plant would encroach on an easement. He revised the plans outside of duty hours and was paid $250 for his services. As Shepherd knew, it was intended that the plant, when finished, would be subject to California meat inspection service. While the remodeling plans were not submitted to Shepherd for approval in his official capacity, he inspected the construction work as a part of his duties. When completed, the processing plant operated under state inspection service.

In 1945, before any of the four transactions occurred, Shepherd submitted a letter to his superior in which he requested permission to work "on a fee basis" outside of duty hours as a consultant for architects, engineers and contractors with respect to the designing of meat plants. The permission which he sought was refused, and he was told that he was not to accept money from anyone for doing work in connection with his official duties and that receiving such a payment was incompatible with his job. In a bulletin which was issued by the Bureau of Meat Inspection on August 29, 1949, and which Shepherd read, veterinary meat inspectors were instructed that they were not to perform unofficial work for the operator of an establishment to which they were assigned. On two occasions in 1949, Shepherd was questioned by his superior as to whether he was receiving money from architects or contractors for drawing plans or doing other work, and he denied doing so.

The board, after making detailed findings substantially in accord with the facts set forth above, found that the following causes for discipline existed within the meaning

of section 19572 of the Government Code:[1] insubordination, wilful disobedience, dishonesty acts during duty hours which were incompatible with the public service, acts during duty hours which were inimical to the public service, acts outside of duty hours which were incompatible with the public service, acts outside of duty hours which were inimical to the public service, inexcusable neglect of duty, failure of good behavior, and "violation of Title 2, Division 5, Part 2, of the Government Code."

The superior court determined that there was substantial evidence to support the board's findings of failure of good behavior, "violation of Title 2, Division 5, Part 2, of the Government Code," and acts during and outside of duty hours which were incompatible with and inimical to the public service. It concluded, however, that none of Shepherd's acts constituted the other causes for discipline found by the board, that, because of an amendment to section 19251 of the Government Code which became effective on October 1, 1949, the findings of incompatible acts were improper insofar as they related to the period between that date and October 16, 1950, and that punitive action could not be based on the transaction involving the Union Packing Company.

[1] A preliminary question is presented as to whether the court erred in failing to reweigh the evidence and exercise its independent judgment thereon. It is, of course, settled that the factual determinations of a state-wide administrative agency which derives adjudicating power from the Constitution are not subject to re-examination in a trial de novo but are to be upheld by a reviewing court if they are supported by substantial evidence. Southern Pac. Co. v. Public Utilities Comm., 41 Cal.2d 354, 367, 260 P.2d 70; Coborn v. Industrial Acc. Comm., 31 Cal.2d 713, 716–717, 192 P.2d 959; Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545; Pacific Greyhound Lines v. Railroad Comm., 11 Cal.2d 427, 429, 80 P.2d 971; Griswold v. Department of Alcoholic Bev. Control, 141 Cal.App.2d 807, 810, 297 P.2d 762. In Boren v. State Personnel Board, 37 Cal.2d 634, 234 P.2d 981, we held that certiorari would lie to review an order of the State Personnel Board, stating, 37 Cal.2d at page 638, 234 P.2d at page 983, that the jurisdiction of the board, "including its adjudicating power," is derived directly from the Constitution. It has also been squarely held that the findings of the board are not to be disturbed if supported by substantial evidence. Black v. State Personnel Board, 136 Cal.App.2d 904, 909, 289 P.2d 863; Genser v. State Personnel Board, 112 Cal.App.2d 77, 80, 245 P.2d 1090; Nelson v. Department of Corrections, 110 Cal.App.2d 331, 336, 242 P.2d 906.

[2] The board was established in 1934 by section 2(a) of article XXIV of the Constitution, and section 3(a) of that article, which was adopted in the same year, provides, "Said board shall administer and enforce, and is vested with all of the powers, duties, purposes, functions, and jurisdiction which are now or hereafter may be vested in any other state officer or agency under, Chapter 590 of the California Statutes of 1913 as amended or any and all other laws relating to the state civil service as said laws may now exist or may hereafter be enacted, amended or repealed by the Legislature." In 1934, chapter 590 of the Statutes of 1913, as amended in 1929, contained provisions requiring the then existing State Civil Service Commission to hold hearings upon request of a civil service employee against whom charges had been filed, to receive and carefully consider evidence, and to render a decision which, in its judgment,

1. Section 19572 of the Government Code provides, in part: "Each of the following constitutes cause for discipline of an employee, or person whose name appears on any employment list: * * *.
"(d) Inexcusable neglect of duty. * *
"(f) Insubordination.
"(g) Dishonesty. * * *
"(p) Wilful disobedience. * * *
"(r) Violation of this part or board rule.
"(s) Any other failure of good behavior or acts either during or outside of duty hours which are incompatible with or inimical to the public service."

was just and proper. Stats.1929, pp. 251–252; Deering's Gen.Laws 1929, Act 1400, pp. 3010–3011. Substantially similar provisions were made applicable to the State Personnel Board by statute in 1937, when chapter 590 was repealed and the commission was abolished, Stats.1937, pp. 2085, 2106, 2112; Deering's Gen.Laws 1937, Act 1404, pp. 742, 764, 770, and they were in force as part of the Government Code[2] when the board's hearing in this case was held in 1952 (see Gov.Code, §§ 19578, 19582, prior to 1953 amendments). The board's power to hold hearings and render decisions in disciplinary proceedings involves, of course, the examination of facts, the resolution of conflicts in the evidence, and the exercise of judgment with respect thereto. It is apparent from the foregoing that the Constitution authorizes the Legislature to specify the powers of the board and that, pursuant to that authorization, the board has been vested with adjudicating power. The findings of fact of the State Personnel Board must be upheld if they are supported by substantial evidence.

As we have seen, Shepherd received payment on four occasions from present or prospective meat plant owners or their representatives for construction and remodeling plans which he prepared outside of duty hours. The evidence relating to the prior refusal of permission to do such work shows that he knew that his conduct was contrary to instructions which had been given him. In 1949 he twice falsely denied engaging in such activities when questioned by his superior, and thereafter, notwithstanding these interviews and the bulletin issued to veterinary meat inspectors by the Bureau of Meat Inspection, he persisted in those activities. The evidence is sufficient to support the findings of insubordination, wilful disobedience and dishonesty. In this connection, there is no sound reason for distinguishing the transaction involving the Union Packing Company from the other transactions. While that company was at all times subject to federal meat inspection, it was contemplating applying for California service when Shepherd drew the remodeling plans, and he must have known that the plant came within the scope of his official duties, particularly since he visited it at the request of his superior.

With respect to the findings that Shepherd was guilty of acts which were incompatible with and inimical to the public service under subdivision (s) of section 19572 of the Government Code, we must determine the effect of the amendment of section 19251 of that code which became effective on October 1, 1949. Until that date, section 19251 merely prohibited state employees from engaging in incompatible activities. The section, as amended, provides in substance that a state officer or employee shall not engage in any activity which "has been determined" to be inconsistent, incompatible, or in conflict with his duties and that each appointing power "shall determine and prescribe," subject to approval of the board, those activities which will be considered inconsistent, incompatible, or in conflict with the duties of state officers or employees under his jurisdiction.[3]

2. The 1937 law was repealed in 1945, at which time the present Civil Service Act was codified in sections 18500–19765 of the Government Code. Stats.1945, pp. 535, 539, 609.

3. Section 19251 of the Government Code now provides: "A state officer or employee shall not engage in any employment, activity, or enterprise which has been determined to be inconsistent, incompatible, or in conflict with his duties as a state officer or employee or with the duties, functions or responsibilities of his appointing power or the agency by which he is employed.

"Each appointing power shall determine and prescribe, subject to approval of the board, those activities which, for employees under his jurisdiction, will be considered inconsistent, incompatible, or in conflict with their duties as state officers or employees. In making this determination the appointing power shall give consideration to employment, activity or enterprise which: (a) involves the use for private gain or advantage of state time, facilities, equipment and supplies; or the badge, uniform, prestige or influence of one's state office or employment or, (b) involves receipt or acceptance by the of-

An incompatibility statement prepared by the Director of the Department of Agriculture was not approved by the board until October 2, 1950, and it was not received by Shepherd until October 16, 1950.

[3–5] It seems clear that the 1949 amendment to section 19251 was intended to provide for the designation of incompatible activities in a specified manner, namely, that each appointing power should prescribe the prohibited activities, subject to approval of the State Personnel Board. It was also contemplated, we think, that employees should be given notice of the action taken by the appointing power and the board. The purposes of section 19251 would be defeated if, in the absence of compliance with that section by the appointing power, an employee could be punished under subdivision (s) of section 19572 for acts incompatible with and inimical to the public service. In our opinion, application of subdivision (s) in this type of case was made dependent, as of October 1, 1949, upon compliance by the appointing power with section 19251, and Shepherd could not be disciplined under the subdivision for incompatible and inimical activities occurring between that date and October 16, 1950. We do not mean to suggest, however, that his conduct during this period could not form a basis for discipline under some subdivision of section 19572 other than subdivision (s).

[6] The record shows that Shepherd's activities in connection with the trailer manufacturing business in San Jose, as well as some of his conduct in the Union Packing Company transaction, occurred between October 1, 1949, and October 16, 1950. However, before October 1, 1949, he drew plans for the People's Meat Market and the Grass Valley Meat Company, both of which were subject to California meat inspection service at the time. As noted above, his duties included surveying meat plants to determine whether their operating methods met state requirements, and he was principally responsible for reviewing building plans and visiting construction projects to see that there was compliance with state standards. It could be inferred that he was improperly using the prestige and influence of his office by dealing privately with those who would be anxious to keep on good terms with him as one who had authority over them. Moreover, he could easily have found himself in the position of having to pass officially upon work which he had been privately compensated to do, and it was established that, in the course of his duties, he did in fact inspect work being done at the Grass Valley Meat Company in accordance with plans which he prepared. The evidence is sufficient to show that, prior to October 1, 1949, Shepherd was guilty of acts which were incompatible with and inimical to the public service within the meaning of subdivision (s) of section 19572.

[7] We are of the view, however, that there is no substantial evidence of inexcusable neglect of duty. The board claims that Shepherd was guilty of such neglect to the extent that he spent time during duty hours obtaining information which he later used in preparing the plans, but it would seem that the information would also have been necessary to the efficient performance of

ficer or employee of any money or other consideration from anyone other than the State for the performance of an act which the officer or employee, if not performing such act, would be required or expected to render in the regular course of hours of his state employment or as a part of his duties as a state officer or employee or, (c) involves the performance of an act in other than his capacity as a state officer or employee which act may later be subject directly or indirectly to the control, inspection, review, audit or enforcement by such officer or employee or the agency by which he is employed.

"Each state officer and employee shall during his hours of duty as a state officer or employee and subject to such other laws, rules or regulations as pertain thereto, devote his full time, attention and efforts to his state office or employment."

Prior to October 1, 1949, section 19251 of the Government Code read: "A State officer or employee shall not engage in any other activity or enterprise inconsistent, incompatible, or in conflict with his duties as a State officer or employee." St.1945, p. 559.

his official duties, and there is nothing in the record to the contrary.

[8, 9] The superior court upheld two findings of the board which, in our opinion, are fatally defective. The finding that Shepherd was guilty of a "violation of Title 2, Division 5, Part 2, of the Government Code" is too vague and uncertain to be a ground for punitive action. The part of the Government Code referred to in the finding constitutes the entire State Civil Service Act, and, by listing a violation of that part as a cause for discipline in subdivision (r) of section 19572, the Legislature must have intended that the board make a determination as to the specific code section which had been violated. In the absence of such specification, an intelligent appraisal of the basis of the board's decision would, in some circumstances, be impossible. The board's finding of a "failure of good behavior" as a separate ground for punitive action is also defective. This finding was based on subdivision (s) of section 19572 of the Government Code, which, following a number of other subdivisions setting forth causes for discipline, lists, "Any other failure of good behavior or acts either during or outside of duty hours which are incompatible with or inimical to the public service." As we have seen, the board, in addition to finding that Shepherd was guilty of a failure of good behavior, determined that he had acted in a manner incompatible with and inimical to the public service. To uphold the finding in question, therefore, would require us to construe subdivision (s) as meaning that a "failure of good behavior" is a distinct ground for punishment, irrespective of whether it involves incompatible or inimical acts and independent of those acts. Harm to the public service is the reasonable standard to apply in disciplining public employees, and the proper interpretation of subdivision (s) is that the words "incompatible with or inimical to the public service" were intended to qualify "failure of good behavior."

[10] In summary, we have concluded that the board's findings of acts incompatible with and inimical to the public service under subdivision (s) of section 19572 are improper with respect to the period between October 1, 1949, and October 16, 1950, and that the findings of inexcusable neglect of duty, failure of good behavior, and "violation of Title 2, Division 5, Part 2, of the Government Code" are defective. The basis of the board's decision approving Shepherd's dismissal thus partially fails, and it is settled that, in such a situation, orderly procedure will best be preserved by remanding the case to the administrative agency empowered to act in matters of discipline so that it may reconsider the penalty to be imposed. Bonham v. McConnell, 45 Cal.2d 304, 306, 288 P.2d 502; Cooper v. State Bd. of Medical Examiners, 35 Cal.2d 242, 252, 217 P.2d 630, 18 A.L.R.2d 593.

The judgment is reversed, and the superior court is directed to enter judgment instructing the State Personnel Board to set aside its decision and to determine the penalty to be imposed in the light of the foregoing opinion.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



148 Cal.App.2d 565

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ransom EASLEY and Calvin Coolidge Johnson, Defendants,

Ransom Easley, Defendant and Appellant.

Cr. 5798.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1957.

Defendant was convicted of bookmaking. The Superior Court, Los Angeles County, Leroy Dawson, J., suspended proceedings and granted probation, and defend-

ant appealed. The District Court of Appeal, Ashburn, J., held that where police possessed information that bookmaking was being conducted at premises in which defendant and codefendant were later arrested, and police saw 10 to 12 people knock once on door of premises, be admitted, and leave in five to ten minutes, and that from outside of residence police had seen defendant telephoning, while seated at table on which were racing form, scratch sheets, "magic slate", and betting marker, and that seizure was limited to these items and objects in plain sight, and search was limited to persons of defendants, arrest was proper, search reasonable, and seizure lawful, although there was no warrant.

Affirmed.

1. Criminal Law ⇐1023(12)

It is immaterial whether a defendant appeals from order of probation or from judgment, as for purposes of appeal they are interchangeable terms. West's Ann. Pen.Code, § 1237, subd. 1.

2. Arrest ⇐63(4)

Reasonable ground for arrest need not be based upon evidence which would be competent at a trial, it may be hearsay, and although information furnished by an anonymous informer is not enough to afford reasonable ground, it is proper to be considered by officers in forming their opinion as to whether reasonable cause for arrest exists.

3. Searches and Seizures ⇐1

The use of one's eyes from the outside of building is neither a search nor a seizure.

4. Criminal Law ⇐260(11)

Question of whether police had reasonable ground for arrest was question of fact for trial judge in case tried without jury.

5. Gaming ⇐60

Where police possessed information that bookmaking was being conducted at premises in which defendant and codefendant were later arrested, and police saw 10 to 12 people knock once on door of premises, be admitted, and leave in five to ten minutes, and that from outside of residence police had seen defendant telephoning while seated at table on which were racing form, scratch sheets, "magic slate", and betting marker, and that seizure was limited to these items and objects in plain sight, and search was limited to persons of defendants, arrest was proper, search reasonable, and seizure lawful, although there was no warrant. West's Ann.Pen.Code, § 337a, subd. 2.

Robert J. Hall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant, after a non-jury trial, was convicted of violation of Penal Code § 337a, subdivision 2, in that he and his co-defendant Johnson did, on May 8, 1956, occupy an apartment in the city of Los Angeles for the purpose of recording and registering bets on horse races. The court suspended proceedings and granted probation. Defendant moved for a new trial which was denied. Thereupon defendant filed a notice of appeal "from the judgment therein entered" and from the order denying a new trial.

[1] As no judgment was actually entered the respondent raises a question of the effect of a notice of appeal worded as above indicated. Section 1237, Penal Code, was amended in 1951 to provide for an appeal by a defendant from an order of probation, saying in subdivision 1: "* * * an order granting probation shall be deemed to be a final judgment within the meaning of this section." Since that amendment it is immaterial whether a defendant appeals in terms from the order of probation or from the judgment. For purposes of appeal they are interchangeable terms. It was so held in People v. Goldstein, 136 Cal.App.2d 778, 793, 289 P.2d 581, and People v. Reed, 128 Cal.App.2d 499, 500, 502, 275 P.2d 633. The instant appeal is to be treated as one taken from the probation order.

Appellant's sole argument is that he was convicted through use of evidence seized as a result of a wrongful search, which evidence he seasonably and unsuccessfully sought to suppress. The claim is found to be without merit.

On May 8, 1956, Officers Braun and Andrews, of the Los Angeles City Police Department, were possessed of information that bookmaking was being conducted at premises whose telephone number was Adams 1–7251. The source of the information was not disclosed to the court. They found said telephone number to be that of a residence, apparently, an apartment, at 111 West 40th Place, Los Angeles, listed in the name of Eva May. The officers on that same day "staked out" that residence, parking their unmarked car some 75 feet away and watching what went on for about an hour. During that period some ten to twelve people would approach the front door, knock once, wait a brief period, the door would open and they would enter. After a lapse of five to ten minutes each would leave the premises. The officers then placed themselves on the side of the house, close to the front door. About three o'clock an unidentified man climbed the stairs of the front porch, went to the door, knocked, and while he was awaiting admittance the two officers came up behind him and looked through the open door. When Braun, who is an expert on bookmaking customs and practices in the area, did so he saw Johnson standing inside, to the right of the living room door, and defendant Easley seated at a table in the kitchen which adjoined the living room, the intervening door being open. Easley was telephoning; on the table in front of him were a racing form, several copies of National Daily Reporter, some scratch sheets and a "magic slate." Just to the left of the slate and in front of Easley was a pad of white paper about six by three inches in size with a betting marker on the top sheet. Defendant had a pencil in his hand and was about to write on the slate when Braun entered the living room. As he passed Johnson the latter said "Eas" and defendant Easley immediately lifted two pieces of paper from the slate and writing which the officer saw thereon as he approached immediately disappeared. Thereupon an arrest of Easley and Johnson[1] was made and search begun, but it seems to have been limited to the persons of defendants. A betting marker was taken from Johnson's wallet and a front door key from each defendant. The seizure embraced those items and such objects as were in plain sight, above enumerated. Defendant's argument on appeal is a claim that the seizure was unlawful because there was no reasonable basis for an arrest and hence no right of search or seizure without a warrant. There was no warrant here.

[2] Reasonable ground for arrest need not be based upon evidence which would be competent at a trial; it may be hearsay; and although information furnished by an anonymous informer is not enough to afford reasonable ground, it is proper to be considered by the officers in forming their opinion as to whether reasonable cause for arrest exists. "'Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.'" People v. Brite, 9 Cal.2d 666, 687, 72 P.2d 122, 132. In People v. Novell, 54 Cal.App.2d 621, 623, 129 P.2d 453, 454, the concept is thus defined: "'By "reasonable or probable cause" is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.' In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568.

"The term, 'probable,' has been defined as meaning 'having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt.' Ex parte Heacock, 8 Cal.App. 420, 421, 97 P. 77."

1. It appears that Johnson was bound over for trial but the subsequent history of his case is not disclosed by the record at bar.

That information furnished by an unknown informer may be taken into consideration by the officers and the court has been held in Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36; People v. Moore, 141 Cal.App.2d 87, 89, 90, 296 P.2d 91; People v. Soto, 144 Cal.App.2d 294, 301 P.2d 45; People v. Thymiakas, 140 Cal.App.2d 940, 942, 296 P.2d 4; People v. Sayles, 140 Cal.App.2d 657, 659, 295 P.2d 579.

[3] The information that bookmaking was taking place in the residence in question was corroborated by the stream of people entering and leaving the same, the manner of entry, and the brief period of the visit. To the foregoing was added the information obtained by Officer Braun in looking through the door before his entrance into the house. He is an expert on bookmaking practices and he then and there identified as tools of the trade the things which he saw surrounding defendant's activities. The situation, excepting the magic slate, was that described in People v. Moore, 140 Cal.App.2d 870, 873, 295 P.2d 969, 971. "Defendant obviously was engaged in some activity involving the telephone; she was using other things which, considered separately, could have legitimate uses but which in combination conveyed to the practiced eye of the expert officer 'racing paraphernalia;' there was nothing to indicate that defendant was engaged in any household chore or other innocent activity. In this respect the case is unlike People v. Sanders, 46 Cal.2d 247, 294 P.2d 10, wherein the officers looking through a window in a door saw pads of paper such as those used by bookmakers, with writing on the pads. It was held that as those things were reasonably convenient to the conduct of defendant's legitimate business they were insufficient to give rise to reasonable ground for an arrest." In the Moore case the defendant gathered up "her stuff" and ran for the kitchen when the officers identified themselves, "thus placing a sinister meaning upon the various items." 140 Cal. App.2d at page 873, 295 P.2d at page 971. In this case, the presence and use of the magic slate, with its disappearing writing, supplied all the unlawful atmosphere that any fair minded officer would need in order to arrive at the conclusion that a crime was being committed in his presence. These things, except the act of writing upon the slate, were seen before the officers entered the living room. Of course, the use of one's eyes from the outside of a building is neither a search nor a seizure. People v. Martin, 45 Cal.2d 755, 762, 290 P.2d 855; People v. Moore, supra, 140 Cal.App.2d 870, 871, 295 P.2d 969.

The inapplicability of People v. Sanders, 46 Cal.2d 247, 294 P.2d 10, upon which appellant relies, sufficiently appears from the above quotation from People v. Moore, supra.

[4] It was a question of fact for the trial judge whether the police had reasonable ground for the arrest in question. People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535. Defendant contradicted most of the evidence upon which the above statement of facts is based, but the conflict was such that the finding of the trial judge cannot be disturbed.

[5] The arrest was proper, the search reasonable, and the seizure lawful.

The order granting probation (the judgment) and the order denying motion for new trial are affirmed.

MOORE, P. J., and FOX, J., concur.

148 Cal.App.2d 584

Lee ADLER, Plaintiff and Appellant,

v.

THOMAS DISTRIBUTING COMPANY, a California corporation, Nelson R. Thomas, E. W. Bennett and Emma K. Bennett, Defendants,

E. W. Bennett and Emma K. Bennett, Respondents.

Civ. 21904.

District Court of Appeal, Second District, Division 3, California.

Feb. 20, 1957.

Action for breach of contract. The Superior Court of Los Angeles County, McIntyre Faries, J., entered judgment for plaintiff, and plaintiff appealed. The District Court of Appeal, Vallée, J., held, in part, that where assignee of lessee acquired lessee's right to share in "profits" derived from "sublease", to which lessor had consented upon condition of execution of supplemental agreement providing for sharing of amount received under sublease over amount for which lessee was obligated under lease, assignee acquired no right to advance rent which lessor returned to lessee on cancellation of lease and sublease, and no right to share of rent lessor received from subsequent lease.

Judgment affirmed in part and reversed in part with directions.

1. Assignments ⇐73

Where assignee of lessee acquired lessee's right to share in "profits" derived from "sublease", to which lessor had consented upon condition of execution of supplemental agreement providing for sharing of amount lessee received over amount for which he was obligated under lease, assignee acquired no right to advance rent which lessor returned to lessee on cancellation of lease and sublease, and no right to share of rent lessor received from subsequently executed lease.

2. Assignments ⇐73

Where lease was cancelled by lessor in good faith because of financial condition of lessee, and cancellation of sublease by lessee was not contrivance of lessor and lessee to defeat lessee's assignee's rights under assignment of lessee's profits, under supplemental agreement by which lessor and lessee were to share profits received from sublease, assignee was not entitled to advance rent which lessor returned to lessee upon cancellation of lease and sublease.

3. Assignments ⇐73, 90

Where assignee of lessee acquired lessee's right to share in "profits" derived from "sublease", to which lessor had consented upon condition of execution of supplemental agreement providing for sharing of amount received under sublease over amount for which lessee was obligated under lease, assignee had right to "profits", extended to unexpired term of sublease, even though sublease was cancelled prior to end of term, and assignee was entitled to judgment against lessor for lessee's share of those profits which lessor had received and which lessor would have received had sublease continued for its full term.

4. Assignments ⇐100

A party to a contract may assert as against an assignee of the other party any right which he could assert against the latter.

5. Appeal and Error ⇐937(1)

Where husband ignored point concerning liability of wife, who was party to lease and supplemental agreement involved in case, for judgment rendered against husband, it would be assumed that husband had conceded that point was well taken, and District Court of Appeal would order that judgment be rendered against wife in same amount as against husband.

Horowitz & Howard and Alvin F. Howard, Los Angeles, for appellant.

Bailey & McWhinney and Rufus Bailey, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment in his favor against defendant E. W. Bennett in an action for breach of contract.

On March 21, 1950, E W. Bennett and Emma K. Bennett as lessors entered into a written lease of a parcel of realty with Thomas Distributing Company, a corporation, to be referred to as Thomas, as lessee. This lease is referred to as the Bennett-Thomas lease. The rental was $1,225 a month for ten years commencing July 1, 1950. The lease provided that the property could not be sublet or the lease assigned by the lessee without the written consent of the lessors. On execution of the lease Thomas paid the Bennetts $14,700 as advance rental.

In May 1952 Thomas negotiated a sublease of the property at an increased rental. As a condition to giving consent to the sublease, the Bennetts required Thomas to share the increased rental with them. Accordingly, on May 22, 1952, a supplemental agreement was entered into between the Bennetts and Thomas.[1] The supplemental agreement recited:

1. The supplemental agreement reads:

"Supplemental Lease Agreement

"Referring to that certain lease dated March 21, 1950, between E. W. Bennett and Emma K. Bennett as Lessor, and Thomas Distributing Company as Lessee, covering the premises described therein and situated at the Northwest corner of South Anderson and Azusa Streets, Los Angeles, California.

"It is understood between the Lessor and the Lessee that due to a change in the Lessee's business operations, the Lessee has no further need for said premises for lessee's own occupancy, and that the Lessee proposes to sublease said premises to other parties for the balance of the term of said lease, subject always to the provisions of Paragraph 16–H of said lease relating thereto; and it is further understood that the Lessee pursuant thereto now proposes to sublease said premises for a portion of Lessee's unexpired term to O'Keefe & Merritt Co.

"Now therefore, in consideration of the performance of the agreements herein contained by the Lessor and the Lessee, and for certain other valuable considerations, the adequacy and receipt whereof being hereby acknowledged by each of the parties hereto, the Lessor and the Lessee do mutually covenant and agree, as follows:

"(1) The Lessor agrees to execute that certain Consent To Sublease, dated May 22, 1952, granting Lessee permission to sublease said premises, in accordance with the terms and provisions of that certain sublease agreement of even date by and between Thomas Distributing Company and O'Keefe & Merritt Co., a copy of which has been furnished the Lessor;

"(2) The Lessee hereby acknowledges and reaffirms Lessee's primary liability to the Lessor for the payment of the rental, and for the performance of each and all of the terms, covenants and conditions contained in that certain lease hereinabove referred to;

"(3) The Lessee must obtain from the Lessor written consent for any subsequent subleases entered into by the Lessee affecting said premises, as per the provisions of Paragraph 16–H of said lease;

"(4) In connection with any and all of such subleasing by the Lessee of said premises for any period or periods subsequent to May 31, 1953, it is agreed that any 'profits' received by the Lessee therefrom shall be divided equally between the Lessee and the Lessor, the Lessee hereby agreeing to pay one-half (½) of all such 'profits' to the Lessor as and when received. 'Profits' to the Lessee in connection herewith shall be defined as any and all amounts received by the Lessee for the use and occupancy of said premises in excess of the amounts Lessee must pay for:

"(a) Rental installments paid or to be paid to the Lessor, calculated at the rate of Twelve Hundred Twenty-five ($1225.00) Dollars per month;

"(b) Taxes to be paid by Lessee under the provisions of Paragraph 16–A of said lease; and

"(c) Real Estate commissions and other bona fide expenses paid by Lessee in securing subleases for said premises.

"(5) Said lease shall be modified and amended by the deletion therefrom of Paragraphs 16–H and 16–I, and not otherwise;

"(6) It is understood by and acceptable to the Lessor that the Lessee has for the unexpired term of said lease retained the services of J. G. Helm Co., Realtors, as sole and exclusive leasing agents for said property for the purpose of obtaining subtenants as aforesaid, and said J. G. Helm Co. shall be paid by the Lessee such commissions as are applicable to all subleases concluded at the rate then prescribed by the Los Angeles Realty Board."

"It is understood between the Lessor and the Lessee that due to a change in the Lessee's business operations, the Lessee has no further need for said premises for lessee's own occupancy, and that the Lessee proposes to sublease said premises to other parties for the balance of the term of said lease, subject always to the provisions of Paragraph 16–H of said lease relating thereto; and it is further understood that the Lessee pursuant thereto now proposes to sublease said premises for a portion of Lessee's unexpired term to O'Keefe & Merritt Co."

By this agreement the Bennetts agreed to consent to a sublease to O'Keefe & Merritt Co. The supplemental agreement contained this provision:

"In connection with any and all of such subleasing by the Lessee of said premises for any period or periods subsequent to May 31, 1953, it is agreed that any 'profits' received by the Lessee therefrom shall be divided equally between the Lessee and the Lessor, the Lessee hereby agreeing to pay one-half (½) of all such 'profits' to the Lessor as and when received. 'Profits' to the Lessee in connection herewith shall be defined as any and all amounts received by the Lessee for the use and occupancy of said premises in excess of the amounts Lessee must pay for:

"(a) Rental installments paid or to be paid to the Lessor, calculated at the rate of Twelve Hundred Twenty-five ($1225.00) Dollars per month;

"(b) Taxes to be paid by Lessee under the provisions of Paragraph 16–A of said lease; and

"(c) Real Estate commissions and other bona fide expenses paid by Lessee in securing subleases for said premises."

Concurrently with the execution of the supplemental agreement, Thomas entered into a sublease of the realty with O'Keefe & Merritt Co. The rental was $1,225 a month through April 1953. O'Keefe & Merritt was given an option to extend the sublease for one year at a rental of $2,100 a month. Two additional options were given for one year each at the same rental. O'Keefe & Merritt exercised the first option and occupied the property for the first eight months of that option year, or until December 31, 1953.

On November 1, 1952, Thomas Distributing Company and Nelson R. Thomas executed to plaintiff their promissory note for $15,000 payable in unequal installments, the first installment due December 15, 1952; the last, November 15, 1953. On December 15, 1952, Thomas Distributing Company executed a written assignment which—after reference to the Bennett-Thomas lease, to the supplemental agreement, and to the fact that Thomas had executed a sublease to O'Keefe & Merritt—assigned to plaintiff "its share of any 'profits' which Thomas Distributing Company is entitled to receive by virtue of or arising out of any of the documents referred to herein. Nothing contained herein shall be construed as assigning anything other than Thomas Distributing Company's share of the 'profits'."[2] On

2. The assignment reads:

"This assignment is made with respect to the following facts:

"1. On March 21, 1950, a lease was executed by and between E. W. Bennett and Emma K. Bennett, as lessors, and Thomas Distributing Company (formerly Nelson R. Thomas Agency, Inc.), a California corporation, as lessee, covering the premises in the City of and County of Los Angeles, State of California, particularly described as: [description].

"The term of said lease is ten years, ending on July 31, 1960, at a total rental of $147,000.00, payable in monthly installments of $1225.00.

"2. On May 22, 1952, a sublease was executed wherein Thomas Distributing Company is designated as lessor and O'Keefe & Merritt Co., a California corporation, is designated as lessee, covering the real property described in the lease mentioned in paragraph 1 above. The term of said sublease is for one year, ending on May 31, 1953, at a monthly rental of $1225.00. This lease provides that the rental shall be paid by the O'Keefe & Merritt Co. to E. W. Bennett, 4073 South Alameda Street, Los

March 18, 1953 a copy of the assignment was received by E. W. Bennett.

Under the Bennett-Thomas lease, Thomas was obligated to pay the taxes on the realty. During the early part of 1953 Thomas was in financial difficulty and could not pay the taxes. On April 8, 1953, Thomas requested E. W. Bennett to pay the second installment of taxes for 1952–53 in the amount of $1,411.58, which Bennett did.

On December 17, 1953, the Bennetts and Thomas entered into an agreement in writing terminating the Bennett-Thomas lease of March 21, 1950, the termination to be effective December 31, 1953. In this agreement Thomas agreed to execute forthwith an agreement terminating the O'Keefe & Merritt sublease as of March 31, 1954, and assigned to the Bennetts all its interest in that sublease effective as of December 31, 1953. The O'Keefe & Merritt sublease was thereupon cancelled effective December 31, 1953. Concurrently with the execution of the agreement terminating the Bennett-Thomas lease, the Bennetts paid Thomas $8,500. The figure $8,500 was reached after negotiations and represented a return of part of the $14,700 paid the Bennetts by Thomas on execution of the lease of March 21, 1950. At the time of the execution of this agreement Thomas could not pay the first installment of taxes on the realty for 1953–54, and it was paid by the Bennetts in the amount of $1,437.23.

On December 18, 1953, the Bennetts, as lessors, entered into a written lease of the realty with The Electric Corporation of California as lessee. The term of the lease was ten years, commencing May 1, 1954. The rental was $1,825 a month; the Bennetts to pay the taxes.

The court found: 1. A petition has been filed in the Superior Court of the County of San Diego for judicial supervision of the winding up of Thomas Distributing Company, which action is pending. 2. The unpaid balance of the Adler-Thomas note is $9,000. 3. In order to secure permission of E. W. Bennett to make the O'Keefe & Merritt sublease, Nelson R. Thomas and Thomas Distributing Company agreed to cause any rentals during the term of that sublease to be paid directly to E. W. Bennett and authorized him to retain half of the excess

Angeles 58, California. An option is granted to O'Keefe & Merritt Co. to extend said sublease for three additional successive periods of one year each, said extended terms to commence, respectively, upon exercise of option on June 1, 1953, June 1, 1954, and June 1, 1955, except that the annual rental for each additional annual term shall be $25,200.00, payable in monthly installments of $2100.00.

"3. On May 22, 1952, an agreement was made between the lessor, E. W. Bennett and Emma K. Bennett, and the lessee, Thomas Distributing Company, granting permission to sublet the said property. Paragraph 4 of the said agreement provides that in connection with any and all subleasing for any period subsequent to May 31, 1953, any 'profits' received by the lessee shall be divided equally between the lessee and the lessor. Profits are construed to be any sums received in excess of the amounts the lessee must pay for rental at the rate of $1225.00 per month, taxes, and real estate commissions, and other bona fide expenses paid by lessee in securing subleases for the premises.

"4. Thomas Distributing Company is

indebted to Lee Adler in the sum of $15,000.00, and, concurrently with the execution of this agreement, has executed a promissory note providing for the repayment of said $15,000.00, together with interest on unpaid balances at the rate of 7% per annum. The first installment is due and payable December 15, 1952, and the last installment is due and payable November 15, 1953. The installments are not equal.

"To secure the payment of the aforesaid promissory note and all attorneys' fees, costs, and other sums which may become due thereon or in connection therewith, the undersigned Thomas Distributing Company does hereby assign to Lee Adler its share of any 'profits' which Thomas Distributing Company is entitled to receive by virtue of or arising out of any of the documents referred to herein. Nothing contained herein shall be construed as assigning anything other than Thomas Distributing Company's share of the 'profits'.

"Without in anywise affecting this assignment, the said Lee Adler may bring action on said promissory note upon the default in any of the terms thereof."

of such rentals over $1,225 a month and to pay the remaining half to Thomas. 4. One-half the rental received by E. W. Bennett during the period the property was occupied by O'Keefe & Merritt subsequent to the time of the assignment to plaintiff and prior to the agreement to terminate the Bennett-Thomas lease after deducting rental at the rate of $1,225 a month, taxes, commissions, and bona fide expenses, is $556.69. One-half the rental received by E. W. Bennett under the O'Keefe & Merritt sublease for the months of January, February, March, and April 1954 after deducting rental at the rate of $1,225 a month, taxes, commissions, and bona fide expenses, is $1,750. That rental would have been received by E. W. Bennett from O'Keefe & Merritt for those months but for the cancellation of its sublease as of December 31, 1953. Judgment was for plaintiff against Nelson R. Thomas for $9,000 and attorney's fees and against E. W. Bennett for $2,306.69. Plaintiff appeals from the part of the judgment which awards him $2,306.69 from E. W. Bennett and from the judgment as a whole in that it fails to grant him any relief against Emma K. Bennett.

The trial court concluded that the assignment from Thomas to plaintiff did not apply to the lease from the Bennetts to The Electric Corporation. Plaintiff argues that it did. We think the point is untenable. True, at the time the supplemental agreement was executed the parties thereto thought the Bennett-Thomas lease would continue for its full term and that on termination of the O'Keefe & Merritt sublease there might be further subleases. But their agreement was that any profits "received by the Lessee" should be divided equally. Thomas assigned to plaintiff "its share of any 'profits' which Thomas Distributing Company is entitled to receive by virtue of or arising out of any of the documents referred to herein." The documents referred to were the Bennett-Thomas lease, the supplemental agreement, the O'Keefe & Merritt sublease, and any other subleases Thomas, with the written consent of the Bennetts, might later execute. The assignment expressly says: "Nothing contained herein shall be construed as assigning anything other than Thomas Distributing Company's share of the 'profits'." No rights were assigned to plaintiff other than the right to receive a share of the "profits" from subleases if and when received by Thomas. Plaintiff acquired no rights in the Bennett-Thomas lease or in the supplemental agreement. The assignment did not give plaintiff any rights in nonexistent subleases but only in the O'Keefe & Merritt sublease and other subleases if and when they ripened into existence. Cf. Cox v. Hughes, 10 Cal.App. 553, 557, 102 P. 956. Since the only sublease which was entered into by Thomas was that with O'Keefe & Merritt, the assignment was limited to "profits" from that sublease.

[1] Plaintiff argues that under the terms of the assignment he is entitled to receive from the Bennetts the $8,500 they paid Thomas on cancellation of the Bennett-Thomas lease. This sum does not come within the definition of "profits" as it is defined either in the supplemental agreement or the Thomas to plaintiff assignment. It was a return of part of a remaining balance of the deposit of future rent made by Thomas at the inception of the Bennett-Thomas lease. No "profits" were received by Thomas by reason of the Bennett-Thomas lease or by reason of the supplemental agreement, as plaintiff argues. The supplemental agreement specifically says: "In connection with any and all of such *subleasing* by the Lessee of said premises for any period or periods subsequent to May 31, 1953, it is agreed that any 'profits' *received by the Lessee therefrom* shall be divided equally. * * *" (Italics added.) Profits could arise only from subleases actually executed.

[2] Plaintiff asserts that after a right has been assigned and the obligor has been notified of the assignment, he may not deal with the assignor as the owner of the right nor may he contrive with the assignor to defeat the assignee's rights. The argument is that by cancelling the Bennett-Thomas lease after the Bennetts received notice of

the assignment to plaintiff, Thomas ceded to the Bennetts its share of the profits from subleasing, and that thereby the Bennetts contrived with Thomas to defeat plaintiff's right. The argument overlooks the fact that implicit in the court's findings is the implied finding that the Bennett-Thomas lease was cancelled in good faith because of the financial condition of Thomas and that it was in default and the fact that the finding is supported by substantial evidence. In view of those facts the court was justified in concluding the Bennetts acted in good faith in cancelling the Bennett-Thomas lease and that they did not contrive with Thomas to defeat plaintiff's rights.

Plaintiff refers us to Jones v. Martin, 41 Cal.2d 23, 256 P.2d 905, Nelson v. Fernando Nelson & Sons, 5 Cal.2d 511, 55 P.2d 859, Greenlee v. Los Angeles Trust & Savings Bank, 171 Cal. 371, 153 P. 383, and Nineteenth Realty Co. v. Diggs, 134 Cal.App. 278, 25 P.2d 522. These cases have no bearing on the questions whether plaintiff is entitled to receive from the Bennetts part of the rental under The Electric Corporation lease or to the $8,500 paid Thomas on cancellation of the Bennett-Thomas lease. They state the well established rule that ordinarily an obligor will not be discharged from his obligation to his obligee's assignee by performance rendered to the assignor after notice of the assignment. O'Keefe & Merritt was the obligor, Thomas the obligee and assignor, plaintiff the assignee. The rule would apply in an action by plaintiff against O'Keefe & Merritt in the event the latter paid the rental under its sublease to Thomas rather than to plaintiff after notice of the assignment to plaintiff.

[3–5] The trial court held that the right of plaintiff to "profits" extended to the unexpired term of the O'Keefe & Merritt sublease and gave him judgment against E. W. Bennett for Thomas' share of those profits which the Bennetts had received and which they would have received had the O'Keefe & Merritt sublease continued for its full term. Plaintiff is not entitled to more. As assignee he stood in the shoes of his assignor, Thomas; i. e., he took subject to all equities and defenses which existed in favor of the Bennetts. A party to a contract may assert as against an assignee of the other party any right which he could assert against the latter. Plaintiff had no greater right than Thomas had under the Bennett-Thomas lease and the supplemental agreement. Bliss v. California Cooperative Producers, 30 Cal.2d 240, 250, 181 P.2d 369, 170 A.L.R. 1009; Parker v. Funk, 185 Cal. 347, 352–353, 197 P. 83; Pacific Rolling Mill Co. v. English, 118 Cal. 123, 129, 50 P. 383. The rights of Thomas were subject to cancellation on its default, as provided in the lease. All rights of Thomas, and consequently all right to sublease, fell on cancellation of the Bennett-Thomas lease. In Herman v. Campbell, 86 Cal.App.2d 762, at page 766, 195 P.2d 801, at page 803, this court quoted with approval from 32 American Jurisprudence 746, thus:

> "'Where a cause of forfeiture has arisen, the fact that the lessee consents to the enforcement of the forfeiture does not render the transaction a surrender as distinguished from a forfeiture so as to bring it within the rule that a lessee cannot by a surrender affect the estate or the interest of third persons held under him' etc."

The judgment is incomplete. It does not adjudicate the issues between plaintiff and Emma K. Bennett except as a judgment in her favor may be implied from its failure to adjudicate against her. Plaintiff contends the court erred in not rendering judgment in his favor against Emma K. Bennett. He argues she was one of the lessors in the Bennett-Thomas lease; she was a party to the supplemental agreement; she signed the agreement terminating the Bennett-Thomas lease; she "benefited from the transaction in exactly the same manner and to the same extent as E. W. Bennett." The Bennetts ignore the point and make no mention of it. We assume, therefore, they concede it to be well taken. It would appear to be. See Vierra v. Pereira, 12 Cal. 2d 629, 86 P.2d 816; Flanery v. Mudd, 86 Cal.App.2d 250, 255, 194 P.2d 806.

The judgment against E. W. Bennett is affirmed. Insofar as the judgment fails to specifically determine the issues between plaintiff and Emma K. Bennett, it is reversed with directions to the superior court to render judgment in favor of plaintiff and against Emma K. Bennett in the same amount as it now stands against E. W. Bennett.

SHINN, P. J., and PARKER WOOD, J., concur.



148 Cal.App.2d 544

M. FRIIS–HANSEN & CO., a co-partnership, consisting of M. Friis-Hansen, Lilly Friis-Hansen, Andrew Friis-Hansen, and Mary Larsen, Plaintiffs and Appellants,

v.

James J. IMPERATRICE, Defendant and Respondent.

Civ. 5345.

District Court of Appeal, Fourth District, California.

Feb. 18, 1957.

Lessors' action for recovery of their share of barley crop produced on leased premises. The lessee filed a cross-complaint, alleging breach of agreement to repair well and replace pump and power plant. The Superior Court, Fresno County, Arthur Shepard, J., rendered judgment which was, in part, adverse to plaintiffs, and they appealed. The District Court of Appeal, Barnard, P. J., held that there was insufficient evidence to support finding that lessors had breached alleged agreement, and held that there was no evidence of fraud on which lessee could conceivably recover, under cross-complaint's second count, for money had and received.

Portion of judgment appealed from reversed.

Landlord and Tenant ⇐154(3)
Money Received ⇐18(3)

In lessors' action for recovery of their share of barley crop produced on leased premises, wherein lessee filed a cross-complaint, alleging breach of agreement to repair well and replace pump and power plant, there was insufficient evidence to support finding that lessors had breached alleged agreement, and there was no evidence of fraud on which lessee could conceivably recover, under cross-complaint's second count, for money had and received.

Lewis W. Boies, Jr., Fresno, for appellants.

Stutsman, Hackett & Nagel, Fresno, for respondent.

BARNARD, Presiding Justice.

On March 1, 1948, the plaintiffs leased about 500 acres of land to one Maggini for a term of five years. The lease provided that the lessee should pay as rent 25% of all crops grown; that the lessee should not assign the lease without the written consent of the lessor; that the lessee should accept the premises "in their present condition", (including a power plant and pump to be installed as soon as possible and for which orders had already been placed); that the lessee should plant to cotton and other crops "as many acres as can be irrigated from the water supply", and pay for all water, power or fuel to be used in irrigating the land "in a farm-like manner"; that at the expiration of the lease the lessee should surrender the premises "in as good condition as when received, reasonable use and wear thereof excepted"; and that the lessor should not be liable for any damage to any property "in or upon the demised premises however caused, other than by the wrongful act of the Lessor, and the Lessee hereby agrees and undertakes to hold and save the Lessor harmless therefrom."

Shortly after the execution of the lease the plaintiffs installed a pump and a butane engine on the property, and Maggini farmed

the property until August 31, 1949. Shortly after the installation of the butane engine Maggini replaced it with a Diesel engine. At some time prior to August 31, 1941, Maggini replaced the Diesel engine with an electric motor which he had purchased under a conditional sale contract.

On August 31, 1949, Maggini assigned this lease to the defendant Imperatrice, who signed an acceptance of the assignment in which he agreed to carry out and perform all the terms and conditions of the lease, and the plaintiffs signed a consent to that assignment. Imperatrice farmed the place from that time until the expiration of the lease. During the crop season of 1950 the flow of water from the well fell off and late that year Imperatrice had the pump taken out of the well in an effort to find out the cause of the trouble. About December 1, 1950, the electric motor which had been installed by Maggini was repossessed by the vendor thereof because of Maggini's default in payment. In January, 1951, Imperatrice bought and installed another electric motor and another pump, and made extensive repairs and improvements to the well. He then continued to operate the property until the lease expired. He vacated the property in February, 1953, and removed the pump and motor which he had installed, claiming them as his own.

The complaint in this action alleged that the defendant owed the plaintiffs $2,863.43 as the lessor's share of a barley crop produced in 1952. It also sought recovery on two other matters which are not material on this appeal. The defendant's answer admitted that the amount would otherwise be due on the barley crop, but denied that anything was due because of the matters alleged in his cross-complaint. He also filed a cross-complaint alleging that under the lease the plaintiffs agreed to install a power plant, pump and well, to be used by the lessee in irrigating the land; that before September 8, 1949, the premises were equipped with a complete well, power plant and pump which were used for that purpose; that during the 1950 season the defendant notified the plaintiffs that the pump and well were not producing enough water; that shortly before December 2, 1950, the defendant caused the pump to be examined and the pump was found to be inefficient to produce sufficient water to irrigate the premises; that on December 2, 1950, the defendant notified the plaintiffs that the electric motor had been repossessed "by the conditional seller" and demanded that the plaintiffs install a motor and other equipment necessary for the efficient operation of said well and pump; that the plaintiffs refused to comply with this demand; that because of said refusal it became necessary for the defendant to purchase and install a pump and motor and do other work necessary for the purpose of producing sufficient water; that this was done at a cost of $8,000; and that the defendant has been damaged in that amount.

A jury brought in a verdict in favor of the plaintiffs for $2,863.43 and a further verdict in favor of the defendant on his cross-complaint awarding him damages in the sum of $4,130.93. Judgment was entered in favor of the plaintiffs for $2,863.43 and in favor of the defendant for $4,130.93. The plaintiffs moved for a new trial with respect to that part of the judgment, based upon the cross-complaint, which is in favor of the defendant. At the close of the arguments on the motion for a new trial the court stated that he regarded the evidence as insufficient to support a finding that the plaintiffs had breached any contract. Counsel asked for further time in which to present authorities and also in which to negotiate a settlement. No authorities or settlement was forthcoming, and the court later entered an order granting a new trial. However, this order was ineffective since it was entered too late, Sec. 660, Code Civ.Proc., after the motion for a new trial was denied by operation of law. The plaintiffs then appealed from that part of the judgment which is in favor of the defendant.

The appellants contend that the evidence was not sufficient to support a verdict for the cross-complainant in any amount. It is argued that under the terms of the

lease the appellants were not obligated to repair or replace any pump or power equipment on the well after the time the well was first put down and equipped; that the court correctly instructed the jury that the lease as written did not place any such obligation on the appellants; that there was no substantial evidence that the appellants had made a subsequent oral promise to repair the well and replace the pump and power plant so that sufficient water could be produced; and that there was no consideration for such a promise had it been made. It is further argued that under the evidence it was error for the court to instruct the jury that the defendant claimed that by some sort of oral promise the plaintiffs had promised, for a valuable consideration, to repair the well and replace the pump and power plant so that sufficient water could be pumped, and that they had failed to do this; and further to instruct the jury that if it found that the plaintiffs had, for a valuable consideration, made such a promise and found that they failed to fulfill the same, and if it further found that in order to preserve his crops the defendant necessarily expended a sum to repair the well and replace the pump and motor, it should find for the defendant in such sum as the evidence showed he had been forced to expend for protection of the crops, if any.

The respondent contends that the evidence is sufficient to support this part of the judgment and that the court properly left to the jury the question as to a subsequent promise, for a valuable consideration, to repair the well and replace the pump and power plant. It is argued that the jury must have found that the appellants did promise for a valuable consideration to repair the well and replace the pump and power plant so that sufficient water could be produced; that the expression "I am going out to buy the kid a pump" clearly implies such a promise; that when the appellants let the respondent into possession of the land they inferentially represented that the power plant, pump and well then on the premises would remain and could be used by the respondent; that the appellants did not inform the respondent that the power plant belonged to some conditional seller; that since his cross-complaint contained a second count for money had and received the respondent was entitled to present evidence of fraud; and that the record establishes that a fraud was obviously practiced.

It clearly appears from the record that a new trial should have been granted, that the court intended to grant one, and that the failure to accomplish that purpose was due entirely to an inadvertence in connection with the time element. The original lease clearly provided that the appellants should install certain equipment only, and that the lessee should take the premises in that condition. It is conceded that this equipment was so installed. Under the lease subsequent repairs were the obligation of the lessee, and the lease did not provide that the lessor should provide sufficient water to irrigate the leased premises. It merely provided that the lessee should plant and irrigate such crops as could be irrigated from the water supply made available by the original equipment. Maggini testified that he bought the first electric motor without any consent from the appellants and that "It was on my own". There is no evidence that the appellants knew that Maggini had not paid for this equipment. It clearly appears that the appellants were not liable to the respondent, in the respect here in question, under the original lease.

There is no satisfactory evidence of a subsequent promise or agreement on the part of the appellants, for a valuable consideration, to repair the well and replace the pump and power plant so that sufficient water could be produced. The only evidence in this connection is that the respondent employed a pump firm to pull the old pump and inspect it. He then made an appointment with Mr. Friis-Hansen to go out shopping for a pump. Imperatrice testified that as they left the office a secretary asked Mr. Friis-Hansen where he was going, and he replied "I am going out to buy the kid a pump"; that

they went to a pump company but Mr. Friis-Hansen did not buy a pump; and that two days later Mr. Friis-Hansen told him that he would not buy a pump and that "I am washing my hands of the whole thing." The respondent testified that thereafter, on December 13, 1950, he placed an order with a pump company for a complete outfit, including a new pump, a switch board and an electric motor; that this outfit cost $6,000 and was installed two or three weeks later; that he used this outfit during the years 1951 and 1952; that he took the outfit away when he left; and that he owned the outfit. He also testified that he spent $1,764.50 in servicing and improving the well on the premises, and other sums in that connection.

The respondent took an assignment of this lease from Maggini and assumed his obligations. He knew what was in the contract and there is no evidence that any representations of any kind were made to him by the appellants when they consented to that assignment. The appellants' only obligation under the lease was to place certain equipment on the property in the beginning, which they did. Maggini replaced the engine with an electric motor without the appellants' consent, and there is no evidence that they knew that this was not paid for. If Maggini had continued to the end of the lease he could not have held the appellants responsible for the new equipment which was later installed. It was Maggini's obligation to keep a pumping plant on the premises, and the respondent stood in Maggini's shoes.

While there was some talk between Mr. Friis-Hansen and the respondent about purchasing a new pump there was no definite promise or agreement on the part of the appellants, and there would have been no consideration had such a promise been made since the obligation to maintain the pumping plant was one already resting upon the respondent. In any event, there was no evidence that the appellants promised to buy anything except a pump, and no evidence of any promise to buy a new electric motor. After they refused to buy a pump, the respondent bought a pump and an expensive motor and other equipment, which he continued to use for the remaining two years, and he then claimed the equipment as his own although the lease required that the premises be surrendered in as good condition as when received, except for reasonable use and wear. There is no evidence of fraud, and no evidence that the respondent made any further demand on the appellants until after this suit was brought. His cross-complaint did not allege any new promise or agreement on the part of the appellants, and such a claim was first raised during the trial. The instruction given was not justified by the terms of the lease or the evidence concerning a subsequent promise. The promise now relied on is the promise to buy a new pump, and there is no evidence as to what the new pump cost. If it should be conceded that such a promise was made, and that a sufficient consideration appears, there was no evidence which would enable the jury to segregate the various items of expense and to properly ascertain any amount which could reasonably be attributed to that oral promise. Under the instructions given the jury could, and apparently did, include in its allowance of damages items which were not within the scope of the subsequent promise now claimed to have been made. On the record before us, it clearly appears that this part of the action should be retried, which fact was recognized by the trial court.

The portion of the judgment appealed from is reversed.

GRIFFIN and MUSSELL, JJ., concur.

148 Cal.App.2d 537

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alice PENSON, Defendant and Appellant.

Cr. 5740.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1957.

Defendant was convicted in the Superior Court, Los Angeles County, LeRoy Dawson, J., of bookmaking and recording bets on horse races, and she appealed. The District Court of Appeal, Fox, J., held that a valid arrest may be made on basis of information communicated by reliable informant; and held that where officers had received information from known source, which on former occasions had proved to be reliable, and such informant had given them not only address but particular portion of premises where bookmaking activities were being carried on and method of operation, viz., by telephone, with a woman in charge, officers had reasonable cause to believe that bookmaking was being carried on and that female telephone operator was committing offense, and her arrest was therefore lawful, even though informant had not disclosed her identity.

Affirmed.

1. Arrest ⇐63(4)

A valid arrest may be made on basis of information communicated by reliable informant; and where officers had received information from known source which on former occasions had proved to be reliable, and such informant had given them not only address but particular portion of premises where bookmaking activities were being carried on and method of operation, viz., by telephone, with a woman in charge, officers had reasonable cause to believe that bookmaking was being carried on and that female telephone operator was committing offense, and her arrest was therefore lawful, even though informant had not disclosed her identity. West's Ann.Pen.Code, § 337a, subds. 1, 4.

2. Arrest ⇐71

As an incident to lawful arrest, it was proper for officers to search premises and seize items which they believed were being used by defendant in commission of crime for which arrest was made.

Earl C. Broady, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

FOX, Justice

Defendant was charged with bookmaking and recording bets on horse races, in violation of subdivisions 1 and 4, respectively, of section 337a, Penal Code. It was also alleged that she had suffered a prior conviction of selling and concealing heroin, a felony, and that she had served a term of imprisonment therefor. Defendant was found guilty on both counts, and the court further found the charge of prior conviction to be true. She appeals from the judgment.

On January 11, 1956, at approximately 4:30 in the afternoon, Officer Allen, of the Los Angeles Police Department, assigned to the Administrative Vice Division, accompanied by Officer Gough, went to 1108 East Vernon Avenue, Los Angeles, pursuant to a tip from an informant who advised them that bookmaking activities were taking place in the back room of this location by the use of a telephone, operated by a woman. The informant had previously given the police officers information which had proved reliable, based upon which they had made arrests and secured convictions.

The establishment where the arrest took place was divided by a partition, the front portion of which was a barber shop, and the back portion was in the nature of a combination lounge and rest room. The door in the partition had a small window, approximately 8" x 10" in size; a portion of the glass had been painted over, leaving

some four inches of visibility, so that one could see only through an area of about 4" x 10". In the partition was a two-way mirror of dark blue color. By means of this mirror one could see from the back room into the barber shop, but could not see from the barber shop into the back room.

When the officers entered the back room they followed a man who knocked on the door, which was opened for him. They observed a woman talking on the telephone. In front of her was an adding machine which she was operating. When defendant observed the officers she dropped the telephone and suddenly turned toward them. On the table next to the adding machine were several pieces of folded paper. With one motion, defendant brushed these papers onto the floor. They were, however, retrieved by the officers; they proved to be betting markers. Defendant, very hurriedly, went to the back of the room, at which time she was placed under arrest. There was also a piece of paper in the adding machine with a few notations on it. A copy of the National Daily Reporter, commonly known as a "scratch sheet," was found on the table. There was a radio in the room from which racing results were heard being broadcast from a Mexican station. There were six other people in the room looking at scratch sheets.

During the time the officers were in the room the telephone rang on several occasions. Officer Allen answered the telephone on each of these occasions but did not talk to any of the people on the other end of the line. The only thing that was heard by him was a clicking sound, following which no buzzing sound was audible.

[1, 2] Defendant's position is that her arrest was unlawful on the ground that the officers did not have sufficient information to establish "reasonable or probable cause" for believing that she was committing a public offense; that the ensuing search was in violation of her constitutional rights; and that the evidence thus seized was inadmissible. She seeks to bring her case within the doctrine of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905.

In the recent case of People v. Montes, 146 Cal.App.2d 530, 303 P.2d 1064, 1065, this court said: "A valid arrest may be made solely by reason of information communicated by a reliable informant." In accord are People v. Gonzales, 141 Cal. App.2d 604, 606, 297 P.2d 50; Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222; and People v. Soto, 144 Cal.App. 2d 294, 301 P.2d 45; See, also, Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36; People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535. This rule governs in the instant matter.

The record shows that the officers had received information from a known source which on former occasions had proved to be reliable. The informant gave not only the address but the particular portion of the premises where the bookmaking activities were being carried on and the method of operation, viz., by telephone, with a woman in charge. With this type of reliable information, the officers had reasonable cause to believe that bookmaking was being carried on in the back room of the barber shop, and that the female telephone operator was committing the offense. Her arrest was therefore lawful (cases supra). The Cahan case, supra, has no application.

As an incident to such an arrest, it was proper for the officers to search the premises and seize items which they believed were being used by defendant in the commission of the crime for which she was arrested. In re Dixon, 41 Cal.2d 756, 761–762, 264 P.2d 513. The betting markers and the scratch sheet thus obtained were properly admissible in evidence. People v. Coleman, 134 Cal.App.2d 594, 598–599, 286 P.2d 582.

There is no substance to defendant's suggestion that the reliabilty of the informer should be discounted because the identity of the individual was not disclosed. The officers' appraisal of the informant's reliability was based upon the truth-

fulness of prior reports from this person which they had verified upon investigation.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



Margaret L. PLUMER, Plaintiff and Respondent,

v.

Everett T. PLUMER, Defendant and Appellant.*

Civ. 21871.

District Court of Appeal, Second District, Division 3, California.

Feb. 21, 1957.

Hearing Granted April 17, 1957.

Husband obtained an order to show cause whereby he sought to modify alimony and child support provisions of property settlement agreement. The Superior Court, Los Angeles County, Elmer D. Doyle, J., dismissed husband's order, and husband appealed. The District Court of Appeal, Shinn, P. J., held that where property settlement agreement stated that spouses desired to effect final and complete settlement of their respective property rights, support, and alimony, and provided that husband was to pay wife $200.00 per month for her support and $200.00 for support of their child, but that if wife's income from other sources exceeded $250.00 per month payment could be reduced, agreement, on its face, and as a matter of law, did not foreclose husband's right to seek modification of alimony and child support payments.

Order reversed.

Divorce ⇐245(3), 309

Where property settlement agreement stated that parties desired to effect a final and complete settlement of their respective property rights and provided that husband was to pay wife $200 per month for her support and $200 for support of their child but that if her income from other sources exceeded $250 per month payment could be reduced, agreement, on its face, and as a matter of law, did not foreclose husband's right to seek modification of alimony and child support payments. West's Ann.Civ. Code, §§ 1636, 1641, 1650, 1652.

Fogel, McInerny & West, James E. West, Jr., and Steven Edmondson, Santa Monica, for appellant.

Hahn, Ross & Saunders, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal by defendant Everett T. Plumer from an order dismissing his order to show cause re modification of alimony and child support. The Plumers were divorced in 1954; the interlocutory decree approved and ordered them to perform the terms of a property settlement agreement under which defendant agreed to pay $200 per month for the support of their minor son and an identical amount for the support of plaintiff until her death or remarriage, the latter obligation to continue for five years from the date of the agreement in the event of plaintiff's remarriage within that time. The interlocutory decree has since become final and plaintiff has remarried.

In December 1955, defendant obtained an order to show cause whereby he sought a reduction of these payments to $100 per month each upon his affidavit that the income from his accounting business had substantially diminished and he could no longer meet his fixed business expenses, provide for the necessities of life and comply with the decree. At the hearing before a commissioner, plaintiff moved to dismiss the order to show cause upon the ground that the court was without jurisdiction to modify the payments. The matter was submitted as a question of law. The commis-

* Opinion vacated 313 P.2d 549.

sioner interpreted the agreement to mean that the alimony and support provisions of the interlocutory decree were in settlement of property rights, that they were based upon an integrated property settlement agreement, and that the court had no authority to reduce the payments on account of a change in defendant's financial circumstances. The commissioner accordingly recommended that plaintiff's motion be granted, and the court made the order of dismissal from which this appeal was taken.

The sole question presented by this appeal is the proper construction to be given to the agreement of the parties. It is entitled "Property Settlement, Support, Alimony and Custody Agreement." The preamble states that the spouses "desire to effect a final and complete settlement of their respective property rights, support, alimony and custody of their child with reference to their marital status and to each other." The agreement divided the community property and provided for the payment of various outstanding obligations. It contains the usual releases of after-acquired property, of liability for subsequent acts and contracts, and of the rights of administration and inheritance. The provisions relating to alimony and child support are as follows:

"8. Husband agrees to and does hereby give the custody of the child of the parties, John Daniel Plumer, to Wife, but Husband shall have the right at all proper and reasonable times to see said child. Husband agrees to pay for the support, maintenance, education, care and custody of said child until he shall reach the age of majority, and for that purpose hereby agrees to pay to Wife the sum of One Hundred Dollars ($100.00) on the 10th and 25th days of each month, * * * making in all the sum of Two Hundred Dollars ($200.00) per month payable hereunder. * * *

"9. Husband agrees to pay to Wife as alimony for her support and maintenance (in addition to the sums mentioned in paragraph 8 hereof) the sum of One Hundred Dollars ($100.00) on the 10th and 25th days of each month, * * * making in all the sum of Two Hundred Dollars ($200.00) per month payable hereunder, * * *. Husband's obligation to pay said alimony to Wife shall cease upon her death or remarriage, except that in the case of her remarriage said payments shall be continued until five (5) years from September 25, 1954, notwithstanding the fact that Wife may have remarried within said period of time.

"10. For purposes of this agreement no earnings of Wife or other income obtained by her shall be considered as a 'changed condition' and taken into consideration in connection with any attempt of Husband to obtain a reduction in payment for support of Wife or said child, John Daniel Plumer, except such portion of said earnings or other income as shall exceed the gross average monthly sum of Two Hundred Fifty Dollars ($250.00). 'Average monthly' earnings or income shall be computed on the basis of the total earnings or income of Wife (other than Husband's payments to her) for the twelve months prior to the filing of Husband's petition for reduction divided by twelve.

* * * * * *

"23. Each of the parties hereto does hereby release and discharge the other from any and all claims and rights, present and future, to support, separate maintenance, alimony pendente lite, alimony, court costs, attorney's fees and from any and all property rights or monetary claims of any nature or kind which each at any time might have against the other, excepting such as are provided for by this agreement."

Defendant contends that the court erred in holding that the support provisions of the interlocutory decree were an inseparable part of an integrated property settlement agreement and that his monthly payments were not subject to modification on account of a change in his financial circumstances. In this connection, defendant argues that paragraph 10 of the agreement grants him, at least by inference, the right to seek a reduction in the amount of the payments be-

cause of his lessened ability to pay. It is conceded by plaintiff that the agreement contemplates a possible modification of the payments, but in one contingency only, namely, when her own income for the calendar year prior to defendant's petition exceeds an average of $250 per month. She argues in defense of the order that the support agreement was an inseverable part of a complete and final disposition of the property rights of the spouses, and that in all respects other than the admitted contingency it is modifiable only by a further agreement between the spouses, citing Van Dyke v. Van Dyke, 126 Cal.App.2d 238, 271 P.2d 910; Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873; Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881; Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 865.

Had the parties not included paragraph 10 in the agreement, there would be little doubt that they intended the instrument to be a permanent settlement of all their property rights and that they did not contemplate a modification of the support payments by the court. However, paragraph 10 cannot be ignored. It impliedly sanctions a reduction because of changed conditions in case plaintiff's income should exceed $250 per month but it does not specifically exclude a reduction when defendant's income has diminished. Under defendant's interpretation the sole limitation set up by that clause is the $250 requirement which is applicable only to a change in Mrs. Plumer's circumstances. Under plaintiff's interpretation, since the clause does not specifically give defendant the right to seek a reduction because of his changed circumstances, the parties must be deemed to have intended to exclude it as a basis for modification. The court below concluded that the spouses intended the payments to be modifiable only on account of a favorable change in plaintiff's circumstances. It reached this conclusion solely from a reading of the agreement and as a matter of law, and the matter of interpretation must be so considered by us. Fox v. Fox, supra, 42 Cal.2d 49, 52–53, 265 P.2d 881, and cases cited.

The agreement must be interpreted so as to give effect to the mutual intention of the parties. Civ.Code § 1636. It must be considered in its entirety, Civ.Code § 1641; Broome v. Broome, 104 Cal.App.2d 148, 231 P.2d 171; Lane v. Lane, 117 Cal.App.2d 247, 255 P.2d 110, and its particular clauses are to be subordinated to the general intent. Civ.Code § 1650. Inconsistencies are to be reconciled, Civ.Code § 1652, and, where possible, every provision of the agreement must be given effect in accordance with its general intention or purpose. Todd v. Superior Court of City and County of San Francisco, 181 Cal. 406, 184 P. 684, 7 A.L.R. 938; Royal Ins. Co. of Liverpool, England v. Caledonian Ins. Co., 20 Cal.App. 504, 129 P. 597; De la Questa v. Armstrong Holdings Co., 48 Cal.App. 487, 192 P. 135.

Defendant's application for modification is not in conflict with the provisions of paragraph 10. He did not seek modification upon the ground that plaintiff's earnings had increased since the date of the agreement. The agreement as a whole cannot be construed as depriving defendant of the right to modification in any and all circumstances. Upon the contrary, it implies that defendant would have a right to seek modification upon the ground of changed circumstances if the income of plaintiff should exceed $250 per month. The right of defendant to seek modification does not depend upon a reservation of the right by agreement. It exists unless the purpose of the parties, as expressed in the agreement, was to fix the obligation of support at an amount that would be definite and subject to change only under stated conditions. The agreement, on its face, and as a matter of law, cannot be so construed as to foreclose the right to seek modification.

The order is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

148 Cal.App.2d 635

Clara QUALLS et al., Plaintiffs,
Clara Qualls, Appellant,
v.
George SMYTH, Defendant and Respondent.
Civ. 5375.

District Court of Appeal, Fourth District, California.

Feb. 21, 1957.

Action for an injunction to abate a dust nuisance arising from defendants operation of a turkey ranch, and for damages. The Superior Court, Fresno County, Arthur C. Shepard, J., entered judgment for plaintiff and one of them appealed attacking, inter alia, the size of the verdict. The District Court, Barnard, P. J., held that award of $250 to a property owner for discomfort and annoyance caused by dust nuisance arising from defendant's operation of a turkey ranch on nearby property, was not inadequate.

Judgment affirmed.

1. Nuisance ⇐50(2)

Where a nuisance consisting of dust arising from operation of a turkey ranch was temporary in nature, and existed for only a few months at a time, measure of damage involved was depreciation of the rental value or use value of nearby property in question.

2. Nuisance ⇐50(7)

Award of $250 to a property owner for discomfort and annoyance caused by dust nuisance arising from defendant's operation of a turkey ranch on nearby property was not inadequate.

James Snedeker, Fresno, for appellant.

Lerrigo, Thuesen, Thompson & Thompson, Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action for an injunction and for damages. It was brought by the plaintiff Qualls, the plaintiffs Hurley and the plaintiffs Marshall to abate a dust nuisance arising from the defendant's operation of a turkey ranch. The general area involved is one of large ranches, in the foothills, devoted to the grazing of cattle and dry farming. In 1953, the defendant leased a portion of a 1300-acre ranch, constructed pens containing about an acre and a half each, and engaged in the business of raising turkeys for market. He operated this ranch during the seasons of 1953, 1954 and 1955, having about 34,000 turkeys each year. The turkey season ran from about July 1 to the middle of November of each year, when the turkeys were sold.

The plaintiffs Marshall lived about one-eighth of a mile southerly, and the plaintiffs Hurley about one-quarter of a mile southerly, from the defendant's turkey pens. The plaintiff Qualls occupied a store building and living quarters about three-quarters of a mile southerly from these pens. This action was brought in August, 1955, and was tried on November 3, 1955. The complaint alleged that each night and morning, at feeding time, these turkeys by scratching and flapping their wings would cause clouds of dust to rise, which dust was carried by the wind to plaintiffs' premises; that the defendant was negligent in failing to employ reasonable means of preventing this dust; and that this caused damage to the plaintiffs by depreciating the value of their properties and by interfering with their comfortable enjoyment of their dwellings. The court found that the defendant conducted this turkey raising operation for about four months out of each year, from July 1st to November 1st; that during said four months' period he conducted the operation in a negligent manner in that he failed to employ reasonable methods to prevent clouds of dust from rising and being carried to the plaintiffs' premises; and that it was not true that the value of the plaintiffs' properties had been decreased. It was further found that by such unlawful nuisance the plaintiff Qualls had been damaged in the sum of $250 because of interference with her enjoyment of her property; that the plaintiffs Hurley had been thus damaged in the sum of $250;

and that the plaintiffs Marshall had been likewise damaged in the sum of $500. A judgment was entered awarding the plaintiffs these amounts, respectively, and enjoining the defendant from so conducting his turkey raising operations as to cause offensive dust or odors to come upon the premises of the plaintiffs. It was further ordered that if the defendant should desire to experiment during the turkey raising season of 1956, with a view to so abating this nuisance as to give no further offense to the plaintiffs, the court would permit such operations but would retain jurisdiction to make further orders if such methods did not prove satisfactory.

The plaintiff Qualls alone has appealed from those portions of this judgment which awarded her $250 as damages, and which permitted the defendant to attempt to remedy the condition during the 1956 turkey raising season. It is argued that this permission to experiment during the 1956 season is inconsistent with the purpose of the restraining order; that this provision in effect deprives this appellant of the relief to which she was entitled under the facts found; and that under the law the court was not justified in doing this. It is further argued that the damages of $250 awarded her was clearly inadequate, since she "had endured the dust and stench for two and a quarter years before the trial," and that this court should modify the judgment by increasing the award. In an affidavit supporting a request for an early hearing she stated that the main basis of her appeal is that the court abused its discretion in permitting the respondent to continue his operations during the 1956 season. At the oral hearing of the cause it was stipulated that this point is now moot since the respondent ceased his operations in that area, and that the only remaining question is as to the inadequacy of the amount awarded this appellant for damages.

[1, 2] The appellant admits that "there was little evidence on the value of damages sustained," and the trial court stated at the conclusion of the case that "the proof respecting the damage phase of the matter is not very satisfactory." There was no satisfactory evidence of any property damage. Since the nuisance was temporary in nature, being for only a few months at a time, the measure of damage involved was the depreciation of the rental or use value of the property, and there was no evidence at all as to that element. As to the element of personal discomfort and annoyance, the evidence was not only unsatisfactory but was conflicting. While the record indicates that there was some discomfort and annoyance to the appellant at times, much of the evidence in her behalf appears so obviously exaggerated as to seriously affect its credibility. There is a marked difference between some of that evidence, as to unbearable conditions for several hours each morning and evening on practically every day during three seasons, and the testimony of the appellant's sister who lived with her most of the time in question. The sister testified that she lived there continuously from August 1, 1953 to August 1, 1955; that the man who had lived there and ran the store prior to August 1, 1953, had made no complaint to them about the dust; that around July, 1955, she noticed something "unusual" in that "there was turkey dust"; that she noticed this dust when she went outside at 6:30 in the mornings; that the dust was thick "lots of times"; that it would depend largely on the breeze; that the dust would be heavy three or four times a week; that it would last an hour or an hour and a half in the mornings; that she could see dust on things outside; that in the evenings she would not know the dust was rising "unless I was out"; that "if I was outside I could see the dust was rising and coming our way"; and that at times she could smell it inside the house. Several witnesses for the respondent testified that they were in or about the appellant's premises frequently, and that they saw no dust or that they saw a little dust around on a few occasions. There was also evidence that some of the dust around appellant's premises was caused by travel on the road, and that the amount of dust had decreased after the respondent began his sprinkling operations at the be-

ginning of the 1954 season. These properties were in an area in which the zone regulations permitted turkey raising, and the health authorities had investigated the complaints made and had found no necessity for action.

There was no evidence of a definite amount of damage suffered, and it was the province of the trial court to weigh the conflicting evidence. A reading of the record indicates that the judge evaluated the evidence remarkably well, and that the amount awarded this appellant is about as close to a proper amount as could be expected from any impartial trier of fact. Incidentally, the other plaintiffs were much nearer to the worst part of the dust than was the appellant and were more seriously damaged, and they have accepted the court's decision.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



148 Cal.App.2d 605

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Hershal LA VERNE, Defendant and Appellant.

Cr. 1120.

District Court of Appeal, Fourth District, California.

Feb. 20, 1957.

Rehearing Denied March 20, 1957.

Hearing Denied April 17, 1957.

Prosecution for manslaughter. The Superior Court, Orange County, John Shea, J., entered judgment of conviction and denied a motion for new trial and defendant appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that instruction on negligence, even if erroneous as not properly distinguishing between ordinary negligence and criminal negligence, was not sufficiently prejudicial to require a reversal in view of fact undisputed evidence showed an intentional assault, rather than a mere lack of due care, and was sufficient to show defendant's guilt of either voluntary or involuntary manslaughter and not merely involuntary manslaughter.

Judgment and order denying new trial affirmed.

1. Criminal Law ⇐1186(4)

The question as to whether an error in a criminal proceeding was sufficiently prejudicial to require reversal must be determined from the circumstances of the particular case. West's Ann.Const. art. 6, § 4½.

2. Homicide ⇐340(1)

In prosecution for manslaughter, instruction on negligence, even if erroneous as not properly distinguishing between ordinary negligence and criminal negligence, was not sufficiently prejudicial to require a reversal in view of fact undisputed evidence showed an intentional assault, rather than a mere lack of due care, and was sufficient to show defendant's guilt of either voluntary or involuntary manslaughter and not merely involuntary manslaughter. West's Ann.Pen.Code, § 192, subds. 1, 2.

3. Homicide ⇐340(1)

In prosecution for manslaughter, instructions pointing out that manslaughter is distinguishable from murder and that heat of passion was one of elements involved in charge of manslaughter were not prejudicial, in view of evidence as to defendant's beating of decedent after he had caught up to him after chasing him for several blocks. West's Ann.Pen.Code, § 192, subds. 1, 2.

4. Homicide ⇐300(3), 340(1)

In prosecution for manslaughter, instructions on self-defense were proper, but even if erroneous, were not prejudicial, in view of evidence that the deceased was the aggressor in that he attempted to strike

defendant when defendant caught up with him at a street intersection. West's Ann. Pen.Code, § 192, subds. 1, 2.

5. Criminal Law ⇐810

In prosecution for manslaughter, trial court did not err in giving instructions requested by prosecution, and by defendant with respect to whether slaying is justified in order to compel submission to an arrest, in view of fact such instructions were not conflicting, and in view of evidence as to defendant's possible intention to attempt to arrest decedent. West's Ann.Pen.Code, § 192, subds. 1, 2.

6. Criminal Law ⇐781(2)

In prosecution for manslaughter, trial court did not err in instructing jury that it should view with caution any evidence which purported to relate to oral admissions of defendant, or to oral confessions by him, in view of testimony as to statements made to witnesses by defendant, and in view of testimony as to statements made by defendant to police officers. West's Ann.Pen.Code, § 192, subds. 1, 2.

7. Criminal Law ⇐730(5)

In prosecution for manslaughter, trial court did not err in overruling an objection to argument of district attorney dealing with law of involuntary manslaughter in view of fact court instructed jury on the law and instructed jury to not apply any law given by counsel in his argument. West's Ann.Pen.Code, § 192, subds. 1, 2.

8. Criminal Law ⇐438

In prosecution for manslaughter, trial court did not err in admitting into evidence two colored slides which were pictures of the brain of the deceased and of a cross-section thereof, on any theory they served no purpose except to inflame minds of jury, in view of fact the slides were used in connection with testimony of doctors and served to prove excessive force had been used by defendant. West's Ann.Pen.Code, § 192, subds. 1, 2.

Cantillon & Cantillon, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Robert P. Kneeland, Dist. Atty., of Orange County, Stanley C. Gould, Deputy Dist. Atty., Santa Ana, for the People.

BARNARD, Presiding Justice.

The defendant was charged with manslaughter in violation of Section 192 of the Penal Code in that on July 23, 1955, he unlawfully, etc., and without malice killed Irving Richard Perrett. A jury found him guilty and his motion for a new trial was denied. He has appealed from the judgment (ordering him to be punished by imprisonment in the county jail for one year) and from an order denying a new trial.

The deceased was a college student. On the evening of July 22, 1955, he and his father went to Newport Beach to visit family friends for the weekend. He received the injuries here in question shortly after midnight, and died later that day. The defendant had rented an apartment near the beach for the use of his family, including a baby sitter, on a two-week vacation. About 1:30 or 2:00 in the morning the defendant, the baby sitter, and a Mr. Smith who occupied an adjoining apartment, were returning to the apartment after a swim. The baby sitter, who was in the lead, noticed a man standing in the walkway looking in the kitchen window of the defendant's apartment. She went back and told the other two what she had seen. They approached the man and the defendant asked him what he was doing there. The man turned toward the street, walked a short distance, and then broke into a run. The three pursued the man for several blocks, and during the pursuit became separated. When the others arrived at a certain intersection the defendant had in his hand a board about four feet long and four inches wide, and the evidence shows that he had been beating the man. During the pursuit shouts of "I will get that God-dam son-of-a-bitch

yet" were heard by occupants of other apartments, together with sounds of running. The baby sitter testified that when she arrived at the intersection she saw the defendant with a stick raised over his head, which he was holding with both hands; that the man was then facing the defendant with his hands moving up around his head; that she heard the man say in a loud voice that the defendant should not hit him in the face or head; that she saw Mr. Smith take a stick away from the defendant; and that when Mr. Smith took the stick the defendant was holding it at his side and the man was down. Mr. Smith testified that when he arrived at this intersection the defendant and the man were standing close to each other; that he took a stick away from the defendant and threw it over to the side of the street; that when he turned around he saw that the deceased was in a sitting position; that he assisted him to his feet; that he saw that the man had a cut on his chin and was bleeding from his nose; that the deceased started to walk away; and that he said to the defendant "I think he has had enough, come on and let us go home." The defendant testified that when he arrived at this intersection the deceased confronted him with raised fists; that the deceased then cut across the boulevard and was slowed down by some automobiles; that when the deceased got on the opposite side of the street he stopped, appeared very large and struck out at the defendant; that the defendant had a stick in his hand and struck back, and for a few seconds a sort of free-for-all took place; that after he had knocked the deceased down he heard Smith holler from across the street; that when he turned to look at Smith the deceased started to pull him down; that he swung his stick once or twice at the deceased's hands; that when Smith arrived he told Smith he was going to get the police; that he went out and tried to stop some automobiles; that while he was doing this Smith told him the man was all right and was walking away, and he thought the man had had enough; that the last time he saw the deceased he was sitting on the curbing; that on the way back to the apartment he argued with Smith about notifying the police but Smith talked him out of it; and that he did not recall how many times he hit the deceased.

A number of witnesses who lived in nearby houses or apartments testified, some of whom were awakened by the disturbance. Several witnesses had heard the deceased moaning and groaning "Don't hit me". The sound of a board hitting the deceased was heard by others at least half a dozen times. There was evidence that while the deceased was lying on the street bleeding the defendant, who was standing over him, swung the board at him several times and then kicked him; that Smith yelled at the defendant "Don't hit him any more. He has enough"; and that the defendant did not stop but Smith went over and took the board from him. There was evidence that the deceased had no weapon in his hands, and several witnesses heard the deceased beg the defendant not to hit him. As Smith and the defendant walked away from the scene a resident of the area hollered "Why don't you take care of that boy?" They replied "Just leave him lay there." One witness testified that he saw two men pick up a body from the street and dump it near a house. The ambulance driver testified that when he arrived the man was lying on the sidewalk. He was bleeding from his ears, nose and mouth, and there was blood on the sidewalk and on the street. The evidence shows that the deceased had been badly beaten about the head and shoulders, and his right hand was injured. There were three distinct fractures of the skull and severe and extensive brain injury. Shortly after they returned home the defendant and Mr. Smith went fishing, and did not return until 5:00 P.M. of that day. During this trip they discussed the attack on Perrett.

The appellant does not, for obvious reasons, question the sufficiency of the evidence to sustain the verdict, and no ques-

tion is raised with respect to the punishment imposed by the judgment. It is argued, however, that the court erred in giving certain instructions, in overruling an objection to one argument of the prosecution, and in admitting two exhibits into evidence.

It is first contended that the court erred in instructing the jury as follows:

> "Due caution and circumspection, as those words are used, mean such caution and circumspection as are reasonably appropriate to avoid injury to one's self and others, under the conditions at hand as they would be viewed by an ordinarily reasonable person in the same situation as the person whose conduct is in question. To exercise due care and circumspection is to take those proper precautions which a person of ordinary prudence would use in the same circumstances."

It is argued that while this instruction is accurate insofar as it defines the civil standard of negligence it is inaccurate in the definition of criminal negligence, and that under the decision in People v. Penny, 44 Cal.2d 861, 285 P.2d 926, the giving of this instruction was reversible error. In the Penny case, the defendant was charged with a violation of subdivision 2 of section 192 of the Penal Code and the sole matter there involved was a homicide resulting from negligence. The court there held that in a prosecution for negligent homicide a greater degree or form of negligence is required than that required in civil cases; and that in such a case the jury should be instructed as to what constitutes criminal negligence. In the present case the charge included both subdivisions 1 and 2 of section 192, and the evidence showed something quite different from the negligence involved in the Penny case. No close question of mere negligence of any sort was here involved and the evidence conclusively disclosed a brutal and intentional attack which was beyond any reasonable necessity or justification. The court here gave the definition of manslaughter in the language of the statute, omitting subdivision 3 thereof, and in explaining the meaning of a number of matters in the statute used the language here criticised. In that connection, and immediately before the criticised instruction, the court further told the jury:

> "When there is a question whether or not a defendant conducted himself without due caution and circumspection, the jury must answer the question in the light of all the surrounding circumstances, for the term 'due caution and circumspection' is a relative term, and the amount of caution required under it will vary in accordance with the nature of acts being done, the type of any instrumentality being handled or used, the surrounding circumstances, and the danger that reasonably should be apprehended."

The portion just quoted pointed out that due caution and circumspection was to be considered in view of the nature of the act being done, the type of the instrumentality used, the surrounding circumstances and the danger to be reasonably apprehended. The criticised instruction which followed would normally be understood in that connection, and as referring to what would be done by a reasonable person, under the circumstances, and through the use of the instrumentality, disclosed by the evidence, and having knowledge of the danger that was reasonably to be anticipated. In view of the additional matter contained in these instructions, and under the circumstances shown by the evidence, it appears very unlikely that the jury could have been misled as it might have been in the Penny case, or that the verdict was in any way affected by the criticised portion of the instruction.

[1, 2] Conceding that the criticised instruction was erroneous in that it did not properly distinguish between ordinary negligence and the criminal negligence involved in a prosecution for negligent homicide, it does not follow that this error re-

quires a reversal. Section 4½ of Article VI of the Constitution provides, among other things, that a judgment shall not be set aside on the ground of misdirection of the jury unless after an examination of the entire case the court is of the opinion that the error complained of has resulted in a miscarriage of justice. It is well settled that the question as to whether the error was sufficiently prejudicial to require a reversal must be determined from the circumstances of the particular case. In People v. Watson, 46 Cal.2d 818, 299 P.2d 243, it is stated that the test generally applicable in determining whether a reversal is required is whether or not it appears to the reviewing court that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. Under the evidence here it would be unreasonable to believe that this jury could have been misled by this instruction into deciding the case on the ground that the appellant was guilty of any form of negligence, or that the fact that there is a legal distinction between civil and criminal negligence would have made any difference to it. All of the evidence, including the testimony in behalf of the appellant, showed something more than negligence of any kind and disclosed, without conflict, an intentional assault rather than a mere lack of care. Further, the evidence was sufficient to show the appellant's guilt under either of the first two subdivisions of section 192. The appellant himself admitted that he repeatedly struck the deceased with this lethal weapon without regard as to where he hit the victim; that he struck the deceased even when that victim's back was turned; that he continued to hit the deceased after he had fallen to the ground and while the deceased was begging him not to strike him; and that he continued to strike the deceased until Mr. Smith took the stick from him. It is inconceivable that the jury based its verdict on any improper consideration of the question of due caution and circumspection. We are far from convinced that any miscarriage of justice has occurred, and the record does not indicate that this instruction was prejudicial. It does not appear to us as reasonably probable that a result more favorable to the appellant would have been reached in the absence of this error, and it would seem that the judgment rendered was unduly favorable to him.

[3] It is next contended that the court erred in giving portions of its instructions which in substance distinguish manslaughter from murder, define heat of passion, and distinguish between the heat of passion which would reduce homicide to manslaughter and that involved in the case of murder. It is argued that the giving of such instructions in a manslaughter case is error, citing People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469, and that instructions on such extraneous matters could only tend to confuse the jury. In the Hatchett case a reversal was based upon the cumulative effect of numerous errors in a case stated by the court to be one where the defendant's guilt was not firmly established. No prejudice appears here in pointing out to the jury that manslaughter is distinguishable from murder principally in that the malice which is required in a murder case is not required in a manslaughter case, and heat of passion was one of the elements involved in the charge of manslaughter here being tried. It would seem from the record that these instructions would clarify the matter for the jury rather than confuse it, and no prejudice appears.

[4] It is next contended that the court erred in instructing the jury with respect to the right of self-defense. These instructions in substance stated that the right of self-defense is not immediately available to a person who has sought or induced a quarrel, and that one who makes a felonious attack cannot thereafter avail himself of the right of self-defense until he has further declined combat. It is argued that these instructions had no application to the facts of the case. One of the questions presented to the

jury was whether or not the deceased had been committing a public offense in the appellant's presence. Another was whether or not the appellant had been attempting to arrest the deceased when this incident occurred. The appellant also attempted to show that the deceased was the aggressor in that he threatened the appellant with his fists and attempted to strike him when the appellant caught up with him at the intersection. In view of some of the evidence received these instructions were proper and, in any event, no prejudice appears.

[5] It is next contended that error appears in that an instruction given at the request of the prosecution and one given at the request of the appellant, with respect to whether a slaying is justified in order to compel submission to an arrest, are conflicting. The complaint made is of portions of two longer instructions, and when read in their entirety no conflict appears. We see neither error nor prejudice in this connection.

[6] It is next contended that the court erred in instructing the jury that it should view with caution any evidence which purports to relate to an oral admission of the defendant or an oral confession by him, and stating the usual rules in that connection. It is argued that these instructions had the effect of implying to the jury that the defendant had made a confession when there was no evidence of that fact, and that even though the instructions correctly stated abstract propositions of law there was no basis in the evidence for giving them. Several witnesses testified as to statements made to them by the appellant and there was considerable evidence as to statements he made to the officers. The evidence justified these instructions and they were more favorable to the appellant than otherwise. No prejudice appears. People v. Todd, 91 Cal.App.2d 669, 205 P.2d 453.

[7] It is next contended that the court committed error in overruling an objection to an argument made by the district attorney. In his argument the district attorney stated that it is not an element of involuntary manslaughter that the person charged with the offense shall have actually intended to take the life of the deceased. He then stated that involuntary manslaughter might be committed by a person who negligently drove an automobile through a red light and collided with another automobile in which someone was killed. The appellant objected on the ground that the statement of law was not correct in this case and asked the court to instruct the jury to disregard that statement. The court overruled the objection but admonished the jury the court would instruct it as to the law and that it should not apply any law given by counsel in his argument. Subsequently, the jury was instructed to be governed solely by the evidence introduced in the trial and the law as stated by the court. No reversible error appears in this connection.

[8] Finally, it is contended that the court erred in admitting into evidence two colored slides which are pictures of the brain of the deceased and of a cross-section thereof. It is argued that there had previously been extensive testimony as to the cause of death and the nature of the blows received by the deceased, that the appellant had stipulated that he struck the deceased and that as results thereof the deceased suffered multiple fractures and brain hemorrhage which caused his death, and that this evidence served no purpose except to inflame the minds of the jury. These slides were used in connection with the testimony of the doctors and served to prove that excessive force had been used by the appellant. They are small pictures and are much less gruesome than the usual pictures introduced in the ordinary case, and we are unable to see either error or prejudice in this connection. People v. Burwell, 44 Cal.2d 16, 279 P.2d 744; People v. Cavanaugh, 44 Cal.2d 252, 282 P.2d 53.

This was not a close case and the evidence, including the appellant's own testimony, discloses a brutal and unnecessary

beating of the victim which could not have been justified even under the testimony of the appellant and his own witnesses. It neither appears that there has been any miscarriage of justice nor that a different result could reasonably be expected from a retrial of the action.

The judgment and order denying a new trial are affirmed.

GRIFFIN and MUSSELL, JJ., concur.



148 Cal.App.2d 433

Francis L. WILSON, Marie Wilson, Robert Busby and C. Marie Busby, Petitioners,

v.

The SUPERIOR COURT OF the State of CALIFORNIA IN AND FOR the COUNTY OF CONTRA COSTA, Respondents.

No. 17586.

District Court of Appeal, First District, Division 1, California.

Feb. 11, 1957.

Mandamus proceeding to require Superior Court, Contra Costa County, Wakefield Taylor, J., before which were pending actions against school district and supervisors of excavation on district's land for damages to plaintiffs' adjoining land from removal of lateral support, to order one supervisor to answer questions which were put to such supervisor while his deposition as adverse party was being taken. The District Court of Appeal, Fred B. Wood, J., held that, where one supervisor was a "principal" as well as district's "agent" allegedly employed by district's counsel to provide counsel with confidential information respecting defense of the actions, such supervisor would be required to reveal all knowledge, legal and pertinent to the matter in issue between supervisor and his adverse parties but would not be required to reveal, without district's consent, contents of any communications between him and district or its counsel or contents of any advice given by such counsel in course of professional employment by district.

Writ of mandate issued.

1. Mandamus ⇐140

Mandamus is an appropriate remedy where party, whose deposition is being taken as an adverse party, refuses to answer questions which are legal and pertinent and not privileged. West's Ann.Code Civ.Proc., §§ 2021, 2055.

2. Discovery ⇐65
Stipulations ⇐14(7)

In matter of taking deposition of a party as an adverse party, the court will determine whether each question asked is "legal" and "pertinent" even if such party interposes no objection of such nature and though parties stipulate that all objections propounded to the witness shall be reserved by each of the parties, except objections as to form of questions propounded. West's Ann.Code Civ.Proc., §§ 2021, 2055.

3. Discovery ⇐41

In actions against school district and supervisors of excavation on district's land for damages to plaintiffs' adjoining land from removal of lateral support, one supervisor was properly asked, in taking his deposition as an adverse party, what was said in conversation with one plaintiff while examining the landslide, how such supervisor determined sequence of events, and whether engineer retained by supervisor discussed matter with supervisor after slide occurred, in view of other testimony given by supervisor. West's Ann.Code Civ.Proc., §§ 2021, 2055.

4. Discovery ⇐39

In actions against school district and supervisors of excavation on district's land for damages to plaintiffs' adjoining land from removal of lateral support, one supervisor was properly asked, in taking his deposition as an adverse party, how steep a cut slope he would have recommended in area of slide and whether such part did

slide. West's Ann.Code Civ.Proc. §§ 2021, 2055.

5. Discovery ⇐41

In actions against school district and supervisors of excavation on district's land for damages to plaintiffs' adjoining land from removal of lateral support, asking one supervisor, in taking his deposition as an adverse party, whether he contended that any part of the damage was fault of plaintiffs or their builder was improper because supervisor's contention had no evidentiary value. West's Ann.Code Civ.Proc., §§ 2021, 2055.

6. Discovery ⇐41

In action against school district and supervisors of excavation on district's land for damages to plaintiffs' adjoining land from removal of lateral support, question, asked one supervisor in his deposition as adverse party, whether he was aware of anything that made plaintiffs' houses unsafe was proper in view of other testimony given by him. West's Ann.Code Civ.Proc., §§ 2021, 2055.

7. Discovery ⇐42

In actions against school district and supervisors of excavation on district's land for damages to plaintiffs' adjoining land from removal of lateral support, question, asked one supervisor in taking his deposition as an adverse party, whether, had excavation not been made, plaintiffs' houses and utility district pump house would still be "sitting there" was proper unless privileged under asserted attorney-client relationship. West's Ann.Code Civ.Proc., §§ 1881, subd. 2, 2021, subd. 1, 2055, 2064, 2065.

8. Discovery ⇐41

In actions against school district and supervisors of excavation on district's land for damages to plaintiffs' adjoining land from removal of lateral support, question, asked one supervisor in his deposition as an adverse party, whether, when he first looked at landslide, he was alarmed that responsibility for it might be attached to his organization was improper, since his state of mind then was not relevant. West's Ann. Code Civ.Proc., §§ 2021, 2055.

9. Discovery ⇐63

Where party whose deposition as adverse party was being taken was an expert witness, questions which were within area of his competency, which pertained to physical conditions and elements of cause and effect which were not within common knowledge of men in regard to damages complained of and which, when properly interpreted, did not call for legal conclusions of such party, were proper even though calling for such party's opinion. West's Ann.Code Civ.Proc., §§ 2021, 2055.

10. Witnesses ⇐219(3)

Policy of nondisclosure yields to policy of full disclosure where the attorney-client relationship has been abused. West's Ann.Code Civ.Proc., § 1881, subd. 2.

11. Witnesses ⇐206

Defendant may employ codefendant to aid in communicating with defendant's attorney, but, if defendant chooses to employ such an agent, defendant, should take codefendant as defendant finds him, that is, burdened with duty of full disclosure, and should not be permitted to withhold any of codefendant's pertinent information whether acquired by codefendant before, during, or after the employment. West's Ann.Code Civ.Proc., § 1881, subd. 2.

12. Discovery ⇐42

Where supervisor of excavations on school district's land was allegedly employed by district's counsel as district's agent to provide counsel with confidential information respecting defense of the actions later brought against district, supervisor, and others, such supervisor, in his deposition as an adverse party, would be required to reveal to plaintiffs in such actions and the court all knowledge, legal and pertinent to the matter in issue between supervisor and his adverse parties but would not be required to reveal, without district's consent, contents of any communications between him and district or its counsel or contents of any advice given by such counsel in course of professional employment by district. West's Ann.Code Civ.

Proc., §§ 1881, subd. 2, 2021, subd. 1, 2055, 2064, 2065.

Tinning & DeLap, Robert T. Eshleman, James E. Cox, Martinez, for petitioner.

Francis Collins, Dist. Atty., John B. Clausen, Deputy Dist. Atty., Martinez, for respondents.

Wallace, Garrison, Norton & Ray, San Francisco, for real party in interest, Woodward, Clyde & Associates, and others.

Barfield & Barfield, San Francisco, for real party in interest East Bay Municipal Utility Dist.

FRED B. WOOD, Justice.

The petitioners are plaintiffs in two actions pending in the superior court against a school district, Richard J. Woodward and others, claiming damages to their property allegedly caused by removal of lateral support when certain excavations were made upon the adjoining property of the school district.

Woodward and his associates were engaged by the district to plan and supervise the work which allegedly caused the injuries to plaintiffs' property, plaintiffs' theory being that Woodward and the district were negligent in the planning and the prosecution of the work.[1]

Plaintiffs took Woodward's deposition as an adverse party under authority of sections 2021 and 2055 of the Code of Civil Procedure.

[1] He refused to answer certain questions, 18 of which are set forth in the petition. Plaintiffs requested the superior court to require him to answer these questions but the court refused to do so. We are asked to direct the superior court to require the witness to answer.[2]

With respect to each question we must determine (1) whether it is "legal" and "pertinent", Code Civ.Proc. §§ 2064, 2065, and proper when asked of a party by an adverse party "under cross-examination", § 2055, upon deposition, § 2021, subd. 1, and (2) whether it can be answered by this witness without violating the attorney-client privilege, § 1881, subd. 2.

(1) *We will first consider the propriety of the questions without regard to the defendant district's claim of the attorney-client privilege.*

[2] We will do so in the light of the issues framed by the complaint,[3] bearing in mind that he is an expert as well as a defendant and, therefore, may be asked for his opinions within the area of his competency. See Lawless v. Calaway, 24 Cal.2d 81, 89–91, 147 P.2d 604. In each instance we will undertake to determine whether the question is "legal" and "pertinent" even if the defendants interposed no objection of that nature at the time, the parties having stipulated that "all objections propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded."[4]

The plaintiffs allege and the defendants admit that the following are among the issues raised by the pleadings: (1) Was the excavation made by defendants care-

1. Defendants in these actions say that plaintiffs have the additional theory that the district, regardless of negligence, would be liable upon the theory of taking private property for public use. That concept, however, does not bear upon our problem and may be ignored.

2. Mandamus is an appropriate remedy as to questions that are legal and pertinent and not privileged. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 392–396, 159 P.2d 944; I. E. S. Corporation v. Superior Court, 44 Cal.2d 559, 564, 283 P.2d 700.

3. It would appear that the rules of relevancy and materiality are somewhat more liberally applied upon the taking of such a deposition than upon the trial of a case. McClatchy Newspapers v. Superior Court, supra, 26 Cal.2d 386, 394–396, 159 P.2d 944.

4. The return and answer to the petition herein interposes the objections that the questions, assertedly, call for the legal conclusions of the witness and for his opinions on ultimate facts in issue.

lessly designed, supervised and executed? (2) Was the earth slide caused by the defendants' acts in excavating the school district's property, or by the independent negligence of a certain utility district and parties unknown in failing to protect and properly maintain certain high pressure water mains? (3) Are the plaintiffs guilty of contributory negligence?

The witness testified that after the slide occurred he investigated the situation; that looking at the situation and watching the sequence of events "convinced me that we were not at fault"; he did not make up his mind on the spur of the moment, he studied the situation for a while before reaching a decision; he had to talk to different people and find out what had happened first, about "the sequence of events" leading up to this; he had to study the ground to see for himself what was occurring; he started considering causes right after he got to the site and started looking around; he started considering causes right away; he could not say just when he started thinking of responsibility of the thing but he started to study it, looked for causes, talked to people there who told him what the sequence of events was and "gradually I started forming my opinion then as to the cause and responsibility of the thing"; he needed to know the sequence of events to determine the causes of the slide; he talked with plaintiff Francis Wilson; and that during the period of planning and supervising the work he had retained engineering expert Harry Seed and discussed with him the question of stability, cuts and fills.

[3] In the light of this testimony it was obviously proper to ask him "what was said" in the conversation with Wilson (1),[5] "who told you what the sequence of events was in the case" (2), "how did you determine the sequence of events in this case" (3), and has engineer Seed "discussed this matter with you since this slide occurred?" (10).

The witness also testified that he was satisfied with the provisions he made for the problems involved in the excavation; if he had the job to do again he would not do anything materially different than he had done; the area involved in the excavation being a hill area and containing ground water was, before the excavation, an area susceptible to slides; he would not have recommended a steeper cut slope than 2½ to 1, would have wanted 3 to 1 along the Wilson property unless the cut bank were not so high.

[4] It was proper to ask how steep a cut slope he would have recommended in "the area of the higher part of the cut—that part that did slide, didn't it?" (12), a compound question, perhaps, but not objected to on that ground.

He testified that the danger of instability of a cut slope is increased from ground water if it is allowed to flow near the surface of the cut slope; he would expect the ground water flow from the Wilson property toward the school property to be rather deep, opposite a certain knoll it would probably be 10 to 15 feet. It was proper to ask him how deep he would expect the ground water to be "at the place of origin of the slide along that cut" (13); also, whether the slide that actually occurred began somewhere close to the corner of the two cuts along the Wilson cut (14); and "didn't this slide follow the exact outline of your cut on the school ground?" (15).

The witness testified, as to the basis of his opinion that he was not responsible for the damage caused the plaintiffs, that he followed conservative practice, the slopes were stable and he didn't think the failure of the slope caused the damage to the property. It was proper to ask, "well, the slope did fail, didn't it, and slide and damage the property * * * that is a fact, isn't it?" (4); "* * * is any part of the reason why the Wilson slope slid and the Arlington slope didn't due to the fact that the Arlington slope had three drains and

5. Each of these and similar symbols identifies the question by the number given it in the petition herein.

the Wilson slope had one drain?" (5);[6] "could this slide have been prevented?" (16); "what caused the water main to break * * *?" (18); and "* * * is that your opinion * * * that * * * the Utility District and these unknown parties that piled rocks around the area of the pipeline caused the destruction of these homes?" (17).

[5] The witness testified that the Wilson house was on a location that could have stability problems if proper precautions were not taken. He was then asked, "do you contend that any part of the damage to or on the Wilson house is my clients' fault or any builder's fault?" (6). This is not a proper question. The word "fault" does not necessarily call for a legal conclusion. In an appropriate context it well might denote a purely factual relationship of cause and effect. But "contend" is not a word to put in the mouth of a witness. What the witness might contend or claim or urge has no evidentiary value in this setting. This witness' "contention" as a party is declared in his answer, denying liability on his part and alleging that plaintiffs negligently caused or contributed to the injuries.

[6] Asked if the plaintiffs had safe, stable dwellings before this work began, Woodward said he did not investigate the plaintiffs' homes as such; he investigated the school property; he thought there could have been things about their property that he was unaware of that might have made them unsafe. It was proper then to ask him, "are you aware of anything now that made their houses unsafe * * *?" (7).

[7] He was then asked: if the excavation had not been made next door to the plaintiffs' houses and the utility district pump house "these three structures * * * would still be sitting there * * *?" The cross-examiner indicated he was asking the opinion based on any information necessary for the witness to answer, whether received by him before or after the occurrence of the slide (8). The question was proper unless privileged under the asserted attorney-client relationship.

The next question was substantially the same as the last, modified to eliminate from the witness' mind any knowledge acquired by him after his employment by the district to assist it in the defense of the case. The witness replied, it would be impossible for him to eliminate knowledge acquired after that date and answer the question. He also refused to answer the question, "* * * Isn't it true, that the excavation as undertaken here was a substantial factor in causing the damage to these three structures"; and the question, if a hole had not been "dug next to these three structures they wouldn't have been able to slide into it * * *" (9). The witness explained that he could not answer such questions fairly without applying knowledge that he gained after the slide occurred.

[8] The question, "* * * when you first went out there to look over this slide * * * you were very alarmed and concerned that responsibility for it might be attached to your organization" was improper and need not be answered (11). His state

6. With respect to the two cuts made in the course of the excavation, one called the "Arlington" cut owing to its proximity to Arlington Avenue, and the other called the "Wilson" cut, owing to its proximity to the property of petitioners, the witness testified that the Arlington cut (which did not slide) was less stable than the Wilson cut (which did slide), that the danger of instability of a cut slope is increased from ground water allowed to flow on the surface of the cut slope, that the height of the two cuts was the same, that the original plan prepared by the witness called for a drain along the top of both cuts, but that the drain on the top of the Wilson cut was omitted from the actual work done, and that the purpose of these drains was to dry up the slopes and avoid the danger of ground water.

of mind on that occasion is not relevant to any issue in the case.

[9] A good many of these questions call for the opinion of the witness but we do not deem them improper, for this is an expert witness, the questions are within the area of his competency, they pertain to physical conditions and elements of cause and effect that are not within the common knowledge of men, and properly interpreted do not (with the exception of question No. 6) call for legal conclusions of the witness. Such questions are within the sanction of the principles enunciated in such cases as Dyas v. Southern Pacific Co., 140 Cal. 296, 73 P. 972, Fonts v. Southern Pacific Co., 30 Cal.App. 633, 159 P. 215, Manney v. Housing Authority, 79 Cal.App.2d 453, 180 P.2d 69, and authorities cited in each.

Also, a number of the questions might be vulnerable if this were direct examination. We do not deem them violative of the rules applicable when a witness such as this is under cross-examination.

Our conclusion is that unless the attorney-client privilege obtains, all of the 18 questions except Nos. (6) and (11) are proper when asked of the witness Woodward upon deposition in this case.

(2) *Which if any of the remaining 16 questions is the witness precluded from answering without the consent of the defendant school district, which asserts the attorney-client privilege?*

As to each of the unanswered questions the school district's counsel objected and instructed the witness not to answer, upon the ground that it would violate the confidential attorney-client relationship. Woodward's own counsel frequently joined in the objection and instruction.

The verified answer filed herein by Woodward and the district states that on the day after the occurrence of the slide the district employed Woodward to investigate the cause of the slide and report to it the results of the investigation; that he did so investigate and report; that such hiring was at the express request of the district's counsel to provide counsel with confidential information respecting the defense of a potential lawsuit against the district; that the investigation and reports and "all information gained by * * * Woodward" in the investigation is "confidential information" and "information which is privileged" as between the district, its counsel and Woodward; and that at the taking of the deposition counsel for Woodward and counsel for the district objected to questions "which sought to discover these matters of privileged information."

We are concerned solely with the question whether information obtained by *this* witness during *this* employment (subsequent to the slide), or any *opinion of his based* in whole or in part *upon such information,* can be elicited without the district's consent.

One might be inclined to the view that *knowledge* acquired (as distinguished from reports made) by a person engaged by a litigant to assist the latter's counsel in preparing the litigant's case would not be within the scope of the privilege which the law accords the attorney-client relationship.

The statute in terms protects any "communication" made by a client to his attorney or the attorney's "advice given thereon." Code Civ.Proc. § 1881, subd. 2. If in our case the district were an individual and he did his own investigating, it would not seem permissible for him to withhold any of the knowledge thus acquired (personal knowledge, within his competency as a witness to attest, and material to the issues) when being interrogated as an adverse party under sections 2021 and 2055. We do not think he could seal his own lips by "communicating" that knowledge to his attorney, even though the communications themselves would be privileged. If so, why should the knowledge similarly acquired by the client's agent (in this case, Woodward), as distinguished from the communications (reports, photographs, diagrams,

etc.) made by the agent to the attorney, be privileged?

The answer is furnished by City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26, 25 A.L.R.2d 1418. It holds that neither the information so acquired by the agent nor opinions of his based thereon can be divulged by him without consent of the client who employed him. The agent was a physician who had been engaged to examine the client and report his observations and opinions to the attorney. That seems quite analogous to our case, the only difference being that here the agent is an engineering expert who was employed to observe the client's property, ascertain and correlate the significant facts and formulate an opinion as to physical causes and effects, all for the purpose of "communication" to the attorney. In the physician-agent-investigator case it was held that "the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed." At page 237 of 37 Cal.2d at page 31 of 231 P.2d. With equal propriety, we think, it may be said that "the client may submit his property to an examination by the engineering expert without fear that the latter will be compelled to reveal the information disclosed."

Yet there is a possible significant difference between the situation which obtained in City & County of San Francisco v. Superior Court, supra, and that which obtains in our case. Here, the agent whom the client selected to investigate and report to its attorney was himself a potential defendant in the litigation which was imminent, the very person upon whose negligence or nonnegligence the imputed negligence or nonnegligence of the district would seem largely, if not wholly, to depend. This person was already potentially subject to the duty of making full disclosure to the plaintiffs in the impending litigation. He was under a potential duty to "be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses," Code Civ.Proc. § 2055, and to be so examined upon deposition, § 2021, subd. 1. When so called as a witness he "must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself." § 2065.

Thus, the state has manifested and declared the policy of requiring full disclosure in the situation described. To what extent, if at all, is this policy modified by "the policy of the law to encourage confidence and to preserve * * * inviolate" the relation of attorney and client (declared in section 1881 of the code), bearing in mind that we are presently concerned only with the knowledge acquired by the agent, not with the content of any communication he may have made as agent?

Clearly, we have two policies to reconcile. Of suggestive value is the statement in Paley v. Superior Court, 137 Cal.App.2d 450, 462, 290 P.2d 617, 624: "The policy of this state is one of liberality in the matter of discovery, Union Trust Co. of San Diego v. Superior Court, 11 Cal.2d 449, 459–460, 81 P.2d 150, 118 A.L.R. 259, a policy which has been implemented by the deposition statutes which in turn are to be liberally construed. Ahern v. Superior Court, 112 Cal.App.2d 27, 30, 245 P.2d 568. Since the attorney-client privilege is grounded on public policy, it 'is strictly construed, since it suppresses relevant facts that may be necessary for a just decision.' City & County of San Francisco v. Superior Court, supra, 37 Cal.2d 227, 234, 231 P.2d 26."

Does the latter policy yield to the former to the extent of not authorizing the district to seal Woodward's lips and of not permitting Woodward to seal his own lips concerning information acquired by him subsequent to the slide, and opinions of his based in whole or in part upon such information? Counsel have brought to our attention no case law that we deem precisely in point, nor have we discovered any. However, we are not entirely without

precedent. There are situations in which it has been found that the attorney-client privilege does not obtain.

[10] Perhaps the clearest type of case in which the policy of nondisclosure yields to the policy of full disclosure is that in which the attorney-client relationship is abused. "The continuous and unbroken stream of judicial reasoning and decision is to the effect that communications between attorney and client having to do with the client's contemplated criminal acts, or in aid or furtherance thereof, are not covered by the cloak of this privilege. [Citations.]" Abbott v. Superior Court, 78 Cal.App.2d 19, 21, 177 P.2d 317, 318. Similarly, when the client seeks advice that will serve him in the contemplated perpetration of a fraud there is no privilege. See cases collected in 125 A.L.R. 508, 512.

While there has been and is no suggestion that the use which the district seeks to make of its co-defendant in the instant case is an abuse of the attorney-client relationship in the sense of involving a venal, corrupt or illegal scheme or purpose (if the privilege does apply, the district has the unquestionable right to invoke it), there may be factors potentially inherent in such a situation that make it impolitic for the law to recognize a privilege.

One such potentiality is suggested by the very fact that the witness Woodward has declared it impossible (in respect to certain questions) to segregate in his own mind the information gained by him before and that obtained after the slide occurred. Here is an indirect but effective impediment upon the witness' use and disclosure of the information he acquired before the district sought him out and made him its agent in preparing its defense.

Another potentiality is the inducement, to a defendant who may acquire significant information, to seal his own lips by accepting, perhaps actively seeking, employment as the agent of a codefendant, if the revealing of such knowledge can be controlled by a cooperative principal.

It happens that there are seven individual defendants, in addition to Woodward, whom the school district might similarly employ and similarly seal their lips. We refer to four members of Woodward's firm, associated with him in planning and supervising the excavation work, and three persons who are members of the firm that performed the work of excavation under the supervision of Woodward and his associates. If the district can employ one codefendant and seal his lips it can employ each of the eight and seal the lips of all.

How far can this go? Can each of these eight employ each of the others as his agent to aid his attorney in preparing and conducting his defense and thus increase from one to nine the number of client-principals whose consents must be obtained for the release of the knowledge acquired by any of the eight as agents?

If the defendants can employ one another as agents to assist in their respective defenses it should be permissible for the plaintiffs to do likewise, with similar concealment of information acquired by each plaintiff as agent of a coplaintiff.

[11] Such a frustration of the policy of requiring full disclosure by a party litigant to an adverse party and the court, seems out of all proportion to the benefit to society of permitting cloture under the aegis of encouraging full and free communication between client and attorney. We see no compelling need for the law to suffer such a situation to obtain. In the instant case, for example, there is no apparent dearth of competent, expert engineering talent (unconnected with the transaction out of which this litigation grew) available to the district to do its investigating and thus avoid the immunization of a codefendant witness. Of course, there is no legal inhibition against a defendant employing a codefendant to aid in communicating with the attorney of the former, but if he chooses to employ such an agent he should take him as he finds him (burdened with the duty of full disclosure) and not be permitted to withhold any of the witness' pertinent information whether acquired by

the codefendant witness before, during or after the employment. A person so employing a coparty who is thus charged with the duty of disclosure is in a situation somewhat similar to a person who communicates with his attorney in the presence of a stranger. In the latter case the communication is deemed not made in confidence. Gallagher v. Williamson, 23 Cal. 331. See also 27 Cal.Jur. 52–53, Witnesses, § 38. In the former case, we might say it is made in confidence subject to the agent's duty to disclose his *knowledge,* preserving the privilege in respect to the agent's "communications."

[12] How, then, are we to reconcile these two policies, measurably effectuating and implementing each without unreasonably curtailing the other? A solution is to be found, we think in the dual capacity of the agent-witness,—Woodward in this case. He is a "principal" in his own right as well as an "agent" of his codefendant. Let him reveal to his adverse parties and the court all of his "knowledge," however acquired, that is "legal and pertinent to the matter in issue", § 2065, between him and his adverse parties, but let him not reveal without the school district's consent the contents of any "communications" between him and the district or its counsel or the contents of any advice given by such counsel in the course of the latter's professional employment by the district. In other words, draw the line between his "knowledge" as an adverse party witness and the "communications" in which he participated and the "advice" which came to his notice, just as if he had been the client in making those communications and the district's counsel had been his counsel in giving that advice.[7]

In view of this conclusion it is unnecessary for us to consider which of the sixteen questions might not be subject to the attorney-client privilege if that privilege did apply to Woodward's after-acquired knowledge.[8]

For the same reason we need not consider whether the school district may have waived its asserted privilege, in whole or in part, by interposing no objection to Woodward's answering questions which involved the use of his after-acquired knowledge, as when he testified that after he had conducted his investigation he became convinced that "we were not at fault," that he was satisfied with the provisions he had made for the problems involved and that if he had the job to do over again he would not do anything materially different.[9]

Let the writ of mandate issue, directing respondent to set aside its order and to make the necessary orders to enable completion of the deposition in accord with the views expressed herein.

PETERS, P. J., and BRAY, J., concur.

7. Counsel for the school district suggest that any relaxing or cutting down of the full sweep of the attorney-client privilege in the situation here presented would be against sound public policy because of the encouragement it would give plaintiffs to join the opposite party's investigators, experts and other potential adverse witnesses as defendants.

Counsel does not suggest that any such situation is here presented. It is a situation to be met when it occurs. There are remedies for improper joinder of parties. Should those remedies prove inadequate we should assume they will be perfected by competent authority, judicial or legislative.

8. For example, what plaintiff Wilson said to Woodward (question (1), above) was not privileged. See Holm v. Superior Court, 42 Cal.2d 500, 507–509, 267 P.2d 1025, 268 P.2d 722, a plaintiff's statement to the defendant's claims adjuster.

9. We note that there are authorities which hold that permitting a witness to answer, by not objecting, is a waiver of the privileged subject matter involved. Faylor v. Faylor, 136 Cal. 92, 96, 68 P. 482; that a waiver once made persists throughout subsequent proceedings in a case, including those taken at a subsequent trial, Deacon v. Bryans, 212 Cal. 87, 91–93, 298 P. 30; that a waiver to be effective is not necessarily restricted to permissive disclosure in open court, Title Ins. & Trust Co. v. California Development Co., 171 Cal. 173, 220, 152 P. 542; and that in some situations waiver of a part may be a waiver of the whole, 8 Wigmore on Evidence (3rd ed.) § 2327, p. 633.

148 Cal.App.2d 540

MERCED COUNTY, a Political Subdivision of the State of California, Petitioner and Respondent,

v.

DEPARTMENT OF SOCIAL WELFARE of the State of California, George E. Wyman, Director of Social Welfare; Social Welfare Board of the State of California, Respondents and Appellants.

Civ. 9128.

District Court of Appeal, Third District, California.

Feb. 18, 1957.

Hearing Denied April 17, 1957.

Mandamus proceeding by county against State Department of Social Welfare, Director of Social Welfare, and State Social Welfare Board to require board to annul decision ordering department to withhold state and federal funds for assistance of administration of aid to needy children program of county for county's refusal to comply with department's rule that each needy ineligible child 16 to 21 years of age, who is not disqualified for other reasons and who is attending school regularly, is disabled, or is employed and contributing to the family, shall be included in family budget unit in determining needs of eligible children living in family groups. The Superior Court, Merced County, R. R. Sischo, J., entered judgment directing that a peremptory writ of mandate issue, and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that the rule is valid.

Judgment reversed.

1. Social Security and Public Welfare ⇐194

In providing aid to needy children, legislative object is to keep the children in their own homes wherever possible. West's Ann.Welfare & Inst.Code, § 1503.

2. Social Security and Public Welfare ⇐194

Rules and regulations of State Board of Social Welfare pertaining to proper maintenance and care of needy children and administration of aid to needy children are binding upon the counties. West's Ann.Welfare & Inst.Code, § 1560.

3. Social Security and Public Welfare ⇐194

No child over age of 18 can receive assistance under the welfare and institutions provision defining "needy child". West's Ann.Welfare & Inst.Code, § 1500.

4. Social Security and Public Welfare ⇐194

Legislation providing for aid to needy children is to be liberally construed. West's Ann.Welfare & Inst.Code, §§ 1500 et seq., 1507.

5. Social Security and Public Welfare ⇐194

Rule of State Department of Social Welfare that each needy ineligible child 16 to 21 years of age, who is not disqualified for other reasons and who is attending school regularly, is disabled, or is employed and contributing to the family, shall be included in the family budget unit in determining needs of children eligible for aid and living in family groups is valid, even though an ineligible child may indirectly benefit by its application. West's Ann.Welfare & Inst.Code, §§ 113, 114, 1500 et seq., 1503, 1507, 1522, 1560; Social Security Act, §§ 401, 402, 42 U.S.C.A. §§ 601, 602.

Edmund G. Brown, Atty. Gen., by Richard L. Mayers, Deputy Atty. Gen., for appellants.

Willard B. Treadwell, Merced County Counsel, Merced, for petitioner-respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment directing that a peremptory writ of mandate issue commanding the Social Welfare Board to annul its decision ordering the Department of Social Welfare to withhold state and federal funds for assistance and administration of the Aid to Needy Children Program of Merced County.

The State Department of Social Welfare is required to supervise the administration of state aid to all persons receiving or eligible to receive state aid, Welf. & Inst.Code, Sec. 113, and the department is required to

"Establish rules and regulations, not in conflict with law or the policies formulated by the board, defining and controlling the conditions under which State aid may be granted or refused" and "Terminate any grants in aid to any county if the laws providing such grants, *or the minimum standards prescribed by the board*, are not complied with by the county or its officers or employees." Welf. & Inst.Code, Sec. 114. (Emphasis added.)

[1, 2] It is the object and purpose of the legislature in providing aid to needy children to keep children in their own homes wherever possible. Welf. & Inst.Code, Sec. 1503. The state board is required to make rules and regulations for the proper maintenance and care of needy children and for the administration of aid to needy children. Such rules and regulations are binding upon the counties. Welf. & Inst.Code, Sec. 1560.

To aid each state in furnishing financial assistance to needy, dependent children the United States provides funds to each state. To receive these funds each state must submit, and have approved by the federal administrator, a state-wide plan for aid for needy children. 42 U.S.C.A. § 601. The state plan must provide that it shall be in effect in all political subdivisions of the state. 42 U.S.C.A. § 602. It must be applied uniformly throughout the state. Federal participation is available through assistance payments made on the basis of the need of the individual. This basis may include consideration of needy persons living in the same home with the recipient when such other persons are within the state's policy as essential to his well being. (Department of Health Education and Welfare, Handbook of Public Assistance Administration, Part IV, Sec. 3132.)

California has provided legislation coordinated with the federal program. Welf. & Inst.Code, Sec. 1500 et seq. As stated, the Department of Social Welfare has power to make rules and regulations for the proper maintenance and care of needy children. If a county refuses to comply with the rules, state aid may be cut off. Sec. 1560. By rule, the Department of Social Welfare has required that, in determining the needs of those children eligible for aid who are living in family groups, the family budget, which is the basis for determining the child's need, shall include the needs of certain ineligible children, 16 to 21 years of age. (Department of Social Welfare Manual, Aid to Needy Children, Rule C–503.) Specifically, the rule provides that each needy ineligible child 16 to 21 years of age who is not disqualified for other reasons, and who is attending school regularly, or is disabled, or is employed and contributing to the family, shall be included in the family budget unit. Merced County contended that the effect of this provision is to increase the amount of aid that might be given to a needy child, and refused to comply with the order in so far as it applied to persons over 18. An order withholding state and federal funds was issued to force the county to comply. The county sought and was granted a writ of mandate to prevent enforcement of this order.

[3, 4] The sole question presented is whether Rule C–503 is one within the power of the department to promulgate or whether the rule is in conflict with certain statutory provisions. In the trial court the county contended that the rule was in conflict with Section 1500 of the Welfare and Institutions Code, which defines a needy child as a child under the age of 18 who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent. Section 1522 specifically provides that no child over 18 is a needy child within the meaning of legislative use of that term. It is clear that under these provisions no child over the age of 18 could receive assistance under the Aid to Needy Children Program. If the rule, as promulgated, contravenes the statute, it must fall. But the rule does not give direct aid to any person except a needy child. It merely requires that in determining the aid to be given to a needy child, the needs of those ineligibles who are

members of the family group in the home of which the eligible child resides shall be taken into consideration. One of the objects of this legislation is to keep needy children in their family group wherever possible. Sec. 1503. The legislation is to be liberally construed. Sec. 1507. The family group cannot be limited to those who are eligible for aid. It must, by definition, include persons who may not be eligible for aid. If a child who is eligible for aid resides with a parent and brothers and sisters who are ineligible for aid, the needs of the child in dollar amounts can only be determined after considering the needs of the family. If their needs are eliminated, then the needs of the child are not determined realistically, for the needs of the child are bound to vary depending upon the financial condition of the family. The legislative objective being to keep needy children in their homes, the needs of the family group may be considered in determining the needs of the child. If the needs of the child are measured in isolation, this objective would probably be defeated. Including such ineligibles in the family budget does not mean that a person over the age of 18 is receiving aid in contravention of the statute, notwithstanding he may benefit by the maintenance of the family home.

[5] It is this court's conclusion that Rule C–503 is not in contravention of any statutory provision, and that the fact that an ineligible child may indirectly benefit by its application does not make the rule void. This is social legislation which is to be liberally construed to achieve its objectives. We hold that Rule C–503 is within the spirit of the legislation, does not conflict with it, and is therefore within the power of the department to promulgate.

Respondent has relied on Department of Social Welfare v. Kern County, 29 Cal.2d 873, 180 P.2d 1, but as we read that case it held that the state could not compel a county to increase the aid to needy children beyond the maximum amount as stated in the statute establishing the maximum aid payable. Rule C–503 does not compel the county to pay in excess of the statutory maximum amount, so we do not consider the case as authority for the proposition that, in considering the needs of the child, the state may not compel the counties to consider the needs of certain ineligibles who are part of the eligible child's family.

The judgment is reversed.

SCHOTTKY and PEEK, JJ., concur.



148 Cal.App.2d 525

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Warren WILLIAMS, Defendant and Appellant.

Cr. 3297.

District Court of Appeal, First District, Second Division, California.

Feb. 18, 1957.

Prosecution for unlawful possession of heroin and for a previous felony conviction. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Comstock, J. pro tem., held that where, at conclusion of an arresting officer's direct examination, introduction of certain articles seized without a warrant at time of defendant's arrest, was objected to on grounds such articles were recovered in illegal arrest and illegal search, and such objection was overruled, and thereafter, without further objection or motion to strike, arresting officer was fully cross-examined, and defendant testified in detail as to his version of the finding of such evidence, defendant waived objection to introduction of such evidence and could not on appeal claim error in its admission.

Judgment affirmed.

1. Criminal Law ⇐1036(9)

Where, in prosecution for unlawful possession of heroin, at conclusion of an arresting officer's direct examination, introduction of certain articles seized without a warrant at time of defendant's arrest was objected to on grounds such articles were recovered in illegal arrest and illegal search, and such objection was overruled, and thereafter, without further objection or motion to strike, arresting officer was fully cross-examined, and defendant testified in detail as to his version of the finding of such evidence defendant waived objection to its introduction and could not on appeal claim error in its admission. West's Ann.Health & Safety Code, § 11500.

2. Poisons ⇐9

Evidence sustained conviction for unlawful possession of heroin. West's Ann. Health & Safety Code, § 11500.

3. Searches and Seizures ⇐7(27)

Where a police officer, after having tried to open an automobile door accepted defendant's implied invitation to look inside when defendant reached across from the driver's side and opened the door for the officer, defendant would be deemed to have consented to officer's search of the automobile without a warrant. West's Ann. Health & Safety Code, § 11500.

4. Criminal Law ⇐633(2)

Where defendant charged with unlawful possession of heroin, and a previous felony conviction did not admit previous conviction until it came out in evidence, trial court did not err in permitting reading to the jury of the charge of previous conviction of felony. West's Ann.Pen. Code, § 1093.

5. Criminal Law ⇐1159(3, 4)

Contentions as to weight of the evidence, as to whether a witness should have been believed or not believed, and as to whether an expert witness disqualified himself by incorrect testimony, if proper, may only be addressed to the trier of fact and not to an appellate court which does not concern itself with conflicts of evidence or credibility of witnesses.

Warren E. Williams in pro per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

COMSTOCK, Justice pro tem.

Appellant and Lester Robinson were accused by information filed in the Superior Court for the City and County of San Francisco of unlawful possession of heroin, a narcotic, in violation of section 11500, Health and Safety Code. An amended information added a charge against appellant of a previous conviction of felony. Both defendants pleaded not guilty to the main charge and appellant denied the alleged previous conviction. A motion by each defendant for a separate trial was denied. The case was tried before a jury on May 1 and 2, 1956 against appellant alone. The record is silent as to why the defendants were not tried together. The jury returned a verdict finding appellant guilty as charged; the allegation of the prior conviction was found to be true. Judgment was duly pronounced and appellant was sentenced to be imprisoned in the State Prison for the term prescribed by law. His appeal is from the judgment.

The record shows that on February 6, 1956, at about 8:30 p. m., Officer Ted Lescher of the San Francisco Police Department observed Warren Williams commit a traffic violation by unlawfully backing his automobile through the intersection of Scott and Ellis Streets in San Francisco. The officer stopped Williams and wrote out a citation. Williams told the officer his address was in the 1500 block on Filbert Street, which was a different address from that shown on his operator's license. Lescher asked Williams the name of the nearest cross street to his home and received an answer that it was 16th Street. Lescher said 16th Street did not cross Filbert and Williams replied that he lived in Oakland, not San Francisco. Asked what his occupation was and why he was in San Francisco, he informed Lescher that he was unemployed and that he had come to San Francisco that evening to keep an

appointment with a girl. The officer noticed that Williams appeared ill, nervous and fidgety and very drawn. Another traffic violator diverted the officer's attention; he went to issue a citation to the other and while so engaged noticed Williams drive up to the curb on Ellis Street and admit Lester Robinson to his car and drive away. About five minutes later, Lescher saw Williams, with Robinson in his car, driving west on Geary Street, at Scott. He was suspicious and followed them to the corner of Post and Divisadero Streets, where Williams drove into a somewhat crowded Standard service station and pulled alongside the rest rooms. Lescher stopped across Divisadero Street and was there joined by Officer Fletcher. Together they observed Robinson get out of the passenger side of the front seat of Williams' car, which was near the rest room door, and enter the rest room. Williams remained in the automobile behind the wheel. Both officers crossed the street and Lescher approached Williams to further interview him while Fletcher walked up to Robinson who was then coming out of the rest room. Officer Lescher again asked Williams about his address and this time received an answer that he lived in the 2500 block in Oakland. Lescher then proceeded to search Williams. The officer described the search as, "Just a quick search or 'frisk', for a weapon", and "Just a hand search, outside of his clothing." No weapon was found. A sum of money was found in Williams' shirt pocket. During this search of Williams, Robinson stood near the left front fender of the car. Neither Williams nor Robinson was then arrested. The station was well lighted. Lescher thoroughly examined the cement pavement and the area all around the car, using a flashlight as well as the lights from the station. Nothing was found except a small, valueless piece of paper. He stepped to the right front door of the car and attempted to open it. His testimony on this was:

"Q. (Berman) And did you open it? A. I attempted to open it, but it was stuck.

"Q. And what happened then? A. Mr. Williams entered the automobile from the left front door, leaned across the front seat and opened the right front door.

"Q. When the right front door was open, did you observe anything in the automobile? A. I did.

"Q. What did you observe? A. I observed a hypodermic needle lying on the floor of the passenger side of the front seat.

"Q. I will show you here People's Exhibit number 1. The Court: Is that marked 1 for identification?

"Mr. Berman: Yes, Exhibit 1 for identification.

"Q. And ask you if that is the hypodermic needle you found at that time? A. This is. I marked it at the time.

"Q. After you found it, what did you do with the needle? A. I had Mr. Williams and Mr. Robinson come around to the right side of the automobile. Mr. Williams came through the right front door and I handcuffed them together.

"Q. And they were placed under arrest, is that right? A. They were.

"Q. Did you observe anything on the ground at that time? A. No.

"Q. Did you ever, at any time, observe anything on the ground? A. I did.

"Q. When was that? A. After I had handcuffed both men singly behind their backs, I observed a bindle of white powder and an eyedropper approximately one foot from the left foot of Mr. Williams.

"Q. From the left foot of Mr. Williams? A. That's correct.

"Q. And where was Mr. Robinson in relationship to Mr. Williams? A. On Mr. Williams' right.

"Q. On Mr. Williams' right? A. Yes.

"Q. I will show you here People's Exhibit number 2, eyedropper, and ask if that is the eyedropper you saw at that time? A. That is it. I marked that also.

"Q. And I will show you here People's Exhibit number 3, which appears to be a white piece of paper, containing a white powder. A. That I found also. I have initialed it also—'W' for Williams.

"Q. You put the 'W–TL' on here, is that correct? A. That's correct.

"Q. And you say People's number 3 for identification, and People's number 2—the eyedropper and the one bindle, were found one foot away from the left foot of Mr. Williams? A. That's correct.

"Q. And Mr. Robinson was on his right? A. That's correct.

"Q. Did you find anything else or—I will withdraw that. Did you observe any other narcotic, or any other articles that purported to be narcotics at that time? A. I did.

"Q. And when and where was that? A. I observed Mr. Robinson moving around, and at that time, approximately four feet from Mr. Williams, I observed a packet of white papers falling from what appeared to be the left pants-leg of Mr. Robinson.

"Q. And that was about four feet away from Mr. Williams? A. Approximately.

"Q. Was that before or after you found People's Exhibit number 2 and number 3? A. After.

"Q. Afterwards? A. Yes, sir.

"Q. I will show you here People's exhibit number 4, and ask you if those are the packs of white papers to which you refer? A. These are. I marked each one separately.

"Q. And those are all with your initials 'TL'? A. That's correct.

"Q. Now, how long was it after you observed the condition of ground—the condition of the cement surface of the service station, and found nothing there except the white piece of paper you described, that contained nothing,—how long after that was it that you found People's Exhibits number 2 and 3 next to the left leg of Mr. Williams? A. Not over three minutes.

"Q. Now, was the defendant placed under arrest? A. That's correct."

Williams' testimony as to this episode was:

"Q. (Postel) What did Officer Lescher do? A. Then Officer Lescher proceeded to search various places, and he went around my car and tried to get into the car from the passenger side, the front door.

"Q. Was he able to get in? A. No.

"Q. So, what did you do? A. Well, I reached over and to assist him. I put the handle down, to let him in the car.

"Q. After the door was opened, what did the officer do? A. Well, he proceeded to shine his flashlight around the car, and he said underneath there, I don't know, he said he found a hypodermic needle.

"Q. Did he place you under arrest at that time? A. Yes, he did. He ordered me out of the car, and he handcuffed me behind my back.

"Q. Was Robinson there then? A. No.

"Q. When did Robinson return. A. Well, I'd say about three minutes after he had handcuffed me behind my back.

"Q. When Robinson came back, what was done? A. When Robinson came back, he asked Robinson did he know me. Robinson said yes, what is the trouble? And he said, well you are under arrest, and then he placed Robinson under arrest. And he took the handcuffs from the other officer and handcuffed Robinson.

"Q. Now, at that time, did you drop anything on to the ground? A. No, I did not.

"Q. On any of these times, did you have any narcotics in your possession? A. I have not. I have never used any narcotics. I have never sold or had anything, any dealings with narcotics.

"Q. I will show you People's number 3, and ask you if you have ever seen that before? A. No, I haven't.

"Q. Did the officer show you anything similar to this at that time? A. Yes, he did. He showed me something similar, but I don't know whether that is it, or not.

"Q. Showing you People's number 4, a group of packets, did you see these at that time? A. Well, yes, I did.

"Q. Had you ever seen them before the officer showed them to you? A. No, I had not.

"Q. Showing you People's number 2, the eyedropper, had you ever seen that before? A. No, I haven't.

"Q. Did you have this with you on that day? A. No, I did not.

"Q. When did you first see this? A. When Officer Lescher said 'What is this?' and he reached under the front wheel of my car and pulled that out.

"Q. Showing you People's number 1, the needle, when did you first see that? A. After Officer Lescher ordered me out of the car, and told me I was under arrest, and I asked him why, and he said because you have a hypodermic needle. And I told him I didn't know where it came from.

"Q. Had you seen this lying in the car? A. No, I had not."

Both Williams and Robinson were taken to the Park Police Station. Lescher observed and interviewed Williams there. Williams had numerous new needle marks on his arm. The officer had become familiar in police work with narcotic withdrawal symptoms. Williams appeared to him to be suffering these symptoms. He was ill, cold, shivering, having chills; his stomach was bothering him; he was doubling up, bending over. Williams stated he had received a shot of heroin from Robinson gratis about the first of the year; that since then he had been making purchases from him; that he had been home on the night of his arrest and was ill from lack of narcotics; that he could not stand the pain and he came over to the City to make a purchase from Robinson.

Appellant states the grounds upon which he relies for reversal as follows:

"(1) Illegal, Search and Seizure;

"(2) Illegal Arrest;

"(3) That the weight of evidence does not warrant sustaining the judgment;

"(4) Failure to receive a fair and impartial trial;

"(5) Due Process of Law;

"(6) That the expert witness disqualified himself;

"(7) That the Jury was given information illegally which would tend to prejudice them;

"(8) Illegal Evidence, due to time and way admitted;

"(9) Improper instructions of Jury."

We have reached the conclusion that there is no merit in the appeal and that the judgment must be affirmed.

[1] Appellant's main argument for reversal is that the evidence upon which he was convicted was erroneously admitted in that it was obtained by an unlawful search and seizure; that he was illegally arrested, and that the hypodermic needle, the eyedropper and the heroin were found without the authority of a search warrant and without being discovered or seized as an incident to a search connected with a lawful arrest. The offense was committed and the case was tried long after our Supreme Court decided People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. Defendant's counsel was familiar with this decision, as shown by his argu-

ments on law points before the trial judge outside the presence of the jury. We think the case made against the defendant upon evidence that was received at the trial pursuant to his express stipulation or without objection by him fully supports the judgment.

At the outset of the trial, in the presence of the jury, counsel for the People exhibited the hypodermic needle (People's Exhibit 1 for Identification), the eyedropper or syringe (People's Exhibit 2 for Identification), one bindle of heroin (People's Exhibit 3 for Identification), and a packet of eight bindles of heroin (People's Exhibit 4 for Identification), fully describing them, without objection by defendant. The People asked to call as their first witness, out of order, Herbert F. Bergman. Counsel for defendant said, "No objection." This witness described himself as a Narcotic Inspector, State Department of Justice. Defendant's attorney stipulated that Bergman was a qualified narcotic inspector, expert to analyze "the various articles, as to whether they are narcotics, or not." Bergman was shown the hypodermic needle and the eyedropper and described them as articles customarily used by narcotic addicts and the method of their use. He was shown the bindles of heroin and testified that he had examined and analyzed them all; that each bindle contained one and one-half grains of heroin. Without making any objection or motion to strike, the attorney for defendant cross-examined this witness as to these exhibits, and on such cross-examination Bergman testified to the method of using the needle and dropper, but that he "did not analyze the needle or the syringe, just the bindles."

Officer Lescher was questioned concerning his searching Williams' person at the service station when he first interrogated Williams there. A timely objection was made on defendant's behalf and the court ordered the objection argued out of the presence of the jury. Counsel for the People made it clear there was no arrest at that time and that it would not be claimed there were any narcotics found on defendant's person at that search. Defendant's attorney persisted in the objection and the objection was sustained by the court. Immediately upon the court being reconvened, Lescher was asked, without objection, "You testified that you searched the defendant?" and answered, "I did." The details of that search were not then gone into. He then testified as to the inspection of the ground, the attempt to open the door of the car, Williams' opening it for him, the finding of the hypodermic needle, the arrest, the finding of the eyedropper and the heroin, the identification and description of the various paraphernalia and the narcotics, the examination and interrogating of defendant at Park Station, the observation of the needle marks on defendant's arm, defendant's admission of being a narcotic user, of having previously purchased heroin from Robinson and of having come to San Francisco on this occasion to meet and purchase heroin from Robinson. All this went into evidence without objection by defendant. The first objection to any evidence following the objection which was sustained by the court as to the initial search of Williams' person came when, at the conclusion of Officer Lescher's direct examination, the needle, syringe, bindle of heroin and packet of eight bindles, which had previously been marked People's Exhibits one through four for Identification, were physically offered in evidence, whereupon the attorney for defendant objected on the grounds that "they were recovered in illegal arrest and illegal search." This objection was overruled. Thereafter, without further objection or motion to strike, Lescher was fully cross-examined and Williams took the stand and testified in detail as to his version of the finding of the needle, the arrest and subsequent events, the main part of his testimony relating to the finding of the needle, the arrest and the connected events being as quoted above.

[2] We hold that defendant waived objection and may not now on appeal claim error as to the admitting of evidence concerning which no objection or motion to strike was made, and that the record so made fully justifies the conviction and sustains the

judgment. In People v. Kitchens, 46 Cal.2d 260, at page 262, 294 P.2d 17, at page 20, the court said: "* * * we adhere to the rule that ordinarily the admissibility of evidence will not be reviewed on appeal in the absence of a proper objection in the trial court," but then went on to apply the now familiar exception that said rule would not be applied to cases tried before the Cahan decision in which illegally obtained evidence was admitted under the former non-exclusionary rule. The case at bar was tried after the Cahan decision and the general rule applies that failure to object waives the objection. In People v. Kelsey, 140 Cal. App.2d 722, at page 723, 295 P.2d 462, at page 463, the court said, "At the time of trial defendant's attorney was familiar with the decision of the Supreme Court in the case of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, and not only made no objection to the receipt of the evidence or motion to strike, but, in effect, waived any such objection. * * * People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17."

There was some advantage to be gained by defendant allowing the evidence to go in without objection. There was obviously available to him the argument that he was completely cooperative in assisting the officer to open the door and look into the automobile, and that the needle then found, as well as the eyedropper and heroin subsequently found, belonged to Robinson and not to him and that his entire conduct in the premises was a badge of innocence. The principle of forbidding a party to change his position in these circumstances has long been applied. In People v. Rolfe, 61 Cal. 540, at page 542, the court said, " 'The practice, whether in civil or criminal cases, of deliberately permitting evidence to be given without objection in the first instance, and then moving to strike it out on grounds which might readily have been availed of to exclude it when offered, is not to be tolerated.' A party is not permitted to remain silent when evidence is offered, with the privilege of accepting it if favorable and afterwards moving to strike it out if it is against him, but he must exercise his right of objection at a proper and reasonable time." People v. Caritativo, 46 Cal.2d 68, at page 73, 292 P.2d 513, at page 515. In the present instance defendant did not even move to strike the claimed objectionable testimony. On the contrary, he proceeded to bring out all the material facts concerning the finding of the articles when he took the stand in his own behalf, though obviously attempting to shift the blame to Robinson.

[3] In addition to having waived objection to the evidence, defendant appears to have consented to the officer's looking into the car and to have actively and voluntarily, without compulsion on the officer's part, opened the door to permit him to look inside. All the elements of legal consent were present. Moreover, the finding of the needle under all the circumstances constituted reasonable grounds for believing that defendant and his companion Robinson were jointly engaged in the common act of unlawful possession of a narcotic, and, therefore, justified the arrest and the incidents which followed. It was not unreasonable for the officer without any show of force or coercion, after having tried the door of the car, to accept defendant's implied invitation to look inside when defendant reached across from the driver's side and opened the door for the officer, as stated by defendant, "to assist him." The case falls within the principle of People v. Burke, 47 Cal.2d 45, 301 P.2d 241, 242, wherein officers, having had prior information that narcotics were used on defendant's premises, the source of information being undisclosed by the evidence, went to defendant's apartment at approximately 11 o'clock p. m. without warrant " 'to make a narcotic investigation.' " They knocked and defendant came to the door and opened it a small distance and asked who was there. One of the officers replied, " '"We are officers. We would like to talk to you." ' " After a moment's hesitation, the defendant stepped back, opened the door and turned on the light. The officers walked into the room without express invitation

and proceeded to question the defendant. It was held that an implied invitation to enter was plain. An officer asked defendant if he had ever been arrested for narcotics and defendant admitted that he had been some years before. He was further asked, "'Do you have any narcotics here at the present time?'" and answered, no. The officer then said, "'You don't mind then if we search your apartment do you?'" The defendant replied, "'No, go ahead.'" In the ensuing search of the apartment the officers found marijuana. Defendant admitted that it was his and that he had smoked some of it. At the trial the marijuana was admitted in evidence over defendant's objection that it was obtained in violation of the exclusionary rule of the Cahan case. The trial court held that there was no need for a search warrant and that defendant consented to the search. Our Supreme Court held in deciding the appeal that the defendant freely consented to the search of his apartment which disclosed the evidence. We think the arrest was amply justified when viewed in the light of the principles applied in People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57 and People v. Martin, 46 Cal.2d 106, 293 P.2d 53. In the Blodgett case, officers saw two people at an early hour of the morning enter the rear seat of a taxicab which had driven up and double parked outside a hotel. Two officers who had been observing the cab decided to investigate it. They approached and ordered the occupants to get out. One of the officers, without request or invitation, opened the left rear door and as he did so saw the defendant withdraw his left hand from behind the seat at the juncture of the seat and back cushion. After the defendant and his companion got out, the officer removed the rear seat and found three marijuana cigarettes where defendant had withdrawn his hand. Against the contention that the search of the cab was unlawful and that the evidence obtained thereby was therefore inadmissible, the court held that the search and discovery of the marijuana were justified upon the ground that there is nothing unreasonable in an officer's questioning persons outdoors at night; that in view of the hour and the unusual conduct of the occupants of the cab it was not unreasonable for the officers to order them to get out of the cab for questioning and that since an officer saw defendant's furtive action in getting out, he had reasonable grounds to believe that he was hiding contraband and the search of the cab was therefore reasonable. In People v. Martin, with no more original ground for suspicion than that they saw two men sitting in the front seat of a parked automobile at night in a location known as a "lover's lane" officers turned their patrol car around to investigate the car and its occupants, whereupon the suspect's car took off at a high rate of speed. The officers pursued, with red light and siren on, stopped the car and approached it, one from the left and one from the right, one of them directing his flashlight into the car. Defendant was sitting on the right-hand side of the front seat. His left hand and his companion's right hand were on the center of the seat. The officers ordered them both to put their hands in front of them. When they did so, an officer saw a small bag in the middle of the front seat that had been covered by their hands. The officer ordered the suspects out of the car, searched them for weapons and then reached into the car and took the bag. One of them examined its contents and concluded that they were marijuana, which a later analysis confirmed. It was held that the entire conduct of the officers was justified and that the evidence procured in the search of the automobile without warrant was admissible. We think the facts of the instant case bring it well within the principles enunciated in those cases and the authorities therein cited. Moreover, the defendant having raised no objection to a full description by witnesses of the exhibits and conduct in connection therewith, no tenable claim of prejudice could arise from the articles themselves being admitted. People v. Citrino, 46 Cal.2d 284, at page 288, 294 P.2d 32, at page 34; People v. Akers, 143 Cal.App.2d 224, 299 P.2d 398.

[4] Defendant contends that it was error to permit the reading to the jury of the charge of a previous conviction of felony. When arraigned on the amended information in which this charge first appeared, defendant denied it. The procedure followed was in accordance with section 1093 of the Penal Code. It is only where the defendant has confessed the previous conviction that the clerk in reading the information must omit therefrom all that relates to such previous conviction. Here, the defendant did not admit the previous conviction until it came out in the evidence. Defendant is apparently confused in asserting that the clerk should not have read the entire amended information to the jury after it had been impaneled and sworn. Up to that point he had not confessed, but had denied the prior conviction. This contention is devoid of merit.

[5] Much of appellant's brief is devoted to patently fallacious argument such as that the narcotic expert disqualified himself by testifying that marijuana is a narcotic, which appellant bluntly states it is not; that the weight of the evidence tends to point more strongly to the guilt of Robinson than to that of plaintiff, and that Lescher should have been disbelieved because his actions smacked of "police state tactics" and he was apparently trying to make a "name" for himself. Such contentions, if proper at all, may only be addressed to the trier of fact, not to an appellate court which does not concern itself with conflicts of evidence or the credibility of witnesses.

Appellant entreated this court that, inasmuch as he is not trained in law nor a learned scholar, and must work under great handicaps with limited facilities, we should be most careful to examine the record and each point brought out by him. This we have done. We have read the entire record with great care and have given earnest consideration to every point advanced which we deemed of sufficient force to be worthy of discussion. Respondent urged that appellant's brief was fatally defective for failure to observe the provisions of Rule 15(a) of the Rules on Appeal, and we agree that the brief did not comply with said rule and that in the absence of proper supporting references to the transcript or apt authorities we were not bound to search the record for error. However, the transcripts were not voluminous and such contentions as had a semblance of legal theory behind them were not difficult to follow. We therefore gave the case a complete consideration on its merits. For the reasons stated, we have concluded that the case was fairly tried, that no prejudicial error was committed and that the evidence supports the conviction.

The judgment is affirmed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.



148 Cal.App.2d 558

T. R. STOCKTON, Individually and by a person doing business under the firm name and style of Minnie L. Watson, a widow, Plaintiff and Respondent,

v.

Merton NEWMAN, Jr., Laura Newman, et al., Defendants and Appellants.

Civ. 17058.

District Court of Appeal, First District, Division 2, California.

Feb. 19, 1957.

Purchaser's action against vendors holding trust deed and others, for alleged fraud as to value of real estate sold, wherein purchaser sought either rescission of contract or damages. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., rendered order granting purchaser a preliminary injunction to preclude defendants from selling property pursuant

to purported notice of default under trust deed, and they appealed. The District Court of Appeal, Kaufman, J., held that court committed no abuse of discretion in granting the preliminary injunction.

Order affirmed.

1. Pleading ⇐238(4)

Two amendments to complaint made after answer had been filed would be treated as having been lawfully made with leave of court, even if they had not been made on five day statutory notice, where first amendment was made during a continuance and defendants came to hearing after continuance with lengthy memorandum seeking to strike amendment, and such amendment stated cause of action, and register showed that second amendment had been ordered filed in open court. West's Ann.Code Civ. Proc., § 473.

2. Pleading ⇐238(2)

Failure to serve notice of motion for leave to amend complaint, after answer has been filed, will not render amendment void. West's Ann.Code Civ.Proc., § 473.

3. Election of Remedies ⇐12

Where purchaser of real estate brought fraud action against vendors holding deed of trust, seeking rescission or damages, since vendors attempted to render notice of rescission ineffectual by filing notice of default, purchaser did not, at such time, make binding election as to which remedy purchaser would pursue.

4. Fraud ⇐31

Defrauded vendee may, in same action, seek rescission or damages in event rescission cannot be maintained.

5. Election of Remedies ⇐6

Purchasers maintaining fraud action against vendors of real estate were not required to elect, during course of trial, between equitable remedy of rescission and legal remedy of affirmance of contract and damages.

6. Mortgages ⇐338

In purchaser's action against vendors holding deed of trust, based on alleged fraud as to value of realty sold, for rescission of contract or for damages, trial court committed no abuse of discretion in granting temporary injunction to preclude vendors from proceeding with sale before trial pursuant to purported notice of default under trust deed. West's Ann.Civ. Code, § 2924c; West's Ann.Code Civ.Proc., § 526, subd. 3.

7. Appeal and Error ⇐948

On appeal from order granting preliminary injunction, burden is on appellants to establish clear abuse of discretion in granting injunction.

Phil F. Garvey, San Francisco, for appellants.

Ewart Lytton Merica, San Francisco, for respondents.

KAUFMAN, Justice.

This is an appeal from an order granting a preliminary injunction enjoining defendants Merton Newman, Jr. and Laura Newman, and their attorney and agents, pending trial of the main action, from enforcing a certain contract dated February 3, 1955, and from proceeding with the sale of certain premises pursuant to a purported notice of default pertaining to a deed of trust dated February 3, 1955.

The original complaint filed on July 6, 1955, contained three causes of action, the first alleging that within the past two years defendants Merton Newman, Jr. and Laura Newman became indebted to plaintiff in the sum of $6,408.91; the second, claiming damages for fraud against the Newmans and certain other defendants in the sum of $12,507.91, and asking punitive damages in the sum of $10,000; the third alleging that the Newmans within the two years last past had become indebted to plaintiff in the sum of $4,099. The second cause of action alleged that certain representations were made by defendants Newman and their brokers, also defendants herein, with intent to deceive and defraud plaintiff and to induce him to rely thereon; that they

represented that the premises at 2037 Pierce Street, San Francisco, were worth the price of $15,800 which plaintiff agreed to and became obligated to pay; that they represented that the seven apartments on the aforesaid premises had been for several months prior to February 3, 1953, lawfully rented to certain persons for a total monthly rental of $235.50 which sum had been received month by month from said tenants, that said representations were false and known by said defendants to be false.

On August 11, 1955, defendants and appellants filed an answer, denying the essential allegations of each of the three causes of action, admitting only that they had been owners of the property at 2037 Pierce Street for several years prior to February 3, 1953, and that on that date, defendants LeDue, Jacobi and Grady were licensed real estate brokers. The answer affirmatively alleged that the property had been worth $15,500 on February 5, 1953, and that the fair market value of said property on July 6, 1955 had decreased to the sum of $10,000, and that plaintiff with full knowledge of the facts alleged in his complaint since February 5, 1953, had neglected to institute action. It was further alleged that on June 3, 1955, plaintiff gave notice of rescission on the ground of fraud, that this is the basis of the First and Third Causes of Action set forth in the Complaint, that plaintiff has been guilty of laches in failing to give notice of rescission from February 3, 1953 to June 3, 1955.

On August 16, 1955 the notice of motion for preliminary injunction was filed accompanied by the affidavit of plaintiff and respondent T. R. Stockton, stating that affiant had received a Notice of Default on or about June 12, 1955, pertaining to the premises at 2037 Pierce Street and a certain Deed of Trust recorded on February 5, 1953, that a sale of said premises is threatened before October 15, 1955, and that affiant had been advised by his attorney that there is generally no statutory right of redemption where there is a sale under deed of trust. It was further averred that the sale was threatened before the action could be brought to trial and final judgment rendered, that irreparable injury would result to affiant, that it would be difficult to ascertain the amount of compensation that would afford adequate relief, that pecuniary compensation would not afford adequate relief, that unless the threatened sale is prevented a multiplicity of judicial proceedings is probable; that grave and irreparable injury will result to affiant in that if said investment is forfeited he will be without any substantial assets and he will have been compelled to forfeit the savings of a lifetime.

The affidavit of Merton Newman, Jr. in opposition to the motion, admitted that the notice of default was recorded on June 3, 1955, and that there was no statutory right of redemption where there is a sale under deed of trust. Affiant alleged that on June 3, 1955, plaintiff served notice of rescission of the contract for the purchase of the premises at 2037 Pierce Street on defendants, and that the First and Third Causes of Action of plaintiff's Complaint were based on said notice of rescission. The affidavit stated that plaintiff was receiving rentals from the aforesaid premises in the sum of approximately $243 per month, and has refused to pay the monthly installment of $128 due under the promissory note secured by the deed of trust since May 13, 1955; that plaintiff seeks the injunction so that he may avoid payment of the monthly installments on the note; that he may, pursuant to provisions of the Civil Code, reinstate the deed of trust and void the notice of default by paying the amounts now in default.

On August 17, 1955, a minute order was made continuing the motion for preliminary injunction.

On August 24, 1955, the first amendment to the Complaint was filed alleging a fourth cause of action which was similar to the second cause of action in regard to the charges of fraud in the real estate transaction. It alleged that notice of rescission had been given to defendants on June 3, 1955 with an offer to restore everything of value received under the contract, and it

alleged therein an offer to rescind, prayed for judgment rescinding said contract and ordering defendants to restore the amount received on the purchase price, plus certain sums for improvements made to the property and other damages suffered by plaintiff.

On August 29, 1955 appellants filed a notice of motion to strike the first amendment to the Complaint on the ground that it was filed without leave of court and that it was filed without noticed motion setting forth the proposed amendment. On the same date a second amendment to the Complaint was filed in open court, which recites that it was made "upon leave of the above entitled court first duly requested and obtained." This amendment to the fourth cause of action alleges that prior to April 16, 1955, plaintiff had performed all promises and conditions of the agreement, and now is so ready and willing to perform, but by reason of the fraudulent representations of defendants is excused from further performance.

The Order Granting Preliminary Injunction was filed on August 30, 1955. It recited that on hearing of the Motion for Preliminary Injunction on August 29, 1955, the court had before it the Complaint, the First and Second Amendments thereto, the Affidavit of Merton Newman, Jr.; Memorandum of Points and Authorities in Opposition to Application for Injunction, Notice of Motion To Strike First Amendment to the Complaint, Supplemental Memorandum of Points and Authorities in Support of Motion to Strike First Amendment to the Complaint and Answer to Complaint of the defendants, Merton Newman, Jr. and Laura Newman, and Donald J. Grady. The order recited that it had come on for hearing after having been continued at the request of Phil F. Garvey, Esq. (counsel for appellants) from August 17, 1955, to August 22, 1955, and after having been continued again at the request of the court from August 22 to August 29, 1955.

[1] Appellants assert that error was committed by the trial court in basing its order for a preliminary injunction on the first and second amendments to the Complaint. It is their position that the court could not consider these amendments since they were filed without an order made pursuant to five days statutory notice. Since the amendments here were after answer filed, they were required to be made with leave of court. Sec. 473, Code of Civ.Proc. The party desiring the amendment must ask leave "and in so doing should disclose the nature of the alteration desired, either in his notice of motion or by presenting the proposed amendment." (21 Cal.Jur. pgs. 178–179, sec. 124.) After the granting of the continuance on August 22 at the court's request, the first amendment to the Complaint was filed by respondent on August 24, 1955. It was served on appellant, for the Register of Actions (Resp.Ex. A) shows that the affidavit of service was filed on August 26, 1955. While respondent states that the purpose of the continuance on August 22 was to permit an amendment, appellants dispute that statement, and there is nothing in the record to show the reason for such continuance. At any rate, appellants came to the hearing on August 29, with a lengthy memorandum of points and authorities in support of a motion to strike the amendment, as well as a supplemental memo, both of which the court had before him at the hearing. There can be no question but that appellants were fully advised as to the nature of the amendment. They can hardly contend that they were prejudiced because this amendment clearly stated a cause of action in rescission when they had previously both in their Answer and their Affidavit in Opposition stated that respondent's first and third causes of action were based on the rescission, the notice of which had been served on them on June 3, 1955.

Respondent admits that no minute order granting leave to amend has been found for the first amendment. The trial judge died shortly after these proceedings. The Register of Actions shows an entry for the second amendment indicating that on August 29, 1955, it was ordered filed in open

court. Appellants filed a motion to strike the first and second amendments on August 21, 1955, one day after the injunction had been granted, and on September 13, 1955 it was submitted. No decision thereon had been rendered when the appeal herein was taken.

We must treat the amendments as properly made. The fact that the court recited in its order that it had before it the Complaint with first and second amendments thereto, and that it had appellants' memoranda of points and authorities in opposition to these amendments, shows that the court considered that the amendments were properly before it, and had been allowed.

[2] The fact that notice of motion for leave to amend was not given (if we assume that such leave had not been given), does not render the amendments void. In Baker v. Southern Cal. Ry. Co., 114 Cal. 501, 46 P. 604, it was held that while notice of motion for leave to file an amended Complaint should be given, where it appears from the record that leave should have been granted had due notice been given, there is no prejudice. And in Burks v. Weast, 67 Cal.App. 745, 747, 228 P. 541, a motion to strike an amended Complaint was held to have been properly denied, where although the amendment was filed without leave of court, defendant had notice of the real cause of action, and there was nothing in the record to show that he was in any way injured by the action of the court, since he was served with a copy of the amended Complaint and had adequate time to prepare for trial. In view of these cases, we conclude that there is no merit in this contention of appellants.

Appellants maintain that respondent was not entitled to a preliminary injunction, since the Complaint shows that damages will adequately compensate him for any injury suffered, and in such case the damages are ascertainable. Schwartz v. Arata, 45 Cal.App. 596, 601, 188 P. 313. There is no allegation that appellants are insolvent. It is urged that an injunction is unnecessary to prevent the sale under the deed of trust since by payment of the monthly installments and the charges provided under Sec. 2924c of the Civil Code, such sale could be prevented by respondent.

Appellants do admit that an injunction may be used as a provisional or ancillary remedy to preserve the status quo pending litigation. Code of Civ.Proc., sec. 526(3).

In the present case, respondent has sought inconsistent remedies for the alleged fraud based on the one transaction. If respondent should be granted the equitable remedy of rescission, that would be a disaffirmance of the contract, and he would be ordered to restore the property to appellants upon their repayment to him of everything received under the contract. If the court should decide that respondent had not acted with sufficient diligence to secure the equitable remedy, then damages could be awarded him, and he would retain the property received under the agreement. This remedy would be in affirmance of the contract.

[3–5] In the present case, since appellants attempted to render the notice of rescission given on June 3, 1955 ineffectual, by filing that same day a notice of default, there was not at that time a binding election made by respondent as to which remedy he must pursue. See Rest. Contracts, Sec. 485(1); Karapetian v. Carolan, 83 Cal. App.2d 344, 347–352, 188 P.2d 809, 1 A.L.R. 2d 1075. In Williams v. Marshall, 37 Cal. 2d 445, 457, 235 P.2d 372, 379, it is said that "A defrauded vendee may, in the same action, seek rescission or damages in the event rescission cannot be obtained. Bancroft v. Woodward, 183 Cal. 99, 190 P. 445. There is no good reason why the plaintiff in such an action should be compelled to make an election between those remedies during the course of the trial, and such a rule would be contrary to fundamental principles of law."

[6] If appellants are allowed to proceed with the sale under the deed of trust, then it is obvious that the prospective judgment, should it be for damages and not rescission, will be rendered ineffective if re-

spondent has been deprived of the subject matter of the contract. It therefore appears that there was a sound basis for the granting of the preliminary injunction. Code of Civ.Proc., sec. 526(3).

While it is true that the sale under the deed of trust could have been prevented by respondent if he had made the payments due under the note plus the other expenses required by section 2924c, Civil Code, within 90 days after notice of default, such payment by him might well be construed as an act in affirmance of the contract. "Any other act indicating an intent to abide by the contract is evidence of an affirmance thereof and of a waiver of the right to rescind." (12 Cal.Jur.2d 417, sec. 200.) If appellants could thus force respondent to give up his right to rescission the election of remedies would be exercised by the alleged wrongdoer rather than by the party wronged.

It may be said that if appellants proceed with the sale under the deed of trust, respondent will be deprived of this particular piece of property, and such damage may be considered irreparable for in equity each parcel of real property is considered unique. "Where land, or any estate therein, is the subject matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established." (Pomeroy, Equity Jurisprudence, Fifth Ed., Vol. 4, p. 1034, sec. 1402.)

[7] We conclude that the trial court did not abuse its discretion in granting the preliminary injunction. The burden is on appellants to establish a clear abuse of discretion to entitle them to a reversal. Remillard Brick Co. v. Dandini, 47 Cal.App.2d 63, 117 P.2d 432; People v. Gordon, 105 Cal.App.2d 711, 722-723, 234 P.2d 287; Palm Springs La Quinta Development Co. v. Kieberk Corp., 37 Cal.App.2d 642, 100 P.2d 346.

Order granting preliminary injunction affirmed.

DOOLING, Acting P. J., and STONE, J. pro tem., concur.

148 Cal.App.2d 614

Frank J. GLAESER, Colin F. Grant, E. O. Gray, Albert F. Hafey, Herbert C. Hansen, Emmett L. Lampson, Grover C. Rosentreter, Clayton H. Swanson, Harold W. Wold, and Charles Y. Woods, Plaintiffs and Appellants,

v.

CITY OF BERKELEY, a municipal corporation, Fire Pension Board, Laurence L. Cross, John D. Phillips, Fred A. Bird, James Howard Le Strange, John Holstrom, Mrs. Lee Breckinridge Thomas, and Weldon L. Richards, Defendants and Respondents.

Joseph R. MANSFIELD, Eugene W. Roark, and William Truelsen, Plaintiffs and Appellants,

v.

CITY OF BERKELEY, a municipal corporation, Fire Pension Board, Laurence L. Cross, John D. Phillips, Fred A. Bird, James Howard Le Strange, John Holstrom, Mrs. Lee Breckinridge Thomas, and Weldon L. Richards, Defendants and Respondents.

Britton SICKLER, Plaintiff and Appellant,

v.

CITY OF BERKELEY, a municipal corporation, Police Pension Board, Laurence L. Cross, John D. Phillips, Fred A. Bird, James Howard Le Strange, John Holstrom, Mrs. Lee Breckinridge Thomas, and Weldon L. Richards, Defendants and Respondents.

Nos. 16927-16929.

District Court of Appeal, First District, Division 1, California.

Feb. 21, 1957.

Consolidated cases involving effect of certain amendments to the Berkeley fire and police pension ordinances. The Superior Court, Alameda County, Richard H. Chamberlain, J., rendered the judgments challenged by appeals of plaintiffs, who had been in employ of city at time of amendments, but had since retired. The District Court of Appeal, Fred B. Wood, J., held that amendments substituting, for fluctuating rate geared to pay rate of active members of force, fixed rate geared to salary received during three years immediately pre-

ceding date of retirement, could not and did not affect persons who had retired prior to effective date of amendments; but held that such amendments did affect policemen and firemen who were then members of force and had not yet retired and amounted to an unreasonable, and therefore ineffective, modification as to such employees.

Reversed.

1. Constitutional Law ⇐102(2)

In absence of express reservation of legislative power to modify pension system, person serving thereunder acquires vested contractual right, which arises even before happening of contingency which makes pension payable, and such right cannot be constitutionally abolished by subsequent changes in law; there being, however, an implied qualification that governing body may make reasonable modifications and changes before pension becomes payable.

2. Municipal Corporations ⇐187(7), 200(7)

Berkeley fire and police pension ordinance amendments substituting, for fluctuating rate geared to going pay rate of active members of force, fixed retirement pay rate geared to salary received during three years immediately preceding date of retirement, could not and did not affect persons who had retired prior to effective date of amendments, but such amendments did affect policemen and firemen who were then members of force and had not yet retired and amounted to an unreasonable, and therefore ineffective, modification as to such employees.

Cornish & Cornish, Francis T. Cornish, Howard W. Wayne, Berkeley, for appellants.

Fred C. Hutchinson, City Atty., Robert T. Anderson, Asst. City Atty., Berkeley, for respondents.

FRED B. WOOD, Justice.

[1, 2] These three cases (consolidated for trial and appeal) involve the effect upon the plaintiffs of certain amendments to the Berkeley fire and police pension ordinances. Plaintiffs (13 firemen and one policeman) were in the employ of the city at the time of these amendments, June 16, 1944. They have since retired.

These amendments changed the rate of retirement pay from one that was geared to the going rate of pay for active members of the force (fluctuating upward with increases in salary rates but not downward with decreases in those rates) [1] to a fixed retirement pay rate geared to the average salary received by the retired employee during the three years immediately preceding the date of his retirement.[2]

These amendments could not and did not affect persons who had retired prior to their effective date. Terry v. City of Berkeley, 41 Cal.2d 698, 263 P.2d 833, as to policemen; Eichelberger v. City of Berkeley, 46 Cal.2d 182, 293 P.2d 1, as to firemen.

Did these amendments affect policemen and firemen who were then members of the force and not yet retired?

The answer is furnished by a decision of our Supreme Court rendered in September, 1955, upwards of ten months after the rendition of judgment in the instant cases. It held that a similar amendment of the charter of the City of Long Beach could and did operate only prospectively, not retrospectively, as to certain firemen and policemen who were in the employ of the city at the time of the amendment. Allen v. City of Long Beach, 45 Cal.2d 128, 287 P.2d 765. These were city employees who, according to the charter prior to the amendment, would be entitled upon retirement to receive a fluctuating allowance equal to one-half of the going rate of pay attached to the position held prior to retirement. The amendment, if operative as to them, would change the retirement allowance to a fixed rate,

1. Berkeley Ordinance No. 2188-N.S. as amended by No. 2254-N.S. (firemen); Ordinance No. 2250-N.S. (policemen).

2. Ordinance No. 2624-N.S. and No. 2626-N.S. (policemen); Ordinance No. 2625-N.S. and No. 2627-N.S. (firemen).

one-half the average salary earned by the employee during the five years preceding his retirement.

This, the Supreme Court observed, would if effective operate as a subtantial decrease without offering any commensurate advantages 45 Cal.2d at pages 131 and 132, 287 P.2d 765. That, coupled with the absence of any claim that the amendment was necessary to preserve or protect the pension program applicable to the employees who would be adversely affected, and the lack of any indication that the city would have difficulty in meeting its obligations without making the amendment applicable to them, 45 Cal.2d at page 133, 287 P.2d 765, would result in an unreasonable and, therefore, ineffective modification, as to such employees.

The court expressed the governing principles in these words: "An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. [Citations.] Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." 45 Cal.2d at page 131, 287 P.2d at page 767.

We see no basis for distinguishing the instant case from the Allen case. The disadvantages of the proposed change are potentially greater here than there. Here, prior to the challenged amendment, the retirement allowance would go up but not down with changes in the salary rate, whereas in Long Beach they followed salary changes down as well as up. Indeed, in the Allen case the Supreme Court referred to the Terry case as one that involved an amendment (the Berkeley 1944 amendment here involved) similar to the Long Beach amendment and as holding that "the change from a fluctuating to a fixed pension was detrimental to pensioners." at page 132 of 45 Cal.2d, at page 768 of 287 P.2d.

Also, we observe no indication in the pleadings or in the findings that the 1944 amendments were necessary to preserve or protect the pension program applicable to persons in office at the time and no indication that Berkeley would have difficulty in meeting its obligations to firemen and policemen in its employ at the time of the amendments.

The defendants seek to distinguish the Allen case upon a number of grounds, none of which seems logically sound to us.

The fact that the Long Beach pension amendment included two features (an increase in the rate of employee contribution and a requirement that the employee contribute for the period of any military leave) in addition to the change in the retirement allowance rate, does not distinguish the Allen case from the instant case, as we read the Supreme Court's opinion. The court viewed each of those three changes separately from the other two and treated each as an unreasonable modification.[3]

Nor do we find a significant distinguishing feature in the fact that in 1938 a retired Berkeley fireman enjoyed a fixed allowance which in 1939 was changed to a fluctuating allowance so that the 1944 amendment was merely a return to the 1938 status. As we read the Supreme Court's decision the reasonableness of a modifying amendment is to be tested by its effect upon

3. Incidentally, in Cochran v. City of Long Beach, 139 Cal.App.2d 282, 293 P.2d 839, the court had occasion to consider that feature of the Long Beach amendment which, if operative, would have changed the employees' retirement allowance from a fluctuating to a fixed basis and held it inoperative upon the authority of the Allen case, making no mention of the other two changes discussed in the Allen case.

the existing law, not by comparing the amendment with the law as it read sometime in the past.

The defendants also argue that in 1944 the cycle of postwar inflation had not yet commenced and "the common thinking of the time was that there would be widespread unemployment after the war, and an accompanying economic tapering off from the high wartime levels," whereas the Long Beach amendment was made in 1951 after the spiral of inflation had started. This is highly speculative. We find no basis for it in the record upon this appeal.

Next, defendants contend that the amendatory ordinances contained recitals which demonstrated that the city council believed it was merely clarifying the language of the ordinances, not changing them, in 1944. The fact that the council may have thought it was not making a change can hardly serve to validate a change which but for such mistaken view could not operate retrospectively.

Defendants argue that the "integrity" of the pension system is strengthened when it can be determined with certainty what the obligations of the system are. This element was equally present in the Allen case but apparently was not deemed of sufficient importance by the Supreme Court to merit comment. Furthermore, we do not think this was the kind of protection of the integrity of a pension system which the court had in mind when, on page 133 of 45 Cal.2d, on page 768 of 287 P.2d it used the expression "necessary to preserve or protect the pension program applicable to persons employed before" the amendment, particularly in view of the context in which those words appear.

Defendants invoke a number of cases that were decided prior to the Allen case. Some of them are consistent, and some are not, with the holding in that case. We assume that the Supreme Court considered all of them, whether or not mentioned in its opinion in the Allen case. There would be no point in our undertaking a further review of those cases.

Defendants seem to overlook the fact that the principles enunciated in the Allen case have reference to changes in a pension or retirement ordinance, charter or statute which does not contain an express reservation of legislative power to modify the system, such as the familiar clause that reserves legislative power to amend or repeal the corporation laws. (Concerning the scope and effect of such a clause, see 6A Cal.Jur. 132–134, Corporations, § 52, and 13 Am.Jur. 233–243, Corporations, §§ 90–96.) In the absence of such a reservation (in Berkeley as in Long Beach) a person serving under a pension system "acquires a vested contractual right to a substantial pension," a right which "arises before the happening of the contingency which makes the pension payable" and "cannot be constitutionally abolished by subsequent changes in the law," there being an "*implied qualification* that the governing body may make *reasonable modifications and changes* before the pension becomes payable." Wallace v. City of Fresno, 42 Cal. 2d 180, 183, 265 P.2d 884, 886; emphasis added. The Allen case furnishes the tests which are to be used in determining the reasonableness of a particular modification.

Upon a second trial, if one is held, the parties should be permitted to amend their pleadings to present issues additional to those heretofore presented, if they are so advised and if the trial court finds the proposed new issues appropriate.

The judgments are reversed.

PETERS, P. J., and BRAY, J., concur.

148 Cal.App.2d 550

Allen REMY, Plaintiff,

v.

EXLEY PRODUCE EXPRESS, Inc., et al., Defendants.

EXLEY PRODUCE EXPRESS, Inc., a corporation, Cross-Complainant and Respondent,

v.

PACIFIC FINANCE CORPORATION, Cross-Defendant and Appellant.

No. 17096.

District Court of Appeal, First District, Division 1, California.

Feb. 19, 1957.

Hearing Denied April 17, 1957.

Action arising out of collision of plaintiff's truck with defendant's approaching truck which crossed center line at about the place where codefendants' automobiles had been left in snow bank on defendant's side of highway. Defendant filed cross-complaint against plaintiff and codefendants. In the main action plaintiff had verdict and judgment against defendant and codefendants. In the cross-action defendant had verdict and judgment against codefendants, and one of the codefendants appealed from such judgment of the Superior Court, City and County of San Francisco, Edward Molkenbuhr, J. The District Court of Appeal, Bray, J., held that under the circumstances the verdicts and judgments were inconsistent.

Reversed.

1. Automobiles ⇐247

Where plaintiff's truck collided with defendant's approaching truck which crossed center line at about place where codefendants' unattended automobiles were parked in snow bank on defendant's side of highway, and in main action plaintiff had verdict and judgment against defendant and codefendants and in cross-action defendant had verdict and judgment against codefendants, verdicts and judgments were inconsistent in that they impliedly found that defendant in one act was both negligent and not negligent.

2. Negligence ⇐71

If a person, without his fault, is put in imminent peril by another and has the choice of two alternatives and chooses the one which later proves to have been the poorer one, and if his choice was a reasonable one in the then light of the circumstances, he is not held negligent for not having taken the better course, and the entire fault of the accident is laid to the person whose negligence placed him in peril.

3. Negligence ⇐82

If a person is put in imminent peril by another and has the choice of two alternatives and unreasonably transfers his loss and is himself injured, he is guilty of negligence proximately contributing to his own injury.

4. Appeal and Error ⇐218(1)

Where verdicts were neither informal nor insufficient in not covering the issues submitted, the statute relating to correction of verdict in trial court did not prevent consideration on appeal of the question, not raised in trial court, of inconsistency of verdicts. West's Ann.Code Civ.Proc., § 619.

5. Appeal and Error ⇐1172(2)

Reversal of cross-action judgment for defendant against codefendants because of judgment's inconsistency with main action judgment for plaintiff against defendant and codefendants did not require reversal of latter judgment where defendant did not appeal from plaintiff's judgment and the judgments were different judgments and were not interwoven.

Partridge, O'Connell & Whitney, Robert G. Partridge, Jr., San Francisco, for appellants.

William A. Kurlander, Anthony J. Calabro, Leslie G. MacGowan, San Francisco, for respondent.

BRAY, Justice.

Defendant and cross-defendant Pacific Finance Corporation appeals from a judgment, after jury verdict, in favor of cross-complainant Exley Produce Express, Inc.

Questions Presented.

1. The main question presented is whether the verdict and judgment are inconsistent with a simultaneous verdict and judgment in favor of plaintiff and against both Pacific Finance and Exley.

2. Has defendant waived his right to claim inconsistency?

3. Should the judgment in favor of plaintiff be reversed?

Record.

The action arises out of a collision between a truck and trailer belonging to plaintiff and a truck and trailer belonging to Exley. Also involved as an alleged contributing factor to the accident are a Dodge and a Crosley automobile belonging to Pacific Finance, and being operated by Smith, a partner of B & B Auto Sales, with the permission of, and under contract with Pacific Finance. Plaintiff sued Exley, Pacific Finance and B & B for damages to his truck. Exley then cross-complained, for damages to its truck, against plaintiff, Pacific Finance and B & B.[1] Motion by plaintiff for nonsuit on the cross-complaint was granted. No appeal was taken. The verdict and judgment on plaintiff's complaint were in favor of plaintiff and against Exley, B & B and Pacific Finance in the sum of $3,872. Motions for new trial thereon were granted as to B & B and Pacific Finance for insufficiency of evidence. No appeal was taken, so that the judgment now stands solely against Exley. The verdict and judgment on the cross-complaint were in favor of Exley and against B & B and Pacific Finance. The motion for new trial of B & B thereon was granted for insufficiency of the evidence. No appeal was taken so that judgment now stands solely against Pacific Finance, which appeals therefrom.[2]

Evidence.

As will appear, it is unnecessary to give the evidence in detail. The accident took place after midnight in the snow area on highway 99. Shortly before, Smith was driving northerly the Dodge, and towing the Crosley. At a curve in the road which went through a cut where the snow was banked on both sides of the road, the two cars slipped to the left side, ending up in the snow bank there. The evidence was conflicting as to whether the Dodge had chains and as to the distance the two cars projected into the southbound lane. (The distance between the two snow banks was 20–24 feet. There were two paved lanes.) Smith and a companion, after being unsuccessful in removing the cars from the snow bank, went for help. The evidence is conflicting as to whether there were any lights lighted on the cars. Plaintiff's truck and trailer was proceeding northerly in its right lane. The Exley truck was proceeding southerly in its right lane, when suddenly it crossed the center line, side-swiping plaintiff's equipment about opposite the Dodge and Crosley. The Exley driver died before trial so his version of the accident could not be obtained. The evidence was such that the jury could have reached any one of three conclusions: (1) That the accident was the result of the combined negligence of the operator of the parked cars and the Exley truck. This apparently was the view of the jury, although the trial court in granting as against plaintiff new trials to the owner and the operator of the cars apparently considered that the parked cars did not contribute proximately to the accident. (2) That the parked cars were without lights and in such

1. There were other parties to the action, but as nonsuits were granted as to them and no appeals taken, they will be ignored.

2. Exley contends that there is only one judgment in the case. While they are included in only one document labeled "judgment," there are actually two judgments. Therein the verdict on the complaint and the judgment thereon are separately stated from the verdict and judgment on the cross-complaint.

position as to force the Exley truck, in order to avoid hitting them, to hit plaintiff's truck; that Exley, thereby put in imminent peril, was not negligent, and that the sole cause of the accident was the negligence of the operator of the two cars. Evidently the jury did not so conclude, nor did the trial court in granting new trials. (3) That the sole cause of the accident was the negligence of the Exley truck. Apparently the jury did not so find, although the court did.

1. Inconsistency.

[1] This, then, brings us to the question of whether the verdicts and judgments were inconsistent, one with the other. Plaintiff's verdict and judgment were against both the parked cars and the Exley truck.[3] Thus, there was an implied finding that both were negligent. But the jury rendered a verdict in favor of the Exley truck as against the parked cars, thereby impliedly finding that while the Exley truck, whose damage was due to its collision with plaintiff's truck, was negligent as against plaintiff's truck, it was not negligent as against the parked cars. Put another way, the jury impliedly found that when the Exley truck collided with plaintiff's truck, the cause so far as the injury to plaintiff's truck was concerned was the joint negligence of the parked cars and the Exley truck, and yet that the damage to the Exley truck in that same collision was solely caused by the negligence of the parked cars.[4]

[2, 3] Exley contends that there can be a difference between the duty of due care which a person owes a third person and the one he owes himself. Thus, says Exley, its driver could have violated the duty of due care owed plaintiff, and yet at the very same instant have been exercising due care as to himself. "The jury could have concluded that, in choosing his course of escape by attempting to avoid the parked cars, the Exley driver unreasonably transferred his loss to Allen Remy." The fallacy of this argument is that when a person, through no fault of his own, is put in imminent peril by another and has the choice of two alternatives, and chooses the one which later proves to have been the poorer one,—if his choice was a reasonable one in the then light of the circumstances, he is not held negligent for not having taken the better course. The entire fault of the accident is laid to the one whose negligence placed him in peril. But if, as Exley contends its driver did here, he "unreasonably transferred his loss" and is himself injured, he is guilty of negligence proximately contributing to his injury. How a person in one act can be unreasonable and at the same time reasonable, or negligent and nonnegligent, is difficult to understand. This would bar Exley from recovering damages for an injury which would not have happened but for his own negligence contributing proximately to the injury with the negligence of the parked cars. See Tubbs v. Stone & Webster Const. Co., 30 Cal.App. 705, 709, 159 P. 242. Counsel have cited no case, and we have found none, holding that in an accident where a person is negligent as to another person, and is thereby injured, he can avoid the effect of that negligence in a claim against a third person who also was negligent. It is clear that the two verdicts and judgments, finding as they impliedly do, that Exley in one act was both negligent and not negligent, are inconsistent and that the judgment appealed from cannot stand.

3. It is simpler and clearer, in this connection, to refer to the vehicles rather than to owners or operators.

4. The situation is made more confusing by the granting of new trials so that as the judgments now stand, Exley was the sole cause of the collision so far as injury to plaintiff's truck is concerned, while the parked cars are the sole cause of the injury to Exley's truck. Moreover, B & B, who was operating the parked cars, have been granted new trials both as to plaintiff and as to Exley, so we have the anomalous situation that while B & B, the operator of the parked cars, are released from any judgment imposing liability for their operation, the owner, who was not operating them but merely had given B & B permission to do so, and whose liability could only be one derived through B & B, is held liable as to Exley for their operation.

2. Waiver.

[4] Section 619, Code of Civil Procedure, provides: "When the verdict is announced, if it is *informal or insufficient,* in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out." (Emphasis added.) Based upon the language of this section, Exley contends that Pacific Finance should have called the attention of the trial court to the alleged inconsistency of the verdicts at the time they were rendered with the request that they be corrected, and having failed to do so, it has waived its right to object to the verdict on appeal. However, the verdicts were neither "informal [n]or insufficient, in not covering the issue submitted * * *" The verdicts here are of the type referred to in the following language in Reed Orchard Co. v. Superior Court, 19 Cal.App. 648, 663, 128 P. 9, 17, 18: "It is readily admitted that the verdict may be so defective as to be subject to subsequent attack, although no objection be made at the time it is rendered, but the situation here is of a very different nature." In Mish v. Brockus, 97 Cal.App.2d 770, 218 P.2d 849, the reviewing court, in effect, held that the trial court should have required the jury to reconsider their verdicts which were "inconsistent and, when considered together, the intent of the jury is not ascertainable * * *" However, there, the losing party had requested at the time of rendition that the verdicts be corrected. Moreover, the situation was one in which the jury, after finding for the plaintiffs, had failed to insert any sum in the assessment of damages clause. Again, in one verdict the jury found for the plaintiffs and in another against them on the same cause of action. The verdicts on their faces were "informal" and "insufficient." There is nothing in the case to support the contention that the error could not have been considered upon appeal if it had not been called to the attention of the trial court. The same is true of Johnson v. Marquis, 93 Cal.App.2d 341, 209 P.2d 63, where without objection the jury was instructed to reconsider two conflicting verdicts first rendered by it. In Brown v. Regan, 10 Cal.2d 519, 75 P.2d 1063, the jury returned a verdict against one codefendant (the owner of the car responsible for the accident) for $5,000 and against the other (the driver of the car) for "Nothing Dollars." When the plaintiff moved the trial court to secure a clarification of these verdicts, the defendant owner vigorously objected and the court acceded to his position. On appeal it was held that the said defendant had waived his right to question the verdicts on appeal. We have no such situation here. Kirby v. Adcock, 116 Cal.App.2d 570, 253 P.2d 700, is likewise not applicable here. There the trial court's attention was not called to the fact that when polled, the exemplary damages were only agreed to by eight jurors. Such failure was properly considered a waiver of the right to attack the verdict on appeal. Cantor v. County of Santa Clara, 139 Cal.App.2d 441, 451, 293 P.2d 894, held that a jury verdict releasing one joint tort-feasor constituted a release of the other joint tort-feasor held liable by the jury. While the subject was not discussed, there was no requirement that the inconsistency of the two verdicts be first called to the attention of the trial judge in order to raise the question on appeal.

3. Plaintiff's Judgment.

[5] Exley contends that if the judgment in his favor is reversed because of its inconsistency with the judgment in favor of plaintiff, then the latter judgment should likewise be reversed. We see no reason why this should be done. Exley did not appeal from plaintiff's judgment although it could have done so and have made the claim of its inconsistency with the judgment on the cross-complaint. Apparently it was satisfied to be held responsible for plaintiff's damages. The situation is entirely different from the situations presented in Blache v. Blache, 37 Cal.2d 531, 233 P.2d 547, Continental Casualty Co. v. Phoenix Const. Co., 46 Cal.2d 423, 296 P.2d 801, and Vyn v. Northwest Casualty Co., 47 Cal.2d 89, 301 P.2d 869, holding that where portions of a judgment adverse to a nonappealing party are so interwoven

with the whole that appeal from a part affects the other parts, the appellate court can reverse the entire judgment if it is necessary to do justice. Here there were, in effect, two different judgments. The plaintiff was not a party to the second judgment, and in nowise concerned with whether it stands or falls. If Exley has any grounds for reversal of plaintiff's judgment against it, it should have appealed in order to present them.

The situation here is different from that in Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 135 P.2d 569. There the main question was who owned the automobile at the time of an accident. The trial court rendered a judgment in favor of plaintiff against Pacific, thereby holding it to be the owner of the car. Pacific appealed. The court gave judgment against plaintiff and in favor of codefendant Pacheco and Geis, a copartnership, thereby holding that it was not the owner. Plaintiff appealed from that judgment. On appeal the judgment against Pacific was reversed for refusal of the trial court to admit certain evidence indicating that Pacific was not the owner. The reviewing court then reversed the judgment against plaintiff and in favor of the partnership.

Differing from our case—if on a new trial in the Ferroni case the additional evidence showed that Pacific was not the owner of the car, then necessarily the partnership was. The judgment in favor of the partnership might not have been granted if the rejected evidence had been admitted. Thus the two judgments were completely interrelated. Moreover, differing from our case, the plaintiff had appealed from the partnership judgment so that the judgment was squarely before the reviewing court. Here there is no appeal from plaintiff's judgment and it is not before this court.

Nor are the cases of Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850, and Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 55 P.2d 847, 848, in point. In the Inyo case the Supreme Court upheld a judgment of the trial court holding the defendant city of Los Angeles negligently responsible for a break in the Olancha division of the Los Angeles acqueduct. In the Southern Pacific case the trial court found that the city of Los Angeles was not negligently responsible for the same break. On appeal, the Supreme Court pointed out that the cases and evidence were "in a practical sense identical" and stated, 5 Cal.2d at page 548, 55 P.2d at page 849: "The rule that a reviewing court is bound by the findings of the trial court on conflicting evidence cannot apply to a situation such as this, where two lower courts, dealing with substantially the same evidence, have reached different conclusions of law, on the legal issue of whether from this evidence legal responsibility is imposed by the law upon the defendant." The circumstances of those two cases were in nowise similar to those here. But the most important difference is that both judgments were appealed from, and the reviewing court had both before it.[5]

Moreover, if the rule of the Blache, Continental Casualty and Vyn cases, all supra, were applicable to this case, it would not require a reversal of plaintiff's judgment. That rule is only applied "if it is necessary to do justice." Blache v. Blache, supra, 37 Cal.2d at page 538, 233 P.2d at page 551. Such necessity does not exist here.

The judgment appealed from is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SHENK, J., dissenting. CARTER, J., not participating.

5. In view of our holding that the verdicts and judgments were inconsistent, we deem it unnecessary to determine whether or not the anomalous situation which resulted from the trial court having granted a new trial on the cross-complaint to defendant B & B, the operator of Pacific's cars, thereby leaving Exley's judgment stand solely against Pacific, the owner of the cars, whose liability could be only a derivative one, requires the reversal of that judgment.

148 Cal.App.2d 575

COMPANIA HARINERA DE LA BAJA CALIFORNIA, Sociedad Anonima, a corporation, Plaintiff and Appellant,

v.

WESTERN BELTING & EQUIPMENT COMPANY, a corporation, Harold M. Bice, et al., Defendants and Respondents.

Civ. 21772.

District Court of Appeal, Second District, Division 3, California.

Feb. 20, 1957.

Action by milling company against supplier for alleged breach of contract in failing to supply machinery and equipment in time for 1945 crop and for alleged fraud. From judgment rendered for defendant by Superior Court of Los Angeles County, John J. Ford, J., plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that evidence supported trial court's finding that supplier had not agreed to have machinery and equipment ready for 1945 crop.

Judgment affirmed.

1. Appeal and Error ⇐931(1)

On appeal, evidence is to be viewed in light most favorable to respondents.

2. Appeal and Error ⇐994(3), 996, 1011(1), 1012(1)

Weight and sufficiency of evidence, inferences to be drawn therefrom, credibility of witnesses and determination of inconsistency in testimony are for trial judge.

3. Evidence ⇐588

Trial court is not bound to accept testimony of one party's witnesses.

4. Fraud ⇐58(2)
Sales ⇐417

In action by wheat milling company against machinery supplier for alleged breach of contract for furnishing machinery for mill, and for alleged fraud, evidence sustained trial court's findings that supplier had not agreed to deliver machinery in time to mill 1945 wheat crop and that it had not fraudulently induced milling company to enter into agreement by belief that it would be so delivered.

5. Sales ⇐417

In action by wheat milling company against machinery supplier for alleged breach of contract for furnishing machinery for mill, where original agreement provided that machinery would have maximum price of $40,510.55 for new materials but that if supplier could furnish used equipment it would pass savings on to milling company, evidence sustained trial court's finding that, after supplier found that certain used material could be furnished, milling company agreed to make payment of $34,500.

6. Fraud ⇐58(4)

In action by Mexican wheat milling company against American machinery supplier for alleged breach of contract for furnishing machinery for mill, wherein supplier presented evidence that invoice prices were merely used to get merchandise across border, evidence sustained trial court's finding that milling company relied on no alleged false representation containing prices set forth in invoices to induce it to pay more than agreed prices.

7. Sales ⇐422

In action by wheat milling company against machinery supplier for alleged breach of contract for furnishing machinery for Mexican mill, finding that supplier's Mexican representative was to be entitled to 15 per cent commission on machinery and equipment was not irreconcilable with other findings.

8. War and National Defense ⇐166

In action by wheat milling company against machinery supplier for alleged breach of contract for furnishing machinery for Mexican mill, where, under contract, parties had agreed upon price, court was under no duty to determine whether Office of Price Administration prices for used machinery and equipment were controlling.

9. Sales ⇐423

In Mexican milling company's action against American machinery supplier for

alleged breach of contract in failing to deliver machinery on time for 1945 wheat crop, wherein it was found that money on deposit in a Mexican bank was part of the agreed price to which supplier was entitled under contract, and that supplier had not been guilty of any breach thereof, and supplier first counterclaimed but later dismissed counterclaim to recover money on deposit because it believed that such money was uncollectible, release of such money was not an issue in case, and trial court committed no error in refusing to release it to milling company.

Arthur E. Briggs and Charles E. McGinnis, Los Angeles, for appellant.

Robert M. Holstein, San Gabriel, for respondents.

PARKER WOOD, Justice.

Action for damages for breach of contract and for fraud. In a previous trial judgment was for plaintiff. A new trial was granted upon the motions of plaintiff and defendants. In the second trial the case was submitted, pursuant to stipulation, upon the reporter's transcript of the previous trial, and upon the depositions and exhibits on file. Plaintiff appeals from judgment in favor of defendants.

Appellant contends that certain findings are not supported by the evidence.

Defendant Western Belting & Equipment Company is a California corporation, having its principal place of business in Los Angeles. It will be referred to as Western. Defendant Bice is president of Western.

Plaintiff is a Mexico corporation. A flour mill which was operated by plaintiff in Mexicali was destroyed by fire in August, 1944.

On November 29, 1944, Messrs. Curiel, Mendez, Ramos and Garcia, representatives of plaintiff, and Mr. Villasenor, a representative of Western in "Lower Mexico," went to the office of Western in Los Angeles and conferred with Mr. Dutson, secretary of Western, regarding the purchase by plaintiff of machinery and equipment for a new flour mill to be constructed in Mexicali. At that conference the plaintiff and Western entered into a written agreement which is as follows:

"November 29, 1944

"Cia Harinera De La Baja
California, S. A.
"Altamirano No. 498
"Mexicali, B. Calif., Mexico
"Gentlemen:

"Pursuant to your conversation with Mr. J. A. Villasenor, our representative in Lower Mexico, we are pleased to accept your order for the following list of material:

[The list which is omitted here consisted of 25 items describing machinery and equipment, including 4 flour mill units.]

"All of the above material at a net price of $40,510.55. This price includes the engineering cost for your flour mill.

"The above price covers all new material, and where-ever possible, we shall attempt to furnish and secure good, workable second-hand equipment, in which event any saving effected will be passed along to you.

"All material is f. o. b. factory, and upon receipt of a deposit of $15,000 we will proceed immediately with the purchase of this material. The balance of material is to be paid for as it is delivered f. o. b. cars.

"We thank you for the opportunity of furnishing this material to you and await your further pleasures in this regard.

"Yours very truly,
"Western Belting & Equipment Co.
"E. A. Dutson
"E. A. Dutson, Sec'y
"E. T. Greenberg
"E. T. Greenberg, V.P.

"Accepted:
"Ignacio Ramos Manuel Curiel
"Pablo Mendez Antonio Garcia
"Nov. 29, 1944.

"P. S. A 15% commission will be added to any equipment that we sell to you.

"Accepted
"Ignacio Ramos Manuel Curiel
"Pablo Mendez Antonio Garcia"

On December 5, 1944, plaintiff paid $15,000 to Western as the deposit required by the agreement.

Western supplied plans, specifications, and services of engineers for the new mill building, which building was completed in April, 1945. In the latter part of June, 1945, Western made the first delivery of machinery and equipment to plaintiff. Thereafter Western made further deliveries to plaintiff, and by November 5, 1945, the substantial part of the machinery and equipment had been delivered. On that date the undelivered material, which was to be delivered for $929.48, consisted of such articles as a drier, cleaner, sewing machine head, bearings and pulleys. Those articles were delivered in November and December, 1946, and in the early part of 1947. It thus appears that Western completed the principal part of its contract about a year after the contract was made; and that delivery of the few remaining articles was completed about a year thereafter.

Plaintiff paid additional amounts as follows: $6,000 on July 6, 1945; $6,000 on September 21, 1945; and $7,500 by deposit, on September 20, 1945, in a Mexicali bank to the credit of Western. The total payment by plaintiff, as of November 5, 1945, was $34,500. (As of said date, $929.48 remained on deposit in the bank to be used in paying for the undelivered articles above mentioned.) It thus appears that when Western had substantially completed the contract on November 5, 1945, plaintiff had paid $33,570.52 to Western and had left $929.48 on deposit to pay the balance of $34,500.

The total amount to be paid under the contract, according to Western, was $34,500 —the amount which plaintiff had paid, that is, $33,750.52 and $929.48 left on deposit. (Letters from Western to plaintiff, dated September 21 and November 2, 1945, which will be hereinafter referred to, indicate that $34,500 was the agreed price.)

Plaintiff's claim for damages for breach of contract is based upon the alleged failure of Western to perform the contract within the time provided in the contract. It is to be noted that in the written contract of November 29, 1944, the time for performance is not stated. Plaintiff asserts that according to conversations at the time of making the written contract the contract was to be performed in time for plaintiff to mill the 1945 wheat crop. Plaintiff's claim for damages for fraud is based upon alleged fraudulent representations of Western that Western would perform its contract in time for plaintiff to mill the 1945 wheat crop. It may be stated generally that the findings of the court were contrary to plaintiff's allegations with respect to breach of contract and fraud.

The court found, among other things, that on November 29, 1944, plaintiff and Western entered into a written agreement for the purchase and sale of machinery, equipment, and engineering services for a price not to exceed $40,510.55; no time for delivery was specified in the agreement; due to shortage of merchandise because of war conditions, and the uncertainty of delivery dates occasioned thereby, which conditions were known to plaintiff, the parties understood and agreed that Western would proceed immediately with the purchase of the merchandise and that it would be delivered by Western within a reasonable time; pursuant to the agreement the merchandise and engineering services were delivered by Western and accepted by plaintiff within a reasonable time, and Western performed all of its obligations concerning the delivery of said machinery, equipment, and engineering services; Western did not agree to deliver said machinery, equipment, and engineering services in time for plaintiff to mill wheat harvested prior to June 1, 1945 (the "1945 wheat crop" was harvested in May); Western did not induce plaintiff to enter into the agreement by fraudulently representing that Western would perform the agreement in time to enable plaintiff to mill the wheat crop harvested in 1945; nor did Western induce plaintiff to enter into the agreement by making any fraudulent representations to plaintiff.

[1–4] Appellant contends that the findings, just referred to, are not supported by the evidence. The argument of appellant is that the evidence established that Western represented through its agent, Mr. Villasenor, that it would deliver the machinery in time for plaintiff to mill the 1945 wheat crop; the oral representations of Villasenor were a part of the "written agreement" by reason of the words of Western in the written agreement, as follows: "Pursuant to your conversation with Mr. J. A. Villasenor, our representative in Lower Mexico"; the evidence is overwhelming that Villasenor promised delivery of the machinery in time for using it in milling the 1945 wheat crop. In support of that argument, appellant quotes from the testimony of its own witnesses. On appeal, the evidence is to be viewed in the light favorable to the respondents. Mr. Dutson, a witness called by respondents, testified that, at the conversation on November 29, 1944, at Western's office, he told Villasenor and the representatives of plaintiff (Curiel, Ramos and Mendez) that on account of the war Western could not guarantee delivery on any amount of equipment. That was substantial evidence that a definite time of delivery was not agreed upon. As above shown no time of delivery was stated in the written agreement. The weight and sufficiency of the evidence, the inferences to be drawn therefrom, the credibility of the witnesses and the determination of inconsistencies in their testimony are matters for determination of the trial judge. Dillard v. McKnight, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835. The trial court was not bound to accept the testimony of appellant's witnesses. Thompson v. City of Long Beach, 41 Cal.2d 235, 246, 259 P.2d 649. Furthermore, testimony of appellant's witnesses Curiel and Ramos at the trial, regarding time of delivery of machinery, was inconsistent with their testimony by deposition. Appellant's witness, Mr. Curiel, testified at the trial that Mr. Dutson said (in the conversation at his office) that the machinery would be delivered immediately. He (Curiel) testified in his deposition that Mr. Dutson said (in the conversation at his office) that everything would be delivered not later than April 1, 1945, so that plaintiff would be ready to mill the forthcoming crop. Appellant's witness, Mr. Ramos, testified at the trial that Mr. Dutson said (in the conversation at his office) that Western had two units "ready to be given to" plaintiff, and that the rest of the machinery would be delivered to be installed and ready for the 1945 harvest. He testified in his deposition that Mr. Dutson said that Western would deliver two machines by May "because Cia Harinera must start buying wheat during the month of May, 1945." Also, testimony of appellant's witness Mr. Garcia, regarding time of delivery, was inconsistent with the testimony of appellant's witnesses Curiel and Ramos. Appellant's witness, Mr. Garcia, testified at the trial that Mr. Dutson said that if plaintiff would pay a certain amount of money, he would guarantee to have the machinery ready so plaintiff "could start in doing that milling." It thus appears that not only was the testimony of Curiel and Ramos at the trial inconsistent with their testimony in their depositions, but that the testimony of each of the witnesses, Curiel, Ramos and Garcia, was inconsistent with the testimony of each other. The above-mentioned findings to the effect that Western did not agree to deliver the machinery in time to mill the 1945 wheat crop, and that Western did not fraudulently induce plaintiff to enter into the agreement, are supported by substantial evidence.

[5] Appellant contends that another finding is not supported by the evidence. That finding is to the effect that plaintiff agreed to pay and Western agreed to accept $34,500 in full payment for the machinery, equipment and engineering services; that plaintiff paid $33,570.52 and left on deposit in the Mexicali bank $929.48, and thereby plaintiff paid the full agreed price to Western. The agreement of November 29, 1944, provided that the price of $40,510.55 covered all new material, and that Western would attempt to furnish good secondhand

equipment, and if it delivered used equipment the saving would be "passed" to plaintiff. The four mill units were rebuilt or secondhand. Mr. Bice, president of Western, testified that two or three of the other machines were used machines; that he and Mr. Dutson (secretary of Western) met with the officers of plaintiff in Calexico in September, 1945, and discussed settlement of the final agreed price on the contract. About September 20, 1945, plaintiff deposited $7,500 in a Mexicali bank to the account of Western, which deposit was represented by credit slips Nos. 2213 and 221305. On September 21, 1945, two letters which were addressed to plaintiff were signed by Bice, representing Western, and by Curiel and Mendez, representing plaintiff.

One of the letters stated, as follows:

"In accordance with the agreement made today with your Mr. Manuel Curiel and Senor Pablo Mendez, we are permitted to draw against the money deposited for our account in the Banco Del Pacifico S. A., as per letter of September 20, 1945, and their credit receipt in our favor (Nos. 2213 and 221305) of September 20, 1945, upon delivery at Calexico of the following equipment as it arrives—or in other words, payment will be made on partial shipments of the following equipment which will complete all of the material purchased from us, and which will complete the original contract dated November 19, 1944:

[List omitted]

"The above being agreeable to us we hereby accept in representation of the Cia Harinera De La Baja California."

The other letter stated, as follows:

"In accordance with our conversation and agreement of today, you agree to notify the Banco Del Pacifico S. A., that they are to release the $7500.-00 which was deposited to our account on Credit Slip #2213 and 221305, against partial shipments, which invoice will be submitted as partial shipments are made."

At the end of that letter, under the word "Accepted," Curiel and Mendez signed their names.

Thereafter Western delivered additional machinery to plaintiff. About November 2, 1945, Western sent a letter to plaintiff, stating as follows:

"Supplementing our letter of September 21, 1945, the balance still to be delivered on the list of material shown in that letter is as follows:

[List omitted]

"All of the above will be furnished for a total of $929.48, which is the balance due us on the deposit of $7500.00 that was placed to our credit in the Banco del Pacifico on September 20, 1945, on their credit receipt #2213 and #221305. This balance is what is still on deposit after our draft of September 28, 1945, in the amount of $1570.52, and our draft of October 24, 1945, in the amount of $5,000.00 has been paid.

"When these deliveries are completed, it will complete our contract in full as originally signed by all parties dated November 19, 1944."

The two drafts referred to in the letter of November 2 were paid on November 5, 1945. The $929.48, referred to in the letter, is still on deposit in the bank. The said three letters constituted substantial evidence that Western and plaintiff agreed, on September 21, 1945, as to the remainder of equipment to be delivered to complete the contract, and as to the remainder to be paid by plaintiff on the contract price, namely, $7,500. Plaintiff had theretofore paid $27,000. The total of the payments and the deposit was $34,500. The finding to the effect that the final agreed price was $34,500 is supported by substantial evidence.

[6] Appellant contends that another finding is not supported by the evidence. That finding is to the effect that plaintiff

did not rely upon any alleged false representations "concerning the prices set forth in any invoices," so as to be induced to pay to Western more than "the agreed price." Appellant argues that certain invoices showed charges for rebuilt mills exceeding the list price for new mills; and there were other overcharges in the invoices. It does appear that the price stated in Western's invoice for the four rebuilt mills was in excess of the manufacturer's price. The evidence shows that in the spring of 1945 plaintiff knew the manufacturer's price, and that all the payments made by plaintiff, other than the original payment of $15,000, were made in the summer and fall of 1945—after plaintiff knew the manufacturer's price. Mr. Bice testified that the invoices did not represent the actual price to plaintiff; that the purpose of the invoices was to get the merchandise across the border. The total of the invoices was $39,944.39. As above stated, the final agreed price was $34,500. There was no evidence that plaintiff paid more than said agreed price. The finding to the effect that plaintiff was not induced by alleged fraudulent invoices to pay more than the agreed price is supported by substantial evidence.

[7] Appellant contends that a finding, pertaining to commission paid to Villasenor, is irreconcilable with other findings and the judgment. That finding was to the effect that the parties agreed that Villasenor was to be paid 15 per cent of the contract price of the machinery and equipment for his commission; and that pursuant to the agreement Western paid him 15 per cent of the contract price of the merchandise and engineering services, or $5,175. Appellant argues to the effect that according to the contract the commission was to be paid on the cost of machinery and equipment; that according to the finding the commission was paid also on engineering costs and on the commission itself; that if the finding is correct, Western wrongfully took part of the commission from plaintiff. The original contract price was $40,510.55, less any saving effected by obtaining secondhand equipment. There was no evidence that the $34,500, which Western agreed to accept and plaintiff agreed to pay, was based on individual invoices or items. This contention is not sustainable.

[8] Appellant contends that the court erred in failing to make a finding on the issue as to whether O. P. A. prices for secondhand machinery and equipment were controlling in the action. Appellant states in its brief: "This is not an action to recover penalties provided for in the O. P. A. Rules and Regulations, but plaintiff-appellant maintains that a reasonable price could not exceed maximum O. P. A. prices." As above stated, the parties agreed upon the price. Under such circumstance, the court was not required to determine the reasonable value.

[9] Appellant contends that the court erred in failing to release to plaintiff the $929.48 which is on deposit in the Mexicali bank. Western filed a counterclaim for $629.48. (Apparently, the counterclaim was for $629.48, instead of $929.48, for the reason that when the sewing machine head was delivered in the early part of 1947 appellant paid $300 for it.) Western dismissed the counterclaim for the reason (as stated in respondents' brief) that the money on deposit in Mexico was uncollectible. Appellant argues that since Western dismissed its counterclaim, the money on deposit should have been released to appellant. In the present action for damages, the matter as to the release of the money was not an issue. The court did not err in failing to order the release of money on deposit in Mexico.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

148 Cal.App.2d 626

P. L. HARRISON, Plaintiff and Respondent,
v.
James W. FRYE et al., Defendants.

Harry Soogian, Oliver Bredeson and George Kalajian, Defendants and Appellants.
Civ. 8910.

District Court of Appeal, Third District, California.
Feb. 21, 1957.

Action by original grantor for injunction to prevent defendants from the erection of residences and requiring removal of such buildings partially erected which allegedly violated a recorded "Declarations of Restrictions," imposed upon the lots by original grantor and his wife. The Superior Court, Stanislaus County, H. L. Chamberlain, J., entered judgment enjoining defendants from further proceedings in construction of buildings and requiring them to remove buildings then under construction and they appealed. The District Court of Appeal, Warne, J. pro tem., held that trial court committed reversible error in excluding offered evidence to effect that grantors had knowledge of material violations of the restriction by other owners of the lots and had failed to enforce restrictions after such knowledge, that grantor had himself materially violated restriction and grantor had waived and abandoned restrictions and was estopped from enforcing restrictions.

Judgment reversed.

1. Covenants ⇐51(2)

Where no contention was made that term "first class residence building" used in a recorded declaration of restriction calling for the erection of first class buildings only, had a technical or peculiar meaning, term was interpreted in its ordinary sense.

2. Covenants ⇐5

Applying definition of "first class" as synonymous with and including "good quality" and "good condition" and negativing "inferior quality", "off grade", "bad condition", "injurious" and "unsafe" to building restriction calling for the erection of first class buildings only, restriction was not vague, ambiguous or uncertain as to its meaning.

See publication Words and Phrases, for other judicial constructions and definitions of "First Class".

3. Trial ⇐375

Where, by stipulation, court had viewed premises allegedly violating building restriction calling for erection of first class buildings only in that building material was ten years old and fixtures used were 30 or 40 years old, trial judge's observation was evidence, and what trial judge saw could be used alone or with other evidence to support court's findings.

4. Injunction ⇐128

In action by grantor to prevent defendants from erecting residences with previously used materials and requiring removal of buildings partially erected which allegedly violated grantors' recorded "Declarations of Restriction", calling for erection of first class buildings only, evidence was substantial to sustain trial court's finding that the restriction was being violated.

5. Injunction ⇐127

In action by grantor for injunction to prevent erection of residences and requiring the removal of buildings partially erected which allegedly violated grantors' recorded "Declarations of Restrictions" imposed on the lots, trial court erred in excluding offered evidence to effect that grantors had waived and abandoned the restrictions and was estopped from enforcing restrictions.

Jensen & Underwood, Modesto, for appellant.

Cardozo, Trimbur & Nickerson, Modesto, for respondent.

WARNE, Justice pro tem.

This is an action by respondent Harrison against appellants for an injunction to prevent the erection of residences and re-

quiring the removal of such buildings partially erected which allegedly violate a recorded "Declarations of Restrictions" imposed upon the lots herein involved by the original grantor who is the respondent. The restrictions call for the erection of first class buildings only.

On January 30, 1938, respondent and his wife executed the restrictions on a parcel of property described as the Harrison Subdivision, and it was admitted by appellants that these restrictions were recorded and applied to the lots owned by the appellants.

On March 22, 1954, appellants obtained a building permit for the erection of the buildings in question. The materials proposed to be used were previously used materials purchased from buildings erected in Richmond near the Richmond shipyards and were ten years old. The materials were described by some of the witnesses as being old and deteriorated and some of the fixtures as being 30 or 40 years old.

The appellants purchased the lots and commenced construction before title was formally delivered to them. They had no actual knowledge of the restrictions until the present action was brought; however, they did admittedly have constructive notice of these restrictions by reason of the recording.

Upon trial, respondent moved for leave to dismiss as to Frye, George Alexander and Louise Alexander. The motion was granted. The court rendered judgment against appellants enjoining them from all further proceedings in the construction of the buildings, requiring them to remove the buildings then under construction and awarding costs to respondent. Appellants' motion for a new trial was denied. They appeal from the judgment.

The first contention made by the appellants is that the term "first class residence building" is so vague, ambiguous and uncertain that a building restriction requiring the erection of such buildings cannot be enforced. Appellants argue that building restrictions, by reason of their operation upon real property, are strictly construed since there are public policies in favor of the free use of land and the free alienation of land, and such restrictions must be clear, certain and unambiguous before they will or can be enforced.

"Words should be understood in their ordinary and popular sense rather than according to their strict legal meaning. This ordinary and popular sense is to be related to the circumstances under which the words are used, having in mind the purpose of the contract and the general situation which brought it into existence." (12 Cal.Jur.2d 353–354.)

"In the absence of technical words or phrases whose meanings are obscure, the office of interpretation belongs to the court. If the contract explains the meaning of the words, there is no need to go outside the contract. If, however, because of the use of technical or trade terms, the language is not plain, the testimony of those skilled in the art or experts in the field is admissible as to the meaning of the language. Where the words are not used in any special or local sense, their meaning is not a matter to be established by expert testimony, and they are to be given their ordinary meaning." (12 Cal.Jur.2d 356–357.)

[1] It does not appear, nor is there any contention made by either side, that the term, "first class residence buildings" has a technical or peculiar meaning; therefore, the term is to be interpreted in its ordinary sense.

[2] Ordinarily, the words "first class" are synonymous with, and include "good quality" and "good condition" and negative "inferior quality", "off grade", "bad condition", "injurious" and "unsafe". Roget's Thesaurus, par. 648 and 649; Pacific Feed Co. v. Kennel, 63 Cal.App. 108, 218 P. 274. Applying this definition to the restriction in question, there is nothing vague, ambiguous or uncertain as to its meaning or as to what was intended by the words "first class residence buildings."

[3, 4] There is substantial evidence in the record to sustain the trial court's finding that the restriction in question was being violated by the appellants. Further, by stipulation of the parties, the court viewed the premises. His observation on viewing the premises became evidence in the case, and what he then saw may be used alone or with other evidence to support the findings. Wheeler v. Gregg, 90 Cal. App.2d 348, 366, 203 P.2d 37, and cases cited therein; McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 889, 264 P. 2d 932.

Appellants cite Threedy v. Brennan, 7 Cir., 131 F.2d 488, and Cleveland v. Martin, 218 Ill. 73, 75 N.E. 772, 3 L.R.A.,N. S., 629, to support their contention that the term, "first class residence building" is vague, ambiguous and uncertain. We have considered each of the cases and find nothing in either that may be said to be controlling in the case at bar.

The appellants contend next that the court committed error in preventing appellants from introducing evidence to prove the respondent's waiver and abandonment of the Declarations of Restrictions and the estoppel of respondent to enforce the restrictions. In summary, the appellants offered to prove: (1) Material violations of the restrictions by other owners of lots in the Harrison Subdivision. (2) Respondent's knowledge of these violations for 3 to 8 years. (3) Respondent's failure to enforce restrictions after knowledge of the above-mentioned violations. (4) Material violations by respondent himself. (5) Respondent's statements to lot-owners in the subdivision that there were no restrictions; that they were no longer effective. (6) There were so many material violations of the restrictions as to amount to a general disregard and abandonment of the restrictions. (7) The appellants carefully examined the subdivision before commencing construction and determined that their homes were as good or better than those homes immediately surrounding them. They relied on this examination. (8) The appellants noted the size of the homes, the use of used materials, the fact that one home within 200 feet of them had no foundation and various other violations before commencing construction, though they did not know at the time that there were any restrictions. They relied on these observations. (9) The appellants had no actual knowledge of restrictions until served with respondent's complaint.

[5] In their answer to plaintiff's complaint, the appellants alleged, as a separate defense, what they offered to prove. The law applicable to this question is found in American Law of Property, Volume II, pages 440–442 and 444, wherein it is stated:

"* * * [T]here may exist personal equities between the parties to the suit which will justify the denial of injunctive relief * * *.

"The equitable defense of clean hands is involved in those cases where the complainant is himself guilty of similar violations of corresponding restrictions. Where the complainant has himself violated an equitable servitude against his own lot, he is debarred from seeking equitable relief against his neighbors for similar violations on their part. This defense has been allowed even in cases where the complainant's breach, although substantial, has been of a lesser degree than that of the defendant. But where the violation by the complainant has been clearly of a trivial and immaterial character, the defense is denied as respects a substantial violation by the defendant which defeats the primary purpose of the restriction. Likewise, a breach by the complainant of a different restriction will not be a bar to equitable relief where the restrictions are essentially different, and the performance of each bears little relation to the other * * *.

"The equitable defense of acquiescence arises where the complainant has acquiesced in the violation of the same type of restriction by third parties. Where the complainant has failed to enforce a similar equitable servitude against third parties, he has debarred himself from obtain-

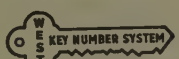
ing equitable relief against the defendant for subsequent violations of the same character. The reason for allowing this defense of acquiescence is the belief that the complainant, by his conduct in failing to seek enforcement against similar violations by third parties, has induced the defendant to assume that the restrictions are no longer in effect. * * *" (Pp. 440–442.)

Also, "The right to enforcement of an equitable servitude, like any other incorporeal property interest in the land of another, is subject to the equitable defense of estoppel. * * *" (P. 444.)

Applying these principles of law to this case, we believe that the trial court committed error in excluding the offered evidence, and that such error requires a reversal of the judgment in order that the court may, upon a new trial, consider such evidence in determining whether plaintiff is entitled to an injunction.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



148 Cal.App.2d 593

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas Flores SANCHEZ, Defendant and Appellant.

Cr. 2706.

District Court of Appeal, Third District, California.

Feb. 20, 1957.

Prosecution for robbery. From judgment of conviction entered in Superior Court, Sacramento County, Gordon A. Fleury, J., defendant appealed. The District Court of Appeal, Warne, J. pro tem., held that where defendant introduced evidence of alibi and jury was instructed that defendant was entitled to an acquittal if, after consideration of all evidence, jury had reasonable doubt whether or not defendant was present at time robbery was committed, refusal of court to instruct that prosecution had burden of proving presence of defendant at time and place of alleged crime was not error.

Judgment affirmed.

1. Criminal Law ⇐829(7)

In robbery prosecution where defendant introduced evidence of alibi and jury was instructed that defendant was entitled to an acquittal if, after consideration of all the evidence, jury had reasonable doubt whether or not defendant was present at time robbery was committed, refusal of court to instruct jury that prosecution had burden of proving the presence of defendant at time and place of alleged crime was not error.

2. Criminal Law ⇐1171(3)

Where district attorney's argument to jury in robbery prosecution referred to fact that defendant's alibi witness was from Reno, Nevada, that witness' expenses were being paid by defendant and that no mention of witness was made at preliminary hearing and the remarks were all based upon the record, district attorney was not guilty of prejudicial misconduct.

3. Criminal Law ⇐1171(3)

Where testimony of defense witness was impeached by proper rebuttal evidence and district attorney stated to jury in robbery prosecution that jury had patched up story from defendant and that not much more needed to be said about defense witness, statements were only fair comment as to credibility of defense witness and did not constitute prejudicial misconduct by district attorney.

4. Criminal Law ⇐1037(1, 2), 1044

Where accused, in robbery prosecution, did not object, assign error, ask that statements be stricken or that jury be instructed to disregard statement made by district attorney in argument to jury, contention

that district attorney was guilty of misconduct could not be raised for first time on appeal.

Harlan M. Thompson, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by J. M. Sanderson, Deputy Atty. Gen., for respondent.

WARNE, Justice pro tem.

The appellant was convicted of robbery in the second degree. He appeals from the judgment and from a purported order denying a motion for a new trial.

The purported appeal from an order denying a motion for a new trial must be dismissed since the record reveals that no such order was made, nor does it appear that the appellant made such a motion.

On November 26, 1955, Zois Trilivas was residing in a hotel in the city of Sacramento. Between 8 and 8:30 p. m. on the evening of that day he left his hotel room and went downstairs to the El Toro Bar, where he met Sanchez, the appellant. After having two small beers, Trilivas was engaged in conversation by appellant, and they had a beer together. Trilivas paid for his own beer, and at that time appellant observed the amount of money in Trilivas' wallet, some seven hundred and fifty dollars. Appellant then told Trilivas that he had a couple of girls, and they left the bar and entered appellant's car. Appellant then picked up the two girls, and the four went to another bar, where they remained drinking and dancing for two or three hours.

Sometime after midnight, appellant, Trilivas and the two girls drove to Land Park and parked. Appellant then got out of the car with one of the girls, and the victim remained in the car with Amelia Ortega, the other girl. After some conversation regarding an act of prostitution Amelia Ortega yelled to appellant who came over and pulled Trilivas from the car. Appellant and the two girls then beat Trilivas severely around the head and groin and took Trilivas' wallet containing his money. Appellant and the two girls then drove off. Trilivas was later found in the park by the police and taken to the emergency hospital.

Appellant's defense was that of an abili; he and his brother and a bartender from the Gold Trail Bar in Reno, Nevada, testified that the appellant was in Reno at the time of the robbery. In rebuttal, the owner of the El Toro Bar and a woman employee thereof testified that appellant was in Sacramento at the El Toro Bar between 8 and 9 o'clock on the evening of November 26, 1955, and that appellant left the bar with Trilivas. Trilivas identified Sanchez as the man who robbed him.

[1] Appellant claims two errors. The first is that the alibi instruction given by the court in lieu of one offered by appellant was erroneous, because the court did not include in the instruction a definite and specific statement covering the burden of proof applicable to the defense of alibi. The rejected instruction read in part as follows: "* * * the burden of proving the presence of the defendant at the time and place of the alleged crime devolves upon the prosecution, and the prosecution must prove beyond a reasonable doubt that he was present at the time of the alleged commission of the offense. It does not devolve upon the defendant to prove that he was not present. * * *"

In lieu thereof the court instructed: "The defendant * * * in this case has introduced evidence to prove that he was not present at the time and place of the commission of the alleged offense, for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt whether or not the defendant was present at the time the crime was committed, he is entitled to an acquittal." Appellant's contention is without merit. The identical instruction on alibi was approved in People v. Shaw, 115 Cal.App.2d 597, 603, 252 P.2d 670. In that case the defendant requested an instruction on the

subject of alibi very similar to the one requested by appellant in the instant case. In that case the trial court refused the defendant's requested instruction and gave the exact instruction as given in the case at bar. The appellate court answered Shaw's claim thus:

"Shaw claims the court's instruction could have misled the jury into believing that the defendants had the burden of proving their asserted alibi beyond a reasonable doubt.

"The point is not well taken. The instruction given is not susceptible of such an interpretation. It simply told the jury that if their consideration of all the evidence left them with a reasonable doubt as to the defendants' presence, they must acquit. That was an accurate and clearly understandable statement of the applicable provision of the law. [Citing cases.]"

The holding in the Shaw case has been approved in People v. Jordan, 45 Cal.2d 697, 706, 290 P.2d 484.

[2, 3] Defendant's second contention is that the district attorney was guilty of prejudicial misconduct in his argument to the jury. There is no merit in said contention. The district attorney's reference to the fact that one of the witnesses was from Reno, that his expenses were being paid by the defendant, and that no mention of this witness was made at the preliminary hearing, were all based upon the record in the case and are matters which the district attorney coulld properly comment on.

The statements: "you have a patched up story from the defendant" and "I don't think much more need be said about Mr. Tessler," amount to no more than fair comment as to the credibility of the defense witness whose testimony was impeached by proper rebuttal evidence. People v. Ryan, 199 Cal. 513, 250 P. 164; People v. Reznick, 75 Cal.App.2d 832, 171 P.2d 952.

[4] The record reveals that at the time the remarks were made, the defendant did not object to or assign them as error, or ask that they be stricken, or ask that the jury be instructed to disregard them. Appellant is, therefore, precluded from now urging this contention for the first time. People v. Simpson, 43 Cal.2d 553, 275 P.2d 31; People v. Sutic, 41 Cal.2d 483, 261 P.2d 241; People v. Hampton, 47 Cal.2d 239, 302 P.2d 300.

In deference to counsel appearing for defendant on this appeal, we feel we should state that he was not defendant's attorney at the trial, nor did he prepare the notice of appeal. Defendant himself appealed, and, at his request, this court appointed counsel to appear for him.

The purported appeal from an order denying a motion for a new trial is dismissed, and the judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



148 Cal.App.2d 570

Clayton STRAUSS and American Transfer Company, a corporation, Plaintiffs, Cross-Defendants and Respondents,

v.

Annie OWENS et al., Defendants,

Oad Porter, Cross-Complainant and Appellant.

Civ. 5358.

District Court of Appeal, Fourth District, California.

Feb. 19, 1957.

Action by owner and operator of automobile for injuries sustained in automobile collision against operator of other vehicle and unnamed defendants allegedly liable as owners of other automobile or as principals of operator. The Superior Court of Tulare County, W. G. Machetanz, J., entered order striking cross-complaint filed by one who was father of child killed in other automobile in collision, who sought recovery for her death but who had not

been served by plaintiffs. He appealed. The District Court of Appeal, Griffin, J., held that father whose minor child was killed in collision was a stranger to cause and was not entitled, as a matter of right, to appear over objection of plaintiffs, and court's order allowing father to file cross-complaint was subject to motion to vacate.

Order affirmed.

1. Parties ⇐73

In action by owner and operator of automobile, for damage sustained in collision, against operator of other automobile and fictitiously named defendants limited to include only those who might own interest in other automobile or who might be responsible for negligence of driver as her principal, father of one whose minor child was killed in collision while riding as guest in such other automobile was a stranger to cause and was not entitled, as a matter of right, to appear over objection of plaintiffs. West's Ann.Code Civ. Proc., §§ 389, 442, 473, 1014.

2. Estoppel ⇐52

A "waiver" is the intentional relinquishment of a known right with knowledge of the facts, and it is voluntary act implying an abandonment of right which can be enforced or a privilege which is subject to be exercised.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

3. Parties ⇐93(2)

Plaintiffs' demurring to and answering cross-complaint did not waive their right to object thereto on ground that cross-complainant had no right to intervene in action, where answer and demurrer claimed that cross-complainant had no right to file cross-complaint, demurrer was sustained on such ground, and after trial court, without notice to plaintiff, entered order granting motion to file cross-complaint, plaintiffs made timely motion to review such order and trial court thereupon entered order refusing permission to file cross-complaint. West's Ann.Code Civ. Proc., §§ 389, 442, 473, 1014.

Xenophon F. Lang, Los Angeles, for appellant.

Crowe, Mitchell & Hurlbutt, Visalia, for respondents.

GRIFFIN, Justice.

On September 10, 1954, plaintiffs brought this action against defendants Annie Owens, John Doe, Jane Doe and Red Company, a corporation, arising out of a collision between a truck being driven by the plaintiff Clayton Strauss and owned by plaintiff American Transfer Company, and an automobile being driven by defendant Annie Owens (hereinafter referred to as defendant).

In the first cause of action it is alleged that the fictitiously named defendants were sued as owners of the motor vehicle being driven by defendant, which would make such defendants responsible for the alleged negligence of defendant Owens in her operation of the vehicle. Under other causes of action they are similarly named, and it is alleged therein that they were principals for defendant and that she was driving as their agent, thus making them liable for her claimed negligence. Only Annie Owens was served with the complaint and summons. On November 16, 1954, she appeared by answer, denied that the motor vehicle being driven by her was owned by the fictitious named defendants but alleged it was owned by one Gladys Porter, deceased. She also denied she was acting as agent of any defendant sued under a fictitious name. The case was set for trial for February 10, 1955, and by stipulation was continued to June 15, 1955.

On May 18, 1955, for the first time, appellant Oad Porter, without service of summons on him, sought to inject himself into said action by filing an answer and alleged that he was sued therein as John Doe. He denied all the allegations of plaintiffs' complaint but did not purport to identi-

fy himself as the owner of the vehicle involved nor as principal for whom defendant Owens may have been driving. In addition, he filed a cross-complaint against plaintiffs and only alleged that he was the father of a two year old child who was riding as a guest with the defendant Owens when the child was killed as the result of plaintiffs' negligence. He sought damages against plaintiffs in the sum of $50,000. A demurrer to this cross-complaint was interposed by plaintiffs which included a ground that it could not be ascertained therefrom how or in what capacity Oad Porter was supposed to be one of the defendants named in the plaintiffs' complaint and sued therein as John Doe. Before ruling thereon appellant filed an amended cross-complaint and failed to identify himself in any capacity which would make him accountable for any negligence of Annie Owens but only alleged that he was the father of the aforesaid deceased child, as heretofore indicated. A demurrer was again interposed on the same grounds. On June 20, 1955, the trial court entered an order, in ruling on the demurrer, stating that appellant had not been served; that he did not show he was a party to the action or had any authority to file a cross-complaint under section 389 of the Code of Civil Procedure; that so far as the record was concerned, he was a complete stranger to the action and a motion to strike it, had it been made, would have been good. The demurrer was sustained with 15 days to amend. On June 24, 1955, appellant filed a motion for permission to file a cross-complaint on the ground he was a necessary party to a complete determination of the controversy. The motion came on for hearing. Plaintiffs' counsel appeared to oppose the motion, but due to the fact that there was no appearance by appellant or his counsel the motion was not heard. On July 8, 1955, the court, by minute order, without further notice to counsel for plaintiff, submitted the motion and granted it. Plaintiffs again demurred to said first amended cross-complaint then filed on the same grounds heretofore indicated. The amended cross-complaint was couched in about the same terms as the original cross-complaint. Upon receiving notice of the subsequent overruling of the demurrer plaintiffs moved to strike from the record all of the pleadings filed in the action on behalf of the appellant on the ground he was not a proper party to the action and was not authorized to appear in it. This motion came on for hearing before Judge Stone and was denied. Plaintiffs claim this judge denied it upon the erroneous assumption that plaintiffs had been afforded an opportunity to oppose the motion for permission to file a cross-complaint and that the former Judge (Machetanz) had already fully considered the question and had ruled upon it. Plaintiffs then moved for relief from the situation created under section 473 of the Code of Civil Procedure, and to avoid default under the cross-complaint filed an answer thereto and recited therein that by virtue of the filing of the answer plaintiffs did not waive their objection that appellant was not a proper party and did not waive their right to raise the question under the motion filed. These facts were presented in the form of an affidavit in support of the relief sought and no counter affidavits were filed in opposition to it. Judge Stone then heard the motion and vacated his order denying plaintiffs' motion to strike all the pleadings filed by appellant and ordered the matter transferred to Judge Machetanz' court for further hearing. This judge apparently recognized that he had ordered appellant's motion for permission to file a cross-complaint submitted without calling it for hearing and without giving plaintiffs' counsel an opportunity to resist or oppose said motion and he set aside his order granting said motion. He reinstated appellant's motion to file a cross-complaint to the law and motion calendar and due notice of the hearing thereon was given to appellant. On the day fixed, neither appellant nor his counsel appeared. Plaintiffs' counsel opposed the filing and the matter was submitted. On February 1, 1956, that judge entered an order to the effect that he did, on January 28, erroneously rule on the original motion for permission to file a cross-complaint without the matter being

called for hearing and that it was submitted in the absence of counsel. He then stated that it appeared from the files in the case that appellant was never served as a fictitious named defendant; was not intended to be sued as a defendant; that judgment could never be obtained by plaintiffs against him; that accordingly appellant could not properly force himself into the case; and that he did not feel plaintiffs were estopped from moving to strike, by reason of having demurred to the improperly filed cross-complaint. He then denied appellant's request to file a cross-complaint and struck all pleadings filed by appellant and plaintiffs' demurrers and answers thereto. Thereafter the case was set for trial as to the remaining defendant and it has been determined as between plaintiffs and that defendant.

Appellant appeals from this order, claiming he was properly before the court as a necessary party to the action since appellant's cause of action arose out of the same transaction; that he was duly authorized by order of the court to appear in said action by cross-complaint; that the court erred in setting aside the previous orders allowing such action; and that plaintiffs appeared by demurrer and accordingly waived any objection to appellant's right to file a cross-complaint, citing such authority as Farmers' & Merchants' Nat. Bank of Los Angeles v. Peterson, 5 Cal.2d 601, 606, 55 P.2d 867; Day v. Western Loan & Bldg. Co., 42 Cal.App.2d 226, 108 P.2d 702; Sax v. Clark, 180 Cal. 287, 180 P. 821; Cyr v. Cyr, 206 Cal. 8, 272 P. 751; and Secs. 389, 442 and 1014, Code Civ.Proc.

[1] On the face of the complaint it does not appear that appellant was a necessary party to the original action or could so qualify. The fictitiously named defendants were limited to include only those who might own an interest in the motor vehicle and by reason thereof might be responsible for the negligence of the driver, and any person who, as principal, allowed Annie Owens, as his agent, to operate said vehicle, under the theory of respondeat superior. The deceased child admittedly was riding as a guest in said car, and plaintiffs do not claim any recovery from her. Appellant therefore was a stranger to the cause of action and was not entitled, as a matter of right, to appear in it. Mercantile Trust Co. of San Francisco v. Stockton Terminal & E. R. Co., 44 Cal.App. 558, 186 P. 1049; Bayle-Lacoste & Co. v. Superior Court, 46 Cal.App.2d 636, 645, 116 P.2d 458; Cohen v. Hellman Commercial Trust & Sav. Bank, 133 Cal.App. 758, 764, 24 P.2d 960. A complete determination of the controversy between plaintiffs and the defendants sued could be had without the presence of the appellant. Appellant never was served and never was intended to be a defendant in this action.

The order of the Superior Court allowing appellant to file a cross-complaint, under the circumstances here related, was subject to a motion to vacate under section 473 of the Code of Civil Procedure. No abuse of discretion appears in granting said orders.

[2, 3] As to the claimed estoppel or waiver of the right to question appellant's right to appear in the action, by virtue of the appearance of plaintiffs by demurring to and answering the cross-complaint, it appears that at the first opportunity plaintiffs appeared and demurred thereto and claimed that appellant did not affirmatively show he was a party entitled to file such a cross-complaint. The demurrer was sustained on this ground. The amended cross-complaint likewise set forth no sufficient grounds in this respect. Although there was an order entered granting the motion to file a cross-complaint, it was, according to the order, inadvertently granted without a proper notice of hearing. On every occasion, and at the first opportunity, plaintiffs did appear, either by demurrer or motion, and object to appellant injecting himself into this action on the ground stated. Timely motion was made to review the erroneous orders entered. A waiver is the intentional relinquishment of a known right with knowledge of the facts. It is a voluntary act and implies an abandonment of a right which can be enforced or of a privi-

lege which can be exercised. 25 Cal.Jur. p. 926, secs. 2 and 3. No such intentional relinquishment of plaintiff's right to oppose the filing of a cross-complaint by appellant is here indicated. Under the circumstances it cannot be said that the court was in error in holding that plaintiffs did not waive the objection. The authorities cited by appellant are not inconsistent with the conclusions here reached.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



148 Cal.App.2d 597

Herbert Arthur VIND and Carmen Leona Vind, Plaintiffs and Respondents,

v.

ASAMBLEA APOSTOLICA DE LA FEEN CHRISTO JESUS, a/k/a Apostolic Church of the Faith In Christ, Jesus, Jesus Valdez, et al., Defendants and Appellants.

Civ. 5347.

District Court of Appeal, Fourth District, California.

Feb. 20, 1957.

Rehearing Denied March 20, 1957.

Hearing Denied April 17, 1957.

Action for injuries sustained in collision of plaintiffs' automobile and automobile driven by assistant pastor who was enroute to regional meeting of defendant church. The Superior Court of Tulare County, Frederick E. Stone, J., entered judgment upon verdict for plaintiffs, and defendant church appealed. The District Court of Appeal, Griffin, J., held that evidence, though contradicted, warranted finding that assistant pastor was authorized to represent local church as its pastor, at regional meeting, and was an official or agent or employee of defendant church at time of collision, and that he was acting within scope of his employment at that time.

Judgment affirmed.

1. Automobiles ⇐197(1)

The mere citation of its constitution and by-laws would not, in itself, absolve church from acts of assistant pastor in tort action against church arising out of alleged negligence of assistant pastor in causing automobile collision if, in fact, assistant pastor was agent of church.

2. Automobiles ⇐244(26)

In action for injuries sustained in collision of plaintiffs' automobile and automobile driven by assistant pastor who was en route to regional meeting of defendant church, evidence, though conflicting, warranted finding that assistant pastor was authorized to represent local church as its pastor, and was official or agent or employee of defendant church at time of accident. West's Ann.Code Civ.Proc., § 2055; West's Ann.Vehicle Code, § 525.

3. Automobiles ⇐193(8)

If employee is driving automobile in discharge of duty for which he was employed by employer, or for accomplishment of result desired by employer, latter may be held liable under doctrine of respondeat superior.

4. Principal and Agent ⇐159(1)

Under Civil Code, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business. West's Ann.Civ.Code, § 2338.

5. Appeal and Error ⇐996

Where evidence will support different inferences, choice of inferences is for the trial court, and its findings based on inference drawn cannot be disturbed on appeal.

6. Principal and Agent ⇐22(1), 122(1)

It is general rule that extrajudicial declarations of agent are not admissible to prove either fact of an agency or the extent of his authority.

7. Appeal and Error ⇐231(7), 1051(1)

Where there was other competent evidence produced on subject, and appellant

had made no objection to admission of evidence at the time, on the ground indicated, no prejudicial error appeared in considering testimony consisting of extrajudicial declarations of agent as proof of extent of his authority.

8. Automobiles ⇐244(26)

In action for injuries sustained in collision of plaintiffs' vehicle and vehicle driven by assistant pastor who was en route to regional meeting of defendant church, evidence warranted finding that assistant pastor was acting within scope of his employment for defendant church at time of collision.

J. B. Mandel and G. C. Wilbert, Los Angeles, for appellants.

Louis L. La Rose, Visalia, for respondents.

GRIFFIN, Justice.

This action was filed by plaintiffs and respondents, Herbert A. Vind and wife, alleging that on October 17, 1953, defendant Raphael Arias was so negligently operating an automobile as to cause it to crash into a car driven by plaintiff husband, which caused serious personal injuries and property damage to plaintiffs. It is then alleged that defendant Arias was the agent, servant and employee of defendant and appellant Asamblea Apostolica de la Feen Christo Jesus, a corporation, also known as Apostolic Church of the Faith in Christ, Jesus (hereinafter referred to as the Church.) Defendant Arias' answer denied negligence, denied agency, and pleaded contributory negligence of plaintiffs. Appellant Church made the same denials and defenses. A trial without a jury resulted generally in a finding in favor of the plaintiffs and a judgment was entered against both defendants for $21,943.51. Defendant Church alone appealed and the only questions presented are: (1) Is the evidence sufficient to support the finding of the trial court that the driver of the car, Arias, was then and there the agent, servant and employee of the Church; and (2) If so, was he acting within the scope of his employment?

On the day of the accident, about 10 a. m., plaintiff was driving his car north on highway 99 in Tulare County. Arias was driving his own car south on that highway. A Mr. Cota, a bishop and secretary of the Church corporation testified, under section 2055 of the Code of Civil Procedure that on October 16th, 17th and 18th, the Church was having a regional convention or a conference of all of the 29 churches of the district at Tulare; that defendant Arias was then assistant pastor of a church in Sanger, the title to which was held by defendant Church; that Arias had a license to preach the gospel, baptize, and officiate at funeral ceremonies. The license bears the seal of the appellant Church corporation. It was received in evidence he testified that some months prior to and after October 17th, the original pastor in the Sanger church was confined to the hospital and Arias was assisting the pastor in the Sanger church but was paid nothing by the Church for his services; that he was working in the daytime at a "Frosty Freeze Company" and in the Sanger church work at night; [Arias' name and address (the address of the Sanger church) appears on the register of ministers in the Church as a deacon]; that in said defendant Church corporation the president is a bishop; that the members of the Board of Directors are all bishops and the bishops appoint pastors and relieve them of their appointments when necessary; that the president calls regional conventions for the purpose of fellowship and when necessary to discuss the Church affairs. He then furnished a copy of a circular invitation which he said was sent out to "all Bishops, Elders, Pastors and the rest of the Congregation" to attend the regional convention at Tulare on October 16th, 17th and 18th. This invitation concludes with the expression: "We supplicate the different groups to take an interest in preparing, * * * this glorious feast, spiritual feast."

The constitution and by-laws of the Church corporation were received in evi-

dence. They provide, in part, that "The amount that should be contributed by each member of the Apostolic Church shall be at least a tenth part of his earnings or possessions * * *"; and that "the Bishops, Elders, Pastors and other Ministers shall be supported from the ninety (90) per cent that is left in the Church". It is then provided that mission churches may be organized by the defendant Church corporation; that "in the conventions all the churches shall be represented by the pastors, but when, through unforeseen events the pastor cannot attend he shall appoint or delegate an assistant pastor or an ordained deacon"; "the assistants of the pastors are those ministers who occupy the second place in the government of the local church and in the absence of the pastors, and with the previous authorization by them, will be able to carry out the same functions". Although Valdez, the pastor who was ill at the time, testified he did not delegate anyone to appear for him at the convention and at the conference, this testimony might be overcome by other evidence.

A Mr. Gaylord, testifying for plaintiffs, said he and Mr. Vind called on the witness Cota at a church in Tulare and Cota told them Arias was a representative of the church of Sanger, the assistant pastor; that Vind suggested that Arias must have been drunk at the time he ran into plaintiffs' car because he crossed over the center line of the highway and collided with it; that Cota stated Arias was not drunk and was not a drinking man; that Cota then showed him some paper bearing Arias' name and said: "This is why Arias was coming to Tulare * * * this is his authorization * * * to appear * * * to come and attend this meeting * * * to represent the Sanger Church"; that the paper contained the signatures of certain individuals and the seal of the Church corporation. He then testified they interviewed Arias, who lived in the pastor's home in Sanger; that they discussed the amount of plaintiffs' injuries and expenses and Arias told them he received a small amount of money from the Sanger church and had to hold a job on the outside in order to live; that he explained the absence of the regular minister on October 17th when he was on his way to Tulare to attend the Church meeting. Plaintiff Vind corroborated this testimony and said Arias told him he worked full time for the Sanger church as assistant pastor and received pay for it; that after showing him his injuries and telling him he was unable to work, Arias offered to turn his car over to plaintiff as part payment but he told Arias this would not be sufficient since he earned $13,000 a year; that he told Arias to talk it over with the officials of the Church, which he agreed to do, and let him know; that he then gave Arias his address and left, and that no correspondence was received from him or them. Arias pleaded guilty to the violation of section 525 of the Vehicle Code. A process server served Arias at the Frosty Food plant with the complaint in this action. He testified Arias said that he carried some insurance on the car but found he did not have the kind that would cover him on this accident; that he "was going to Tulare to attend a meeting for our Church"; that he was studying to be a pastor and was going to Tulare to "represent the Church". A traffic officer at the scene said he interviewed Arias and found a Bible on the seat and he believed he told the officer he was going to Tulare to preach or something connected with church work. The witness Cota and defendant Arias denied generally the wording of these purported conversations.

The president of the defendant Church testified generally as to its general laws and rights and said the corporation appoints the several pastors, owns the churches, and the pastors and their assistants, including ordained deacons, control the government of the Church, locally (which is autonomous); that he never authorized, appointed nor ordained Arias pastor of that Church to act for the corporation, and he knew he received no compensation. One of defendants' witnesses did testify that Arias did occupy part of the Sanger church premises, rent free, for over two years.

Arias testified it was about one year, and he repaid it in services in caring for the pastor's wife and the local church; that he received no other compensation from the Church during the year's absence of the pastor but did give one-tenth of the salary he received from the Frosty Food store to it; and that no one told him to go to this convention but he did so on his own volition.

It affirmatively appears from the by-laws of defendant Church that in the conventions called by its president, all churches should be represented by the pastors. The trial court might consider, from the provisions of the by-laws, that each pastor, when attending such a convention, did represent not only his church, but represented, to some extent, the defendant Church in reference to its property and the government and finances of the several churches. Empire Star Mines Co. v. California Employment Commission, 28 Cal.2d 33, 43, 168 P.2d 686; Malloy v. Fong, 37 Cal.2d 356, 370, 232 P.2d 241. The pivotal question then is whether there was any substantial evidence that Arias, the assistant pastor, during the years of sickness of the pastor of that church, was similarly authorized. There is direct evidence of the pastor, the bishop, and of Arias, that he had no such authority delegated to him. On the other hand, there is, at least, circumstantial evidence that he was so authorized. He was living on the premises of the Church during that time; he was conducting the services at night; and he was listed in the register of ministers at that address as the deacon. It was conceded that he was assistant pastor at the time. He was licensed to preach, baptize, and officiate at funerals, although the right to perform wedding ceremonies was denied to him. This limitation would not be determinative. He was otherwise actually performing the authorized duties of the pastor although there is evidence he consulted with the pastor at the hospital in reference to some of them. There is evidence that the bishop showed plaintiff some paper and said: "This is why Arias was coming to Tulare * * * This is his authorization * * * to appear * * * and come and attend this meeting * * * and to represent the Sanger church"; that that paper contained the original signatures of certain individuals and the seal of the corporation and was not the paper or invitation referred to by the bishop; and that Arias said he was going to Tulare "to represent the Church".

In Malloy v. Fong, supra, although that case is factually dissimilar, certain principles of law were applied which should be applied in the instant case. It was there held that a church supervisory body is liable for injuries caused by the tort of its agent, a church pastor, acting within the scope of his agency; that an agency relationship may be informally created, neither particular words nor consideration being required, but simply conduct by each party manifesting acceptance of a relationship whereby one of them is to perform work for the other under the latter's direction; that the rule of respondeat superior applies to ecclesiastical bodies; that evidence that a church supervisory body had the right to install and remove its ministers, to approve or disapprove their transfers to other jurisdictions, and to supervise and control the activities of its local churches, particularly those in the mission stage, supports the conclusion that the body had a sufficient right to control the activities of the pastor of a local embryonic church to establish an agency relationship; and that a finding of agency relationship between a church pastor and another is supported by evidence that the other gratuitously assumed the pastor's responsibility for the supervision and control of instruction and activities connected with a church Bible school during the illness of the pastor, that such participation was essential to the conduct of the school, and that he continued to perform duties in connection therewith under the supervision of the pastor after the latter's assumption of authority.

[1] The mere citation of its constitution and by-laws would not, in itself, absolve the Church from the acts of Arias in the tort

action if, in fact, he was its agent. Chamberlain v. Southern California Edison Co., 167 Cal. 500, 140 P. 25; Kroupa v. Oak Park Theatre Co., 111 Cal.App.2d 514, 244 P.2d 985.

[2] While the evidence might well have justified a contrary conclusion, the finding of the trial court that he was authorized to represent the Sanger church, as its pastor, and was an official of or an agent or employee of defendant Church at the time is supported by the evidence.

The next claim is that if Arias could be held to be an agent of defendant Church, there was no substantial evidence indicating he was acting within the scope of his authority at the time of the accident since he had no duty to attend the convention and since he was driving his own car; that it was of no benefit to the defendant Church that he used this particular means of locomotion, nor was it within the contemplation of his superiors that he do so; that he had a choice of means of conveyance and the Church had no authority to designate his means of conveyance; and that the claimed admissions of Arias were not binding on the Church corporation, citing such authority as McVicar v. Union Oil Company, 138 Cal. App.2d 370, 292 P.2d 48; United States v. Sharpe, 4 Cir., 189 F.2d 239; Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1; Loos v. Boston Shoe Company, 123 Cal.App.2d 564, 266 P.2d 884; Barton v. McDermott, 108 Cal.App. 372, 381, 291 P. 591; and Restatement of the Law of Agency, p. 508, Sec. 229.

[3] There is a rule which holds that if the employee is driving in the discharge of a duty for which he was employed by the employer or for the accomplishment of a result desired by the employer the latter may be held liable under the doctrine of respondeat superior. Casselman v. Hartford Acc. & Ind. Co., 36 Cal.App.2d 700, 98 P.2d 539. The authorities cited by appellant on this subject bear principally on "transfer" cases wherein an employee (or military personnel) was reporting to a new assignment and the mode of transportation was not the concern of the employer. Restatement of the Law of Agency, p. 505, Section 228, sets forth a general statement concerning the scope of employment and gives three criteria: (a) Is it the kind that a servant is required to perform? (b) Is it substantially within the authorized time and space limits? (c) Is it actuated, at least in part, by a purpose to serve the master? Comment *b* to this section states that although proof that one was in the general employment of the master does not of itself create an inference that the act was done within the scope of employment, still, if there is proof in addition, that the act tended to accomplish an authorized purpose and was done at an authorized place and time, then there is an inference the act was done within the scope of employment. See also Sullivan v. Thompson, 30 Cal.App.2d 675, 87 P.2d 62. 2 Cal.Jur. 10-Year Supp. p. 492, Sec. 315, restates this general rule.

[4, 5] Having previously held that it was proper to find, under the evidence, that Arias was, at the time, in the employ of defendant Church, it might well appear that the meeting at Tulare was called, not only to discuss the relationship between the Mother Church and the member churches but also the relationship of the Mother Church to the individual members respecting tithing, and that Arias would be the one to administer the rules or orders made by the appellant organization. Under the circumstances it might well appear that the Mother Church, the member church in Sanger, and the assistant pastor, acting for the incapacitated pastor, were all jointly interested in and directly affected by the meeting in Tulare. There was a written statement signed by the bishop that he was certain that Arias was not drinking, that "he was attending Church * * * we had a conference in Tulare that same day". This might well indicate he was requested to be present at this conference, separate from the convention, and that he was using his own car in response to that request and for the purpose indicated. There is some corroboration of the fact that Arias was expected to be at that conference, notwith-

standing the testimony of other witnesses, because on the first occasion possible he had someone call the bishop and tell him of the accident and of his inability to be present at the time indicated. However, he did testify that he subsequently attended but sat in the audience and did not participate in the conference. There is considerable evidence and authority is cited which might well have supported a finding in favor of the Church on this issue too. The cases are far from being in harmony on the subject as to the quantum of proof required to show agency sufficient to establish liability under the theory of respondeat superior. 2 Cal.Jur. Ten-Year Supp. p. 492, Sec. 314, and cases cited under West's Annotated California Codes, Sec. 2338, Civ. Code. Under the latter section a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business. Boynton v. McKales, 139 Cal.App.2d 777, 294 P.2d 733. In Lockheed Aircraft Corporation v. Industrial Accident Comm., 28 Cal.2d 756, 172 P.2d 1, it is said that where the employee is combining his own business with that of his employer or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, and he will be held to be serving his employer unless it clearly appears that neither directly nor indirectly could he have been serving the employer. The By-laws of defendant Church provide that its Board of Directors, 12 in number, must be ministers, properly ordained, and this Board is elected by the ministers. In determining the question as to whether the assistant pastor was authorized to act for the minister or pastor and was acting within the scope of his authority, the trial court had the right to draw the reasonable inferences mentioned and to find that he was so acting. Where the evidence will support different inferences, the choice of inferences is for the trial court, and its finding based on the inference drawn cannot be disturbed on appeal. Maslow v. Maslow, 117 Cal.App.2d 237, 255 P.2d 65.

[6–8] It is the general rule that extrajudicial declarations of an agent are not admissible to prove either the fact of an agency or the extent of his authority. Barton v. McDermott, 108 Cal.App. 372, 381, 291 P. 591; Carter v. Carr, 139 Cal.App. 15, 33 P.2d 852; 2 Cal.Jur.2d p. 692, sec. 46. In the instant case there was other competent evidence produced on the subject and appellants made no objection to the admission of the evidence at the time, on the ground indicated. No prejudicial error appears in considering that testimony. Nanny v. Ruby Lighting Corp., 108 Cal.App.2d 856, 859, 239 P.2d 885; Wilcox v. Berry, 32 Cal.2d 189, 192, 195 P.2d 414.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.



148 Cal.App.2d 631

Kermit QUINN, Plaintiff and Respondent,

v.

William Lyle LITTEN et al., Defendants,

William Lyle Litten and F. N. Rumbley Company, a corporation, Appellants.

Louis ALLOWAY, Plaintiff and Respondent,

v.

William Lyle LITTEN et al., Defendants,

William Lyle Litten and F. N. Rumbley Company, a corporation, Appellants.

Civ. 8944.

District Court of Appeal, Third District, California.

Feb. 21, 1957.

Rehearing Denied March 22, 1957.

Hearing Denied April 17, 1957.

Automobile passengers' actions for personal injuries sustained in collision between automobile and truck. The Superior Court, Merced County, R. R. Sischo and Gregory

P. Maushart, JJ., entered judgments for passengers and truck driver and owner appealed. The District Court of Appeal, Warne, J. pro tem., held that under the circumstances the stipulation respecting separate trial of the matter of the applicability of res judicata doctrine arising from prior judgment against defendants in favor of third party in a property damage action, did not prevent the defendants from claiming that prior judgment did not necessarily adjudicate that negligence of truck driver was a proximate cause of passengers' injuries.

Judgments sustained in part and reversed in part and remanded for new trial on issue of liability alone.

1. Judgment ⇐585(1)

To constitute a judgment in one case a bar to prosecution of second action, there must have been an identity of question litigated in the two cases which would form basis of recovery in the second case.

2. Judgment ⇐713(3)

Where automobile and truck collided and trailer detached from truck and caused nearby business firm to suffer property damage for which a judgment was procured against drivers of automobile and truck as well as truck owner, under the circumstances the judgment was not res judicata as to liability of driver of truck and truck owner in an action brought by automobile passengers against truck driver and owner for personal injuries sustained in collision.

3. Stipulations ⇐14(4)

Where automobile and truck collided and property damage judgment was recovered by a nearby business firm against drivers of truck and automobile as well as truck owner, and automobile passengers brought action against truck driver and owner and parties stipulated that issue as to applicability of res judicata should be first submitted, under the circumstances the stipulation did not prevent truck driver and owner from claiming that prior judgment did not necessarily adjudicate that negligence of truck driver was proximate cause of passenger's injuries.

Stammer, McKnight & Barnum, by Galen McKnight, Fresno, for appellants.

C. Ray Robinson, by James A. Cobey, Merced, and Bruce Walkup, San Francisco, for respondent.

WARNE, Justice pro tem.

An accident occurred at the intersection of 16th and R Streets in the City of Merced when an automobile driven by Roy Harris struck the side of a trailer which was attached to a truck, owned by the defendant F. N. Rumbley Company, which was being driven at the time by the defendant Litten. After the impact, the truck and trailer continued on and at some point within a distance of approximately 200 feet the trailer became detached from the truck, swung to the right off the street and struck a pile of lumber owned by the Yosemite Builders Supply Company. Said company brought suit in the justice court for damages to its property and recovered damages jointly against Harris, F. N. Rumbley Company and Litten. When the accident occurred Kermit Quinn and Louis Alloway, plaintiffs in the instant action, were passengers in the Harris automobile. Both were injured and both brought separate actions against Litten and F. N. Rumbley Company to recover damages for the injuries they allegedly received as a proximate result of defendants' negligence. The first two causes of action of each complaint contain the usual allegations of negligence, proximate cause, injury and damage. Each complaint also contains a third cause of action which alleges, in substance, that the judgment in the justice court action was a final and conclusive adjudication of the liability of defendants and that defendants were thereby estopped from further litigating their liability to plaintiffs.

By stipulation of the parties the claim of res judicata, as set forth in the third cause of action of each complaint, was tried before Judge Sischo without a jury, separate from and prior to the trial of the case on its merits under the first and second causes of action; and upon the trial of that issue the court ordered that the doctrine of res judicata did apply, and that the defendants were

barred from attempting to again litigate the question of liability to plaintiffs. Thereafter, the cases were tried before Judge Maushart, with a jury, upon the issue of damages only, and a judgment against defendants was entered in each case. The defendants have appealed from the judgments.

At the trial of the issue presented by the third cause of action there was offered in evidence the stipulation, the official file of the justice court pertaining to the Yosemite Builders Supply Company case and the reporter's transcript of the testimony taken at said trial. No further evidence was offered. The complaint in the justice court charged that plaintiffs' damages were caused through the joint negligence of Harris, Litten and F. N. Rumbley Company. At the trial Litten was questioned at some length as to the manner in which he operated his truck after the collision, and as to when the trailer left the street before crashing into the pile of lumber. There were no findings of fact made in the justice court as to whether the damage was solely the result of the collision between the vehicles. The parties in the case at bar stipulated "that as a result of said collision and subsequent thereto said trailer became detached from said truck," and went through Yosemite Builders' fence and struck its lumber. The parties disagree as to the meaning and effect of the stipulation—that is, as to whether it precludes the defendants from claiming that the judgment in the justice court might have been based upon something which the driver did or failed to do after the automobile and trailer collided at the street intersection, and therefore did not necessarily adjudicate that the negligence of Litten was a proximate cause of the collision of the two vehicles by which collision alone respondents were injured. Respondents contend that no such construction can be placed upon the stipulation, and that defendants cannot dispute the facts to which they have agreed. They cite the following cases in support of this contention: Capital National Bank of Sacramento v. Smith, 62 Cal.App.2d 328, 343, 144 P.2d 665; Steele v. Steele, 132 Cal.App.2d 301. 303, 282 P.2d 171; Hart v. Richardson, 134 Cal.App.2d 242, 246, 285 P.2d 685—that a party is estopped from questioning the effect of his own stipulation. However, as stated in Orr v. Forde, 101 Cal.App. 694, 699, 282 P. 429, 431:

> "* * * To give the stipulation the effect contended for by respondent would be to deprive the appellant of an important defense interposed by him. * * * 'The stipulation [made for the purpose of expediting the trial of an action] is to be interpreted with reference to its subject-matter, in the light of the surrounding circumstances, including the state of the pleadings, the allegations therein, and the attitude of the parties in respect of the issues.'"

The stipulation does not in effect state that the collision was the sole cause of the trailer colliding with the lumber; nor did defendants waive any of their affirmative defenses. If such were true, it would amount to a stipulation that the doctrine of res judicata was applicable and disposed of the entire question of liability.

[1, 2] As stated in Hardy v. Rosenthal, 2 Cal.App.2d 442, 445, 38 P.2d 412, 413: "* * * to constitute a judgment in one case a bar to the prosecution of a second action, there must have been an identity of a question litigated in the two cases which would form the basis of a recovery in the second case." In the instant case, the material questions, other than the measure of damages, are: Was Litten, the truck driver, guilty of negligence that proximately caused the damages to the plaintiffs? Was Harris, the driver of the automobile in which the two plaintiffs were passengers, guilty of contributory negligence imputable to plaintiffs. The collision between the two vehicles occurred within the street intersection, and the question of negligence and contributory negligence might well have been determined by the actions of the two drivers up to the moment their vehicles came together. There is nothing in the case of Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892, relied upon by respondents, that is con-

trary to the law as stated herein when applied to the facts of this case.

The evidence taken at the trial in the justice court may have caused the court in that case to conclude that the collision was caused by the negligence of Harris but that, after the collision and before the trailer actually became detached from the truck, the truck driver did something which a reasonably prudent person would not have done, or failed to do something which a reasonably prudent person would have done, and by such negligence he permitted the trailer to crash into the lumber. What the truck driver did, or failed to do, after the collision of the vehicles at the street intersection might have constituted negligence that would support a recovery in the Yosemite Builders Supply Company case and in no manner have contributed to the actual collision. Hardy v. Rosenthal, supra.

[3] Respondents likewise contend that by their stipulation appellants waived their defenses of joint enterprise, agency and contributory negligence. The stipulation provides: "* * * that * * * if the court should decide that the doctrine of res judicata or estoppel by judgment is applicable herein, these actions shall be set for trial, and shall be tried, on the sole issues of the nature and extent of the injuries, if any, suffered by the plaintiffs in connection with said automobile accident and of the damages, if any, which the plaintiffs are entitled to recover herein and that, by proceeding to trial on said issues of injuries and damages, *the defendants shall not be deemed to waive their claim that said doctrine of res judicata or estoppel by judgment does not apply herein.*" This language makes it clear that the defendants were not waiving any rights they had to appeal and therein to claim error in the trial court's decision that the rule of res judicata fastened liability upon them. By the order of the trial court, defendants were barred from attempting to litigate the question of liability on the merits. It is our conclusion that the court erred in so holding and also in ruling that the question of defendants' liability was determined by the judgment in the justice court.

Since it appears that the question of the amount of damage sustained by each plaintiff has been determined, there appears to be no reason for a retrial on that issue. The judgment in each case is sustained as to that issue. The judgments in so far as the issue of liability is concerned are reversed and remanded for a new trial on the issue of liability alone.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.

48 Cal.2d 57

W. E. WILLIAMS, Plaintiff and Respondent,

v.

Glen E. REED et al., Defendants;

Robert M. Cairns et al., Appellants.

S. F. 19343.

Supreme Court of California,
In Bank.
Feb. 21, 1957.

Action by payee against co-makers of note containing chattel mortgage security, for deficiency judgment after sale under mortgage. The Superior Court, Contra Costa County, Hugh H. Donovan, J., entered deficiency judgment against defendants, and they appealed. The Supreme Court, Carter, J., held that evidence warranted finding that defendants were not accommodation makers because they received value, particularly in view of applicability of presumption of value arising from fact that defendants signed note as comakers, but that payee, in view of usurious nature of transaction, would not be allowed recovery of interest.

Judgment reversed in part and affirmed in part.

Opinion, 302 P.2d 582, vacated.

1. Bills and Notes ⇐493(1)

Where defendants appeared as ordinary joint makers of negotiable note, it would be presumed that they received value from loan of money made by payee, in view of provision that every negotiable instrument is deemed prima facie to have been issued for valuable consideration, and every person whose signature appears thereon to have become parties thereto for value. West's Ann.Civ.Code, §§ 2819, 2822, 3105, 3110; West's Ann.Code Civ.Proc., §§ 726, 1963, subds. 21, 39.

2. Chattel Mortgages ⇐287

In action by payee against comakers of note containing chattel mortgage security, for deficiency judgment after sale under mortgage, evidence warranted finding that defendants were not accommodation makers because they received value, particularly in view of applicability of presumption of value from fact that defendants had signed as comakers. West's Ann.Civ.Code, §§ 2819, 2822, 3105; West's Ann.Code Civ. Proc., §§ 726, 1963, subds. 21, 39.

3. Judgment ⇐628

Where judgment which payee obtained against one comaker of note was based on subsequently, separately executed agreement between that comaker and payee, and agreement was not novation and judgment did not release other comakers from liability for deficiency judgment after sale under securing chattel mortgage, fact that execution was obtained and judgment recorded did not release these other comakers, who did not change position in reliance thereon.

4. Judgment ⇐628

Where judgment which payee obtained against one comaker of note was based on separately, subsequently executed agreement between comaker and payee, and agreement was not novation, and judgment did not release other comakers from liability, fact that judgment was recorded and execution issued but not levied upon did not preclude payee from obtaining deficiency judgment after sale under chattel mortgage security against other comakers. West's Ann.Code Civ.Proc., § 726.

5. Usury ⇐103

When transaction violates usury law, intent of neither of parties is material, nor is it material that borrower rather than the lender took the initiative in the transaction. West's Ann.Const. art. 20, § 22; West's Ann.Civ.Code, § 1916–1 et seq.

6. Usury ⇐78

Where transaction, by which payee received a $10,000 note as bonus for loan of $30,000 represented by note at 5% interest, was single, and whole was tainted by usury, payee could not recover interest on $30,000 note even though he had dismissed portion of action seeking recovery on $10,000 note. West's Ann.Const. art. 20, § 22; West's Ann.Civ.Code, § 1916–1 et seq.

Athearn, Chandler & Hoffman, F. G. Athearn, Leigh Athearn, San Francisco, Theodore P. Lambros, Chicago, Ill., Carlson, Collins, Gordon & Bold, Richmond, and Roscoe E. Jordan, Oakland, for appellants.

Herron & Winn and John Wynne Herron, San Francisco, for respondent.

CARTER, Justice.

This is an appeal by defendants Arvidson, Carroll and Cairns, makers (with Reed who does not appeal) of a $30,000 promissory note, from a deficiency judgment, after sale under a securing chattel mortgage, in favor of plaintiff, payee of the note.

Two negotiable notes, one for $30,000, bearing 5% interest, and the other for $10,000, were dated June 14, 1950, the first became due in 60 days and the second on December 14, 1950, and named all the makers as such with plaintiff as payee. They recited that "I" promise to pay the principal and interest. The notes were secured by a chattel mortgage executed by Reed covering property owned by him. After this case was reversed on an appeal by plaintiff from a summary judgment for all the makers but Reed, who defaulted, Williams v. Reed, 113 Cal.App.2d 195, 248 P.2d 147, plaintiff dismissed the portion of the action pertaining to the $10,000 note and the trial proceeded on the $30,000 note. The $10,000 note was given as a "bonus" for the $30,000 loan, and was, therefore, usurious, hence the action thereon was dismissed. This action was commenced to foreclose the chattel mortgage and for a deficiency judgment for the balance due; the amount realized at the foreclosure sale ($687) was credited on the note. The judgment awarded interest and attorney's fees (provided for in the note) on the $30,000 note. Soon after the maturity of the notes, and on October 12, 1950, an agreement with reference to the notes was made between plaintiff and Reed and his wife. Before the instant action was commenced, plaintiff obtained judgment against Reed on that agreement, but the judgment has not been paid or satisfied.

The main defenses of defendants-makers, except Reed, were that the agreement made October 12, 1950, between Reed and his wife and plaintiff, wherein plaintiff agreed to accept and Reed to pay $35,000 on October 28, 1950, to discharge the two notes which had in effect extended the time for payment two and one-half months on the $30,000 note, was a novation—a substitute for the notes, thus exonerating them; that they were accommodation makers only, having received no value, and under section 3110 of the Civil Code,[1] were liable only as sureties, and the October 12th agreement freed them from liability because it changed the obligation (see Civ.Code, §§ 2819, 2822); that the judgment for plaintiff in his action on the agreement achieved the same results and constituted an election of remedies; that the action will not lie because of failure to comply with section 726 of the Code of Civil Procedure.[2] The trial court found against all of these contentions.

Several matters are settled by the former decision on appeal. Williams v. Reed, supra, 113 Cal.App.2d 195, 248 P.2d 147. Reserving the question of whether defendants (other than Reed) were accommodation makers and entitled to the application of surety law which was said to be a factual question, it was held that the October 12th agreement showed no intent on its face for novation releasing such defendants; that the judgment on that agreement, there being no execution, was not an election which estopped plaintiff; that the security of the

1. "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." Civ.Code, § 3110.

2. "There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter. * * *." Code Civ.Proc. § 726.

chattel mortgage was not waived to the prejudice of those defendants to render them not liable; that even if the agreement was a novation as to Reed it would not release the other defendants; and that the right of action was not controlled by section 726 of the Code of Civil Procedure. The opinion of the court closed with the statement that it did not intend to foreclose the determination of any issue of fact including novation.

Defendant Cairns (the other defendants filed no brief but join in Cairns' brief) contends that he was an accommodation maker, and under the laws of suretyship as applied to him, the October 12th agreement changed the obligation and released him from liability.[3] Assuming an accommodation maker is in such position, the basic question is whether there is sufficient evidence to support the trial court's finding that he and the other defendants were not accommodation makers because they received value. It will be recalled that under section 3110 of the Civil Code, *supra,* a maker is not an accommodation one unless he did not receive value for signing the instrument and defendant asserts that the value must have been from the consideration for the note—from the payee (plaintiff) rather than from Reed, the accommodated maker, for lending his name to the instrument, citing Britton, Bills and Notes (1943), p. 365; 11 C.J.S., Bills and Notes, § 742. Accepting the foregoing premise as correct, it appears that the evidence is sufficient as to all the defendants.

[1] In the first place it should be observed that the defendants appear as ordinary joint makers of a negotiable note and thus "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value." Civ.Code, § 3105. This clearly means that everyone who appeared to be a party to the instrument (defendants appeared as makers here) were presumed to have received value from the loan of money made by the plaintiff payee; a presumption of consideration arose, Weiss v. First Savings Bank, 28 Cal.App.2d 140, 146, 82 P.2d 45, 83 P.2d 35. Among the presumptions also is the rebuttable one "That a promissory note or bill of exchange was given or endorsed for a sufficient consideration" Code Civ.Proc. § 1963(21), and "That there was a good and sufficient consideration for a written contract" Code Civ.Proc. § 1963(39). "[T]he writing [promissory note] itself carries the presumption of consideration, which is evidence to be weighed against this defendant's testimony. With this conflict, the finding of the trial court that a consideration passed should not be disturbed." Rodabaugh v. Kauffman, 53 Cal.App. 676, 679, 200 P. 747, 748; see, also, Moore v. Gould, 151 Cal. 723, 726, 91 P. 616; Pacific Portland Cement Co., Consolidated v. Reinecke, 30 Cal.App. 501, 158 P. 1041; Ellington v. Freer, 111 Cal. App. 651, 295 P. 857. Hence it follows that there was a presumption that defendants all received value from the plaintiff's loan of money. Moreover, it may be inferred from the evidence that defendants received some benefit from the loan.

Defendants and Reed had known each other for some time prior to the execution of the note and were enjoying business relations. Reed agreed to assist them in organizing various projects and foundations in which they were interested. Those projects were beneficial to defendants, and Reed purported to be able to obtain funds for them from eastern capital. Defendant Cairns testified that plaintiff was assisting him in organizing Cairns' Agricultural Research Foundation to study and develop plant nutrition and soil in which he had long been interested; that the foundation was not philanthropic; that he would realize

3. There is a conflict of authority as to whether an accommodation maker of a negotiable instrument is in the position of a surety and has all the defenses available to a surety. See, Mortgage Guarantee Co. v. Chotiner, 8 Cal.2d 110, 64 P.2d 138, 108 A.L.R. 1080; Britton, Bills and Notes, p. 1121 et seq.; Elkhorn Production Credit Ass'n v. Johnson, 251 Wis. 280, 29 N.W.2d 64, 2 A.L.R.2d 260.

gains from it by selling products from the research; that he had no funds to finance such a foundation but Reed told him he could obtain them from the east, and advance the project for him; that he would install an irrigation system on Reed's ranch for the latter's services in obtaining finances for the foundation; that he wanted Reed to get the $30,000 for his financial difficulties so he could continue performing for his interests in the foundation; that he said nothing when he signed the note concerning the capacity in which he signed it, indicating that he was an ordinary comaker. Plaintiff testified (Cairns also) that before Cairns signed the note he telephoned Reed to see if time enough was allowed for repayment and if it was all right, indicating Cairns' interest in Reed receiving the loan to benefit Cairns.

Reed testified by deposition, "There is no question but that all three of these men—and I am referring to Arvidson, Carroll and Cairns—were to benefit, either directly or indirectly from the $30,000.00 loan; is that correct? Answer: That is right"; that an automobile Reed got from Cairns was in part payment for his services; that he had "obligations" on his ranch that must be met and the ranch was to go into the defendants' foundations; that "In addition, prior to June 14, 1950, I had formed for Carroll and Arvidson and the company, which is known as West Coast Industrial Engineers. This operating company was set up with Carroll and defendant Arvidson as officers and managers. In addition, on or about June 14, 1950, I had created an agricultural research foundation for defendant Robert M. Cairns and also an operation company for this foundation. Defendant Cairns and his wife were officers in said organization. These organizations were designed so that a profit would be made by defendants Carroll, Arvidson and Cairns in accordance with their duties as officers of organization. At the time of the execution of the subject notes, there was yet no work to be done by me to get said foundation and operating company in operation. In addition, money was needed to get said organization into operation. On June 14, 1950, I had an interest in a valuable farm at Walnut Creek, which interest I had acquired by means of a written contract of sale. It was agreed by the defendants and myself that said farm would become an asset of the foundation and operating company. However, on June 14, 1950, at the time said notes were executed I was in default on the contract of sale and money was borrowed by all of us from plaintiff Williams to make payments due on the farm."

[2] The foregoing is sufficient from which the trial court could infer that all the defendants realized or were to receive value from the loan of the money and thus were not accommodation makers. There were real benefits to be received by defendants from the loan transaction, rather than a mere motive on their part of wanting to help Reed. There is evidence to the contrary to the effect that the $30,000 was only for Reed's personal benefit but that merely creates a conflict. At least with the presumption of valuable consideration present, the evidence which tends to support it sufficiently contradicts the contrary evidence. In Gardiner v. Holcomb, 82 Cal.App. 342, 353, 255 P. 523, 528, it is said: "While a party's intent may be to aid a maker of a note by lending his credit, if he seeks to accomplish thereby legitimate objects of his own and not simply to aid the maker the act is not for accommodation." See, also, Irwin v. Colburn, 56 Cal.App. 41, 204 P. 551.

Defendants assert there was an "election of rights" by plaintiff in suing and obtaining judgment against Reed on the October 12th agreement, recording an abstract of the judgment, and having a writ of execution issue (no levy of the writ was made and nothing was realized from it) which forecloses the instant action of foreclosure on the notes and chattel mortgage; they concede that the October 12th agreement was not, as found by the trial court, a novation. That contention in part was answered by the former appeal in this case when the judgment had been obtained but no execution had been issued. The court there said: *"Was the reduction of Reed's October, 1950,*

obligation to judgment an election which estops plaintiff from maintaining the present action? If the October, 1950, agreement was not a novation and did not release Reed's comakers on the original notes, it is difficult to see how the mere reduction of Reed's October obligation to judgment (a judgment not yet satisfied in whole or in part) could give that obligation a different effect. In October Reed promised to pay plaintiff a certain sum of money. In November the court found that Reed for a valuable consideration promised to pay plaintiff that sum of money, and decreed that plaintiff have judgment against Reed for that amount of money. That judgment does not import any new factor into the situation. It affords plaintiff a better muniment of title to Reed's October promise to pay. It does not modify plaintiff's promise to *accept that amount of money, and nothing but money* (no mere added muniment of title to Reed's promise) in satisfaction of the original notes of June, 1950.

"The parties agree that upon the basis of the record before us the obligations of the defendants as comakers of the original notes were joint and several. Each note was in the form of a promise made in the singular number and executed by each of the defendants. In such a case there is a presumption that the promise is joint and several. Civ.Code, § 1660 and subd. (7) of § 3098.

"Reed's comakers claim that in such a case the bringing of an action against one of the makers (Reed) without joining the others, and obtaining judgment against him alone, bars the plaintiff from later suing any of the others in respect to that obligation. They cite cases from other jurisdictions, none from California. Those cases are not applicable. Three of them involved joint, not joint and several, obligations: Fleming v. Ross 1906, 225 Ill. 149, 80 N.E. 92, 8 Ann.Cas. 314; Morgan v. Edgar, 1929, 107 W.Va. 536, 149 S.E. 606; and Fedderson v. Goode 1944, [112] Colo., [38] 1944, 145 P.2d 981. The remaining case, Taylor v. Sartorious, 1908, 130 Mo.App. 23, 108 S.W. 1089, involved a joint and several obligation. The court recognized that joint and several obligors may be sued separately but held that those later sued get the benefit of a judgment favorable to the obligor first sued, to the extent that he successfully defended. It is true in most jurisdictions, including California, that *joint* obligors upon the same contract are indispensable parties. They may not be sued separately [citations]. If judgment is obtained in a separate action against one, it bars an action against the others. [Citation.] When the obligation is *joint and several* it is not non-joinder to sue one alone [citations]. The same is true of an action against one or more and less than all of a number of persons jointly and severally obligated as tort-feasors. In such a case the judgment obtained against one is not a bar to an action against the remaining joint and several obligors. *'Nothing short of satisfaction in some form constitutes a bar* * * *.' Grundel v. Union Iron Works, 127 Cal. 438, 442, 59 P. 826, 827, 47 L.R.A. 467 [78 Am.St.Rep. 75]. [Citations.] That being so in respect to joint and several tort obligors * * * under a contract. * * * Accordingly, but for the possible effect of section 726 of the Code of Civil Procedure, a mere judgment against Reed in a separate action against him upon the original notes would not preclude plaintiff from bringing subsequent actions against Reed's comakers.

[3] "But plaintiff's former action was not brought upon the original notes. It was brought against Reed upon his separate agreement of October, 1950, to which none of the other note makers was a party." Emphasis added; Williams v. Reed, supra, 113 Cal.App.2d 195, 203, 248 P.2d 147, 153. The added facts that a writ of execution was obtained and the judgment was recorded add nothing to the picture; defendants did not change their position in reliance thereon. In fact if anything, they were possibly benefited by a partial exhaustion of rights against Reed and, as said on the former appeal, quoted *supra*, " 'Nothing short of satisfaction in some form constitutes a bar' " against an action against the comakers.

In connection with this same argument defendants rely on section 726 of the Code of Civil Procedure, *supra*, and say the right of action for a deficiency after sale under the chattel mortgage, which was the only action that could be brought, was lost because of the judgment on the October 12th agreement, and the issuance of execution, and recording of the judgment. This also is in part answered on the former appeal, the court stating: *"Has the plaintiff waived the security of the chattel mortgage to the prejudice of the rights of Reed's cosigners and thereby lost his right to proceed against them?* Reed's cosigners direct attention to section 726 of the Code of Civil Procedure which declares that '[t]here can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter', and prescribes the circumstances under which a deficiency judgment may be obtained and the manner and method of determining the amount of such judgment. They then claim that plaintiff has disabled himself from resorting to the security of the chattel mortgage and has thereby prevented himself from getting a deficiency or personal judgment against them.

"This came about, they say, because the October, 1950, agreement with Reed operated as a novation which cancelled the original notes and as a necessary consequence extinguished the chattel mortgage. This argument lacks merit for the reason, as we have seen, no novation occurred by the mere execution of the October, 1950, agreement.

"They further contend that 'even if no novation had been entered into, and the plaintiff had brought this action * * * against Reed alone on the notes and recovered judgment, the plaintiff would have been only an unsecured judgment creditor, and the lien of the mortgage would have been lost.' Whether or not such a suit by plaintiff reduced to judgment would have lost him the mortgage seems immaterial. He did not bring an action on the 'notes.' He brought an action on the October, 1950, agreement.

[4] "Moreover, plaintiff's former action against Reed was upon an agreement susceptible to the interpretation that Reed confessed judgment while waiving as to himself the benefit of prior resort to the mortgage security and yet keeping the mortgage alive and available for the benefit of plaintiff and Reed's cosigners. The prohibition against Reed's making any such waiver at the time of or in connection with the making of the loan and the execution of the mortgage, Civil Code, § 2953, signifies authority in Reed later to waive the rights or privileges conferred upon him by section 726 of the Code of Civil Procedure. See Salter v. Ulrich, 22 Cal.2d 263, 266–267, 138 P.2d 7, 146 A.L.R. 1344. If after obtaining judgment against Reed in the former action, plaintiff had *levied* execution against the mortgaged property, *bought* that property upon the execution sale, and *were now relying upon the title thus acquired* (as was done by the secured creditor in the Salter case) plaintiff might find that he had destroyed the mortgage security or had estopped himself from claiming any mortgage interest in that property and thereby be precluded from obtaining a deficiency judgment against Reed's cosigners. But plaintiff has not done that. There is nothing in the record before us to indicate that he has even taken out a writ of execution to enforce the judgment in the former action." Emphasis added; Williams v. Reed, supra, 113 Cal.App.2d 195, 205, 248 P.2d 147, 154. We fail to see how the mere recordation of the judgment and issuance but not levy of execution changes that reasoning.

[5] Finally, defendants claim that the $10,000 and $30,000 notes were part of the same transaction (contrary to the trial court's findings) in which the plaintiff gave only $30,000 and the $10,000 was usurious[4] interest; that hence the 5% interest pro-

4. "The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court

vided for in the $30,000 note should not have been allowed by the judgment because the whole transaction is tainted with usury. There can be no question that all the evidence including plaintiff's is one way, namely, that the $10,000 note was given as a "bonus" or "finder's fee" for the loan of $30,000 and nothing else, and was part of the loan transaction. Plaintiff makes no real contention that the bonus would not constitute usurious interest. See, In re Fuller, 15 Cal.2d 425, 434, 102 P.2d 321; Anderson v. Lee, 103 Cal.App.2d 24, 228 P.2d 613; Brown v. Cardoza, 67 Cal.App.2d 187, 153 P.2d 767; Pacific Finance Corp. v. Crane, 131 Cal.App.2d 399, 280 P.2d 502. When the transaction violates the usury law the intent of neither of the parties is material, Martin v. Kuchler, 212 Cal. 536, 299 P. 52, nor is it material that the borrower rather than the lender took the initiative in the transaction. Martin v. Ajax Construction Co., 124 Cal.App.2d 425, 269 P.2d 132. Plaintiff claims, however, that since he dismissed his action on the $10,000 note and the 5% interest specified in the $30,000 note is not usurious, he is entitled to the latter interest as awarded by the judgment. In Moore v. Russell, 114 Cal.App. 634, 641, 300 P. 479, 481, the court said: "The note in controversy having provided for the payment of $750 bonus and a flat interest at seven per cent. was plainly usurious. Thus tainted the plaintiff lost the right to claim or collect interest in any amount." Emphasis added; see, also, Paillet v. Vroman, 52 Cal.App.2d 297, 305, 126 P.2d 419; Jones v. Dickerman, 114 Cal.App. 357, 361, 300 P. 135; Haines v. Commercial Mortgage Co., 200 Cal. 609, 617, 621, 622, 254 P. 926, 255 P. 805, 53 A.L.R. 725; 91 C.J.S., Usury, §§ 56, 58. Since there is a single transaction and the whole was tainted by the usury, it can make no difference that plaintiff dismissed the portion of his action on the $10,000 note.

[6] The judgment, insofar as it awards interest, is reversed; in all other respects it is affirmed. Each party shall bear his own costs on this appeal.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



48 Cal.2d 31

Marion WILDMAN and Elvaree H. Wildman, Husband and Wife, Plaintiffs and Appellants,

v.

GOVERNMENT EMPLOYEES' INSURANCE COMPANY, a Corporation, Defendant and Respondent.

L. A. 24123.

Supreme Court of California,

In Bank.

Feb. 19, 1957.

Rehearing Denied March 20, 1957.

Action by tort judgment creditors of insured for declaration of legal rights and duties of insurer under automobile liability policy and for judgment requiring insurer to pay judgment against insolvent insured. The Superior Court, San Diego County, Charles C. Haines, J., entered judgment adverse to judgment creditors and they appealed. The Supreme Court, Carter, J., held that provisions of automobile financial responsibility law are considered a part of every automobile liability policy and insurer does not have the right to limit its

of the State, shall be 7 percent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding 10 percent per annum.

"No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than 10 percent per annum upon any loan or forbearance of any money, goods or things in action." Cal.Const. art. XX, § 22; see, also, Stats.1919, p. LXXXIII, as amended, West's Ann.Civ. Code, § 1916–1 et seq.

coverage in a liability policy issued to named insured or members of insured's immediate family because public policy of state is to make automobile owners financially responsible to those injured in the operation of such automobiles by third parties.

Judgment reversed.

Opinion, 301 P.2d 465, vacated.

1. Insurance ⇐146(3)

Any ambiguity or uncertainty in a policy is to be resolved against insurer.

2. Insurance ⇐146(3)

If semantically possible insurance contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for losses to which the insurance relates.

3. Insurance ⇐146(3)

If insurer uses language in policy which is uncertain any reasonable doubt will be resolved against insurer; if doubt relates to extent or fact of coverage, whether as to peril insured against, amount of liability, or the person or persons protected, the language will be understood in its most inclusive sense for benefit of insured.

4. Insurance ⇐435.8

Automobile liability policy endorsement stating unqualified word "insured" included named insured and any member of insured's immediate family—no exceptions—while using the automobile or legally responsible for the use thereof provided actual use of automobile was with permission of named insured was ambiguous for reason endorsement could not apply when one of named insureds or members of immediate family were using automobile and also when some one else was driving with consent and permission of insured, and therefore, insurer having caused uncertainty and ambiguity must have ambiguity resolved against it.

5. Insurance ⇐152(3), 435.8

Provisions of automobile financial responsibility law are considered a part of every automobile liability policy and insurer does not have the right to limit its coverage in a liability policy to insured and insured's immediate family because public policy of state is to make automobile owners financially responsible to those injured in the operation of such automobiles by third parties. West's Ann.Vehicle Code, §§ 402, 415.

6. Insurance ⇐435.8

Although automobile liability policy indorsement had stated that the unqualified word "insured" included named insured and any member of insured's immediate family—no exceptions—while using automobile or legally responsible for use thereof provided actual use of automobile was with permission of named insured, insurer was liable to tort judgment creditors, who had sustained damage resulting from the operation of insured's automobile by another, under motor vehicle financial responsibility law, which was a part of every liability policy issued. West's Ann.Vehicle Code, §§ 402, 415.

Swing, Scharnikow & Staniforth and Robert O. Staniforth, San Diego, for appellants.

Luce, Forward, Kunzel & Scripps and James L. Focht, Jr., San Diego, for respondent.

CARTER, Justice.

Plaintiffs Marion Wildman and Elvaree Wildman, husband and wife, appeal from a judgment in favor of Government Employees' Insurance Company.

On February 3, 1955, Eusebio Bonifacio and Cecilia Bonifacio were the owners of a 1953 Cadillac coupe automobile. Plaintiff Elvaree suffered personal injuries and the property of both plaintiffs was damaged, on February 3, 1955, as the result of the negligent operation of the Cadillac which, at the time of the accident, was being operated by Victoria Villanueva with the permission and consent of the Bonifacios. Plaintiffs obtained a judgment, which is now final, against Victoria Villanueva and Cecilia Bonifacio in the sum of $5,000 and costs in the sum of $66.90.

The judgment is unsatisfied and the Bonifacios are insolvent.

Prior to the time of the accident defendant insurance company had issued to Eusebio Bonifacio a policy of insurance. Plaintiffs brought an action in declaratory relief to obtain a declaration of the legal rights and duties of the defendant insurance company under the policy and for a judgment requiring it to pay the judgment theretofore obtained by plaintiffs against Cecilia Bonifacio. The trial court concluded that plaintiffs take nothing by their complaint and entered judgment to the effect that the insurance afforded by the defendant's policy did not cover the accident.

Plaintiffs contend that the restrictive endorsement on the policy is ambiguous. Under the terms of the insurance policy involved, defendant agreed to indemnify Eusebio Bonifacio and Cecilia Bonifacio against any liability not exceeding the sum of $10,000, together with taxed court costs and interest which might arise against Eusebio and Cecilia in favor of any person or persons who should sustain any damage to their persons or property by reason of an accident incurred while Eusebio or Cecilia were using the automobile or legally responsible for the use thereof, provided the use was with the consent and permission of Eusebio or Cecilia. An endorsement was attached to the policy, dated December 3, 1954, and provided:

"1. The first sentence of Insuring Agreement III, Definition of Insured, is eliminated and is hereby replaced by the following:

"With respect to the insurance for Bodily Injury Liability and Property Damage Liability the unqualified word 'insured' includes the named insured, the individual named below, and any member of the insured's immediate family

No Exceptions

while using the automobile or legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured.

"2. Such insurance as is afforded by this policy does not apply while any person not an insured as defined in Paragraph 1 above is using the automobile, except that such insurance as is afforded for Medical Payments applies with respect to bodily injury to or sickness, disease or death of the named insured, the individual named below, and any member of the insured's immediate family.

"3. As evidenced by the signature below of the named insured, the named insured acknowledges and agrees that this endorsement forms a part of the above captioned policy issued by the Government Employees Insurance Company and is effective as of 12:01 A.M. Standard Time on the effective date of the endorsement."

Defendant contends that the endorsement controls, is unambiguous, and provides coverage only when the automobile in question is driven by the insured or one of his immediate family.

[1–3] We agree with plaintiffs that the endorsement is ambiguous. If the words "No Exceptions" were not present, the policy would reads as follows: "the unqualified word 'insured' includes the named insured, the individual named below, and any member of the insured's immediate family while using the automobile or legally responsible for the use thereof, *provided the actual use of the automobile is with the permission of the named insured.*" (Emphasis added.) Paragraph 2 provides that the policy does not apply while any person not an insured as defined in Paragraph 1 is using the car "except that" the provision for medical payments applied to the named insured and members of his immediate family. The question is, to what do the words "No Exceptions" relate? Immediately following the words "No Exceptions" comes the statement "while using the automobile or legally responsible for the use thereof, provided the actual use of the automobile is

with the permission of the named insured." It appears that the "no exceptions" applies to the named insured and members of his immediate family while any of them were using the automobile or had consented and permitted its use by some one else. The phrase referring to use with consent and permission would, otherwise, have no effect whatsoever inasmuch as Eusebio, Cecilia and members of their immediate family were directly covered by the policy in the first part of paragraph 1. "It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. (Arenson v. National Auto. & Cas. Ins. Co. (1955), supra, 45 Cal.2d 81 [83], 286 P.2d 816; Coit v. Jefferson Standard Life Ins. Co. (1946), supra, 28 Cal.2d 1, 3, 168 P.2d 163, 168 A.L.R. 673; 5 Am.Jur. 790, § 507.) If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. (Fageol Truck & Coach Co. v. Pacific Indem. Co. (1941), 18 Cal.2d 748, 751, 117 P.2d 669.) If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against (Fageol Truck & Coach Co. v. Pacific Indem. Co. (1941), 18 Cal.2d 731, 746–747 [16, 17], 117 P.2d 661; Ocean, etc., Corp., Ltd. v. Industrial Acc. Com. (1924), 194 Cal. 127, 132, 228 P. 1; Miller v. United Ins. Co. (1952), 113 Cal.App.2d 493, 248 P.2d 113; Pendell v. Westland Life Ins. Co. (1950), 95 Cal. App.2d 766, 770, 214 P.2d 392; see also Christoffer v. Hartford* Acc., etc., Co. (1954), 123 Cal.App.2d Supp. 979, 267 P.2d 887), the amount of liability (Hobson v. Mutual Benefit H. & A. Assn. (1950), 99 Cal.App.2d 330, 333 et seq., 221 P.2d 761; see also Narver v. California State Life Ins. Co. (1930), 211 Cal. 176, 180 et seq., 294 P. 393, 71 A.L.R. 1374) or the person or persons protected (Olson v. Standard Marine Ins. Co. (1952), 109 Cal.App.2d 130, 135 [1, 5], 240 P.2d 379; see also Island v. Fireman's Fund Indem. Co. (1947), 30 Cal.2d 541, 543, 548, 184 P.2d 153, 173 A.L.R. 896; Sly v. American Indem. Co. (1932), 127 Cal.App. 202, 15 P.2d 522), the language will be understood in its most inclusive sense, for the benefit of the insured." Continental Casualty Co. v. Phoenix Constr. Co., 46 Cal.2d 423, 437, 438, 296 P.2d 801, 809, 810.

[4] In the case under consideration the ambiguous words are "no exceptions." Webster's New International Dictionary defines "exception" as an exclusion or taking out by exception something that would otherwise be included. Inasmuch as use by another with the consent and permission of the insured is specifically set forth later in the same paragraph the words "no exceptions" can hardly be construed to apply to that situation. Paragraph 2 provides that the medical payments provided for in the policy apply only when bodily injury or sickness or death is suffered by the named insured or any member of his immediate family. It appears that paragraphs 1 and 2 cannot be reconciled insofar as coverage is concerned. Finding II of the trial court (Cl.Tr. 12) is inconsistent in itself. In that finding the court found that the defendant agreed to "indemnify the said Eusebio P. Bonifacio and Cecelia Bonifacio against any liability not exceeding the sum of $10,000.00, together with taxed court costs and interest, which should arise against the said Eusebio P. Bonifacio or Cecelia Bonifacio in favor of any person or persons who should sustain any damage to their property and also in favor of any person or persons who should sustain any bodily injuries by reason of an accident occurring while the said Eusebio P. Bonifacio or Cecelia Bonifacio were using the said automobile *or legally responsible for the use thereof, provided such use was with the permission and consent of the said Eusebio P. Bonifacio or Cecelia Bonifacio*, and *provided further that said automobile was not being used at said time by any person other than the said Eusebio P. Bonifacio or Cecelia Bonifacio* or members of their immediate family. * * *" (Emphasis added.) It is apparent

from this finding that the coverage afforded by the policy cannot apply two ways at the same time: it cannot apply *only* when one of the name insureds, or members of their immediate family, are using the car and also when some one else is driving with the consent and permission of the insured. The insurer, having caused the uncertainty and ambiguity which exists in the policy under consideration, must have that ambiguity and uncertainty resolved against it under the well settled rule in this state and elsewhere. See Continental Casualty Co. v. Phoenix Constr. Co., 46 Cal.2d 423, 437, 438, 296 P.2d 801 heretofore quoted, and cases cited therein. "The language will be understood in its most inclusive sense, for the benefit of the insured." Continental Casualty Co. v. Phoenix Constr. Co., supra, 46 Cal.2d at page 438, 296 P.2d at page 810. With these rules in mind the policy must be construed as extending coverage to persons suffering bodily injury or property damage caused by the vehicle in question when it was being driven by the named insured, or members of their immediate family, and also by some one else driving the vehicle with the consent and permission of the named insured. It follows from what we have said that the trial court erred in concluding that the policy in question "did not apply at the time of the accident on February 3, 1955, when Victoria Villanueva was driving the Cadillac automobile owned by Eusebio P. Bonifacio and Cecelia Bonifacio."

Plaintiffs also contend that if the policy in question does not apply when the automobile covered is being driven by some one other than the insured persons but with the consent and permission of the insured that it violates the provisions of section 415 of the Vehicle Code. That section, which is entitled "Contents and requirements of motor vehicle liability policy" provides as follows:

"Requisites Of Motor Vehicle Liability Policy.

"(a) *Motor vehicle liability policy defined; requirements.* A 'motor vehicle liability policy,' as used in this code means a policy of liability insurance issued by an insurance carrier authorized to transact such business in this State to or for the benefit of the person named therein as assured, which policy *shall* meet the following requirements:

"(1) Such policy shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby intended to be granted.

"(2) Such policy shall insure the person named therein *and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured.*" (Emphasis added.)

[5] Defendant insurance company argues that it had the right to limit its coverage in a policy of insurance issued by it "and when it has done so, the plain language of the limitation must be respected," Continental Casualty Co. v. Phoenix Constr. Co., 46 Cal.2d at page 432, 296 P.2d at page 806. Defendant's argument is without merit. In the Continental Casualty Co. case, the restrictive endorsement defined the vehicles covered by the policy. It was held not to apply to the coverage on the authorized vehicles and hence could not apply to the drivers thereof.

The policy involved here provides, under the heading "Conditions" in section 8 that "Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The Insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for

the agreement contained in this paragraph." In section 23, also under the heading "Conditions" it is stated "Terms of Policy Conformed to Statute. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes."

No case construing section 415 of the Vehicle Code as it relates to the circumstances here present has been cited to us, nor has independent research revealed one.[1] In Northwest Casualty Co. v. Legg, 91 Cal. App.2d 19, 24, 204 P.2d 106, 109, the court said: "Section 415 is a part of the Financial Responsibility Law. As such, it is directly related to the matter of suspending and reinstating operators' licenses in connection with proving ability to respond in damages for injuries caused to others. *Whether or not these provisions are controlling with respect to the contract which an insurer may make with an insured, and their relation to the provisions and requirements contained in the Insurance Code, need not be here decided.*" (Emphasis added.) It appears that section 415 must be made a part of every policy of insurance issued by an insurer since the public policy of this state is to make owners of motor vehicles financially responsible to those injured by them in the operation of such vehicles. Section 402 of the Vehicle Code provides that "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." We are of the opinion that for an insurer to issue a policy of insurance which does not cover an accident which occurs when a person, other than the insured, is driving with the permission and consent of the insured is a violation of the public policy of this state as set forth in sections 402 and 415 of the Vehicle Code. In Malmgren v. Southwestern A. Ins. Co., 201 Cal. 29, 33, 34, 255 P. 512, 513, an analogous situation was involved. The insurance carrier sought to avoid liability on the ground that its liability did not accrue under the policy until an execution issued upon the judgment obtained against the assured, or judgment debtor, was returned unsatisfied by reason of the insolvency or bankruptcy of the assured. At that time the law of this state, Stats.1919, p. 776, provided that every policy of insurance should contain a provision that the insolvency or bankruptcy of the insured person should not release the carrier for the payment of damages sustained. The court said: "The statute of this state, which is the final word on this issue, does not make the return of the execution unsatisfied a prerequisite to the commencement of an action upon the policy. * * * The substantive law of this state cannot be enlarged, circumvented, defeated, or modified by any provision which the insurer may have elected to place in its contract in derogation of or in conflict therewith. The statute is founded upon principles of public policy and an anomolous situation would be created if the rights of third parties, for whose protection the law was adopted, could be hindered, delayed, or defeated by the private agreements of two of the parties to a triparty contract." See, also, to the same effect, Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 747, 7 P.2d 999, 85 A.L.R. 13; Belt Casualty Co. v. Furman, 218 Cal. 359, 363, 23 P.2d 293; Western Machine Co. v. Bankers I. Ins. Co., 10 Cal.2d 488, 492, 75 P.2d 609; Olds v. General Acc. Fire, etc., Corp., 67 Cal.App.2d 812, 822, 155 P.2d 676; Bias v. Ohio Farmers Indemnity Co., 28 Cal.App.2d 14, 16, 81 P.2d 1057; Pigg v. International Indemnity Co., 86 Cal. App. 671, 673, 261 P. 486.

[6] Inasmuch as sections 402 and 415 of the Vehicle Code set forth the public

1. The question here presented was not determined by this court in Norris v. Pacific Indemnity Co., 39 Cal.2d 420, 247 P.2d 1; Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861.

policy of this state such laws must be considered a part of every policy of liability insurance even though the policy itself does not specifically make such laws a part thereof. We have here, however, a policy containing a clause which provides that the insurance afforded by the policy *shall* comply with the provisions of the motor vehicle financial responsibility law "of any state * * *" wherein the liability arising out of the ownership, maintenance or use of the automobile may occur.

We conclude that the restrictive endorsement hereinbefore set forth and discussed is ambiguous; that the construction thereof urged by defendant insurance carrier would be violative of the sections of the Vehicle Code heretofore discussed; and that said sections were intended by the Legislature to be, and are, a part of every policy of motor vehicle liability insurance issued by an insurance carrier authorized to do business in this state.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR and SCHAUER, JJ., concur.

SPENCE and McCOMB, JJ., concur in the judgment.

Rehearing denied; SPENCE and McCOMB, JJ., dissenting.



48 Cal.2d 25

COUNTY OF SAN DIEGO, Plaintiff and Appellant,

v.

SAN DIEGO GAS & ELECTRIC COMPANY, a Corporation, Defendant and Respondent.

L. A. 23743.

Supreme Court of California, In Bank.

Feb. 19, 1957.

Rehearing Denied March 20, 1957.

Action by county against gas and electric utility for declaratory relief and for an accounting for an amount allegedly due under franchise. The Superior Court, San Diego County, C. A. Paulson, J., entered judgment for utility and county appealed. The Supreme Court, Traynor, J., held that where utility's business was a unitary one and its county and city operations are integrated rather than separate and distinct from each other, utility must compute its payments to the county on a system wide basis.

Judgment reversed.

McComb and Schauer, JJ., dissented.

Opinion 299 P.2d 664, vacated.

1. Franchises ⇐2

A utility's gross receipts for purpose of determining amount of compensation due county under franchise under Broughton Act are produced by all of its operative property. West's Ann.Public Util.Code, § 6001–6017.

2. Franchises ⇐2

When operative properties are integrated and employed by utility as a unit and production of receipts by one part of property is dependent upon or contributes to production of receipts by other parts, receipts produced by each part cannot be identified specifically and total receipts must therefore be apportioned among the various properties according to the factors that produce them. West's Ann.Public Util. Code, §§ 6001–6017.

3. Electricity ⇐4
Gas ⇐6

Where a gas and electric utility's distribution lines originated in city and extended outward into county, production of receipts in county was completely dependent upon use of city facilities, and receipts contributed to maintenance of facilities, utility's business was unitary for purpose of determining moneys due to county under franchises granted by county to utility. West's Ann.Public Util.Code, §§ 6001–6017.

4. Electricity ⇐4
Gas ⇐6

Where a gas and electric utility's business was a unitary one and its county and

city operations are integrated rather than separate and distinct from each other, utility must compute its payments for use of county franchise under Broughton Act on a system wide basis. West's Ann.Public Util.Code, §§ 6001–6017.

James Don Keller, Dist. Atty., and Duane J. Carnes, Deputy Dist. Atty., San Diego, for appellant.

Luce, Forward, Kunzel & Scripps, San Diego, Chickering & Gregory, San Francisco, Edgar A. Luce, San Diego, Walter C. Fox, Jr., San Francisco, and James L. Focht, Jr., San Diego, for respondent.

TRAYNOR, Justice.

On November 28, 1952, the County of San Diego filed an action for declaratory relief and an accounting for monies claimed to be due for the years 1947 to 1951, inclusive, for franchises granted by the county to defendant under the Broughton Act (Pub. Util. Code, §§ 6001–6017). That act fixed the payments at "* * * two percent (2%) of the gross annual receipts of the grantee arising from the use, operation, or possession of the franchise." Section 6006.

Defendant serves all of San Diego County including several municipalities. It has two franchises from the county, one for electric lines and one for gas lines. It also holds franchises granted by the several municipalities.

Among the municipalities served by defendant are the cities of San Diego, Coronado, and National City. These three cities are contiguous and for the purposes of this opinion are considered as one.

Defendant computed its payments to the county in the following manner: (1) it determined its gross receipts from the county alone, *excluding all receipts from city consumers;* (2) it apportioned *county* receipts between distribution property and all other operative property by means of an "investment factor," a percentage figure derived by dividing the value of investment in distribution property *in both the city and county* by the value of total investment in all operative property *in both the city and county;* (3) it apportioned the part of gross receipts thus attributed to distribution property between public and private rights of way according to the number of miles of each in the county.

The trial court found that the method used by defendant in its computation was correct, and therefore entered judgment for defendant. The county appeals.

The county contends that defendant's facilities are operated as a unit and that receipts of the entire system should therefore be included in the computation and apportioned among the various franchises by the method approved in prior decisions of this court. County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983; City of San Diego v. Southern Cal. Tel. Corp., 42 Cal.2d 110, 266 P.2d 14; County of Los Angeles v. Southern Counties Gas Co., 42 Cal.2d 129, 266 P.2d 27; see also County of Tulare v. City of Dinuba, 87 Cal.App. 744, 263 P. 249. The county also urges that even if city receipts are to be segregated from defendant's total receipts, county receipts should likewise be so segregated, but that defendant does not consistently maintain such segregation, for it allocates part of the county receipts to the city by applying in its apportionment between distribution property and other operative property an "investment factor" that reflects the value of investment in plant in both the city and county.

The basic question presented is whether receipts from defendant's entire system should be included in the computation of payments due the county, or whether defendant can identify the gross receipts produced by its city property by treating its county and city operations as separate and distinct from each other and exclude that portion of its gross receipts from the computation of payments due the county.

[1, 2] The answer to this question is to be found in the rationale of system-wide computation and apportionment in the cases previously cited. This rationale is based

on two premises. A utility's gross receipts are produced by all of its operative property. City of San Diego v. Southern Cal. Tel. Corp., supra, 42 Cal.2d at pages 123–124, 266 P.2d 14; County of Los Angeles v. Southern Counties Gas Co., supra, 42 Cal.2d at pages 133–136, 266 P.2d 27. When operative properties are integrated and employed in a business as a unit and the production of receipts by one part of the property is dependent upon or contributes to the production of receipts by the other parts, the receipts produced by each part cannot be identified specifically and the total receipts must therefore be apportioned among the various properties according to the factors that produce them. County of Tulare v. City of Dinuba, supra, 188 Cal. at pages 674, 678, 682, 206 P. 983; City of San Diego v. Southern Cal. Tel. Corp., supra, 42 Cal.2d at page 124, 266 P.2d 14; County of Los Angeles v. Southern Counties Gas Co., supra, 42 Cal.2d at pages 133–136, 266 P.2d 27; see also Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 121, 41 S.Ct. 45, 65 L.Ed. 165; State Railroad Tax Cases, 92 U.S. 575, 608.[1]

It is true that in the Dinuba case it was recognized that apportionment by formula might not be necessary in every situation. It was said: "We have adopted this appropriation, to the various rights of way, according to mileage, not necessarily as an exclusive method of distribution of the gross receipts, but as a practicable one where the contribution of the various franchise easements to the gross earnings cannot be otherwise determined. There may be portions of the distributing system where the entire transmission from the producing plant to the consumer is supplied through a given franchise, or is entirely supplied over private easements. Such earnings would inure to such specific franchises or easements. * * * But where, as will often happen, contribution to the earnings of the various rights of way is general and indistinguishable, we can see no reason why the proportionate mileage basis should not be used in apportioning the statutory percentage of gross receipts." 188 Cal. at pages 681–682, 206 P. at page 990. The exceptional situation contemplated by that statement, however, is more fully explained by another statement in the opinion: "If the electric plant is all within the borders of a single municipality and entirely distributed from transmission lines covered by the franchise no complications can arise. The entire proportion of the earnings attributable to the transmission and delivery of electricity belongs to the gross receipts from which the two per cent. shall be paid. Immediately the operation of the business passes such limitation the complications begin, if we treat the separate franchise is used solely and exclusively in all electricity passing through the part of the system covered by such franchise * * *." 188 Cal. at page 675, 206 P. at page 987. In other words, the exceptional situation in which apportionment by formula is not necessary is one in which one franchises as controlling the income from serving the community that granted the franchise and no other. The Dinuba case expressly recognized "[t]he absurdity of the position that any integral part of an electric distributing system * * * is entitled to credit for the whole of the earnings from deliveries and sales in a given county or municipality when a large part of such service is over parts of the system not subject to such franchise or permit * * *." 188 Cal. at page 674, 206 P. at page 987.

We are thus brought to the question whether defendant operates its property on a system-wide basis or whether its city and

1. Similar principles are applied in the cases arising under the California Bank and Corporation Franchise Tax now found in part 11, § 23001 et seq. of the Revenue and Taxation Code. (See Butler Brothers v. McColgan, 17 Cal.2d 664, 111 P.2d 334; Edison California Stores v. McColgan, 30 Cal.2d 472, 183 P.2d 16; John Deere Plow Co. of Moline v. Franchise Tax Board, 38 Cal.2d 214, 238 P. 2d 569.)

county operations are so separate and distinct that the receipts of one are not dependent upon or contributed to by the other.

[3] During the years in question[2] defendant operated what is described as a radial system. The bulk of its administrative facilities and most of its production plant were within the city. Its distribution lines originated in the city and extended outward into the county. All of the gas and electricity used in the city were produced and distributed therein. Many county consumers were also served by the lines originating in the city with gas and electricity produced in the city.

The conclusion is inescapable that defendant's operative property, including its franchises, is integrated and operated as an interdependent whole. Defendant itself has recognized the unitary nature of its business, for in apportioning county receipts between distribution property and other operative property it has used an "investment factor" reflecting the value of investment in the entire system. Moreover, the production of receipts in the county is completely dependent upon the use of city facilities. The same lines that carry gas and electricity to city consumers are extended into the county to supply consumers there. General plant and office facilities in the city contribute to an indeterminate extent to the production of county receipts, City of San Diego v. Southern Cal. Tel. Corp., supra, 42 Cal.2d at page 122, 266 P.2d 14, and such receipts in turn contribute to the maintenance of such plant and facilities. Thus there can be no doubt that defendant's business must be regarded as unitary to determine what part of its total receipts, including county receipts, are attributable to its operative property in the city. Since it is unquestionably unitary for that purpose, it does not lose its unitary character when it is necessary to determine what part of its total receipts are attributable to operative property in the county, for its business cannot be, for purposes of the Broughton Act, both unitary and nonunitary at the same time. As was said in County of Tulare v. City of Dinuba, supra, "* * * the purpose of the act was to impose only a two per cent. charge upon the gross receipts arising from the entire franchise rights enjoyed in all the highways covered by the system, whether in one or several counties or municipalities. When the company or corporation has paid two per cent. of all its earnings properly attributable to all its franchises whether covering one or more counties, it has fulfilled its obligation. It, of course, cannot concern such corporation how this amount is distributed to the various municipalities, so long as it is released from further liability * * *." 188 Cal. at page 675, 206 P. at page 987.

[4] We conclude therefore that since defendant's business is a unitary one and its county and city operations are integrated rather than separate and distinct from each other, defendant must compute its payments to the county on a system-wide basis in accord with established principles governing such computation. (County of Los Angeles v. Southern Counties Gas Co., supra, and cases cited.)

The judgment is reversed for a recomputation of the disputed payments in conformity with the views expressed in this opinion.

GIBSON, C. J., and SHENK, CARTER, and SPENCE, JJ., concur.

2. On November 1, 1949, the company started importing gas over county rights of way for use in the city. After the commencement of this action the company made supplemental payments to the county for use of the gas franchise for the last two months of 1949 and for the years 1950 and 1951, basing those payments on a computation that includes receipts from its entire system. The dispute as to the gas franchise is therefore limited to the payments for 1947, 1948, and the first ten months of 1949.

McCOMB, Justice.

I dissent. I agree with the reasoning in the opinion prepared by Mr. Presiding Justice Barnard for the District Court of Appeal in County of San Diego v. San Diego Gas & Electric Co., Cal.App., 299 P.2d 664.

SCHAUER, J., concurs.

Rehearing denied; SCHAUER and McCOMB, JJ., dissenting.



148 Cal.App.2d 656

John Forrest KINGEN, Plaintiff and Respondent,

v.

Frank WEYANT, Gust Paleologos and Nick Paleologos, Individually and Gust Paleologos and Nick Paleologos, d/b/a Fairground Inn, Defendants and Appellants.

Civ. 5352.

District Court of Appeal, Fourth District, California.

Feb. 25, 1957.

Action by tavern patron against another tavern patron for unlawful assault and battery in tavern and against tavern owners and operators for injuries received from such other patron allegedly due to negligence of owners and operators. The Superior Court, Fresno County, Milo Popovich, J., following verdict for all defendants, granted patron's motion for new trial as against all defendants, and owners and operators appealed. The District Court of Appeal, Mussell, J., held that evidence was insufficient to support judgment against owners and operators.

Order reversed as to appellants.

1. Appeal and Error ⇐977(3)
New Trial ⇐6

Granting of new trial rests largely in trial judge's discretion, and order granting new trial may be reversed only if there is no substantial conflict on material issues and the evidence is insufficient, as matter of law, to support a contrary verdict.

2. Innkeepers ⇐10.2

Inn proprietor has duty to protect his patrons from injury, annoyance, and mistreatment but is not an insurer of their safety.

3. Innkeepers ⇐10.1

Inn proprietor's obligation in regard to protection of his patrons is limited to exercise of reasonable care.

4. Innkeepers ⇐10.2

In regard to injury, annoyance, and mistreatment of his patrons, innkeeper is liable only when he is negligent in receiving or harboring guests of known or vicious propensities.

5. Negligence ⇐134(5)

In action by tavern patron against tavern owners and operators for injuries received from other patron allegedly due to negligence of owners and operators, evidence was insufficient to support a judgment against owners and operators.

Edward A. Friend, San Francisco, for appellants Paleologos.

Simon Marootian, Fresno, for respondent.

MUSSELL, Justice.

This is an action for damages for personal injuries sustained by plaintiff when his head struck the tile floor in a tavern and restaurant owned and operated by appellants Gust and Nick Paleologos in Fresno county.

The complaint contains three causes of action. The first cause of action is against the defendant Frank Weyant for damages for unlawful assault and battery. In the second cause of action it is alleged that the defendants Paleologos and their bartender carelessly and negligently served intoxicating beverages to defendant Weyant, knowing that he had consumed intoxicating beverages to excess and know-

ing that he was a person of vicious, violent, quarrelsome and disorderly propensities; that they negligently failed to control his conduct and allowed him to assault and strike plaintiff with his hands and fists, causing him to fall and strike his head on the floor. It is alleged in the third cause of action that the appellants and their agent, the bartender, negligently served intoxicating beverages to defendant Weyant, negligently failed to control him in his disorderly conduct, having the ability to do so, and negligently allowed him to assault the plaintiff.

A jury trial resulted in a verdict for all defendants and plaintiff moved for a new trial. The court granted the motion on all the grounds stated in the notice of motion and as against all defendants. Defendants Gust and Nick Paleologos appeal from the order granting a new trial as to them.

On November 6, 1953, the premises involved herein and known as the "Fairground Inn" were owned and operated by the appellants. At about 5:00 p. m. on that date, defendant Weyant, an equipment operator for the county of Fresno, entered the building and he and his wife, who came in a few minutes later, sat at the bar, drinking, until about 9:00 p. m. Weyant drank two bottles of beer before his wife arrived and five or six bourbon and soda highballs thereafter. At about ten minutes to 9 o'clock, one Jim Kepley and his wife came in with another couple and occupied one of the booths. Kepley came over to the bar and got four bottles of beer to carry back to the booth, and as he passed Weyant and his wife, he said "Hello" to her. When Kepley, who was not known to Weyant, had returned to his booth, Weyant asked his wife what his name was and she stated that his name was Jim, that he used to live across the alley from her, and that she did not know his last name. Weyant testified that he then said, "It is funny that you should call him Jim and you don't recall his last name"; that she said, "Well, if you want to know what his last name is, why go over and ask him"; that he then walked over to the young man and said, "Pardon me, sir, my wife don't seem to recall your last name. What is your last name?"; that Kepley said, "It is none of your damn business"; that he (Weyant) then said, "Would you like to take a walk outside"; that Kepley's wife would not let him go outside and at that time a Mr. Holcroft came over to the booth and in a "gentlemanly manner settled the situation very nicely"; that he (Weyant) intended to take Kepley out and beat him up; that while he was at the booth the bartender said, "Boys, break it up"; that he (Weyant) then walked back to his wife and started out of the inn; that he took his wife by the arm and off the bar stool and they started toward the door; that "somebody took me by the shoulder when I got opposite the shuffleboard and I just brushed back my arm that way, and the back of my hand struck somebody alongside the jaw"; that he did not see who it was and that he was "just getting unencumbered to get out of the door"; that as soon as he got out of the door, his wife told him he had better come on back "Forrest is on the floor"; that he went back and sat on a bar stool and saw the plaintiff, Forrest Kingen, stretched out flat on the floor and that the first time he had seen him was as he went out; and that he had seen Kingen playing at the shuffleboard during the conversation with Kepley.

Plaintiff Kingen testified that he had known Weyant for approximately two years; that he had been going to the Fairground Inn for approximately that same length of time; that he went to the inn on November 6, 1953, at about 2:00 p. m. and was playing shuffleboard when Weyant come in; that he continued playing shuffleboard until approximately 9:00 p. m.; that he drank several beers, but was sober; that he saw Weyant and his wife sitting at the bar but did not see what they did; that at about 9:00 p. m., while he was playing shuffleboard, some one fell against him and he remembered trying to push them up and that "the only

thing I remember is 'take it easy, Frank', and turned around, and that is when my lights went out"; and that he did not remember being struck by Frank or falling to the floor.

Jim Kepley testified that he and his companions were sitting at a booth in the inn; that he had occasion to go to the bar and order some drinks; that he saw Mrs. Weyant, whom he had known for several years, sitting at the bar; that he said "Hello" to her and went back to his booth; that Weyant came over to the booth and "asked me what my name was, what I was doing, where I worked, and wanted me to go outside with him"; that he told Weyant that it wasn't any of his business; that Weyant then went to the bar and came back again, asking the same questions and tried to pull him out of the booth; that Mr. Holcroft, one of the shuffleboard players, then came over to the booth and after further conversation with Weyant, his wife persuaded him to go back to the bar; that Weyant was pulling his wife by the arm, taking her outside, and when they were about at the door, Kingen tried to stop him; that Weyant hit Kingen with his right hand and Kingen fell to the floor and hit his head.

Ernest Neil Gonzales, the bartender, testified that he had worked at the inn for about four years; that he was on duty on the night of November 6, 1953; that he was instructed by the appellants to keep order in the premises and to stop any disturbance, if possible; that plaintiff was playing shuffleboard intermittently from 6:00 to 9:00 p. m. and had had several drinks; that Weyant and his wife were sitting at the bar and when some one spoke to her, Weyant went over to the booth and there was a little argument; that "I told them to break it up, take it easy, and that seemed to settle it"; that there was no more commotion and that the argument lasted less than one minute; that Weyant and his wife came back to the bar and Weyant pulled his wife off the stool and started for the door; that when they got almost to the door, plaintiff came over and laid his hand on Weyant and "I don't know whether Frank hit him or just shoved him, or what it was, but anyway, Forrest fell down. It was all instantaneous, like that. I couldn't say whether he either hit him or pushed him. I don't know"; that when plaintiff came over to defendant Weyant, he said something like "Don't do that" and Weyant said "This is my own family affair and stay out of it"; that during all the time he had worked at the inn he had never seen Weyant get into any kind of a fight or argument or trouble nor had never seen him in an intoxicated condition.

Other witnesses who were present when plaintiff received his injuries testified as to the argument with Kepley and the ensuing events. However, it is apparent from all the testimony that the argument at the Kepley booth was of short duration and that plaintiff received his injuries when Weyant was taking his wife from the premises.

[1] Appellants argue that the trial court abused its discretion in granting a new trial as to them and that the evidence would not support a judgment against them. We are in accord with these contentions. The granting of a new trial rests largely in the discretion of the trial judge and an order granting a new trial may be reversed only when there is no substantial conflict on material issues, and the evidence is insufficient as a matter of law to support a contrary verdict. Brinkerhoff by Nelson v. Ferguson, 107 Cal. App.2d 175, 176, 236 P.2d 588. However, if, as in the present case, the evidence as a whole is insufficient to support a verdict in favor of plaintiff as against these appellants, the order granting a new trial cannot be sustained. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 168, 153 P.2d 338. And, as is said in Martin v. Smith, 103 Cal.App.2d 894, 897, 230 P.2d 679, 681; "* * * (w)hen it appears that there is no substantial evidence to support a judgment in favor of a party whose motion for new trial has been granted, an ap-

pellate court may and should reverse the order of the trial court granting a new trial."

The action against appellants herein is based upon allegations that they served intoxicating liquor to Weyant, knowing that he had been consuming such beverages to excess and knowing that he was a person of vicious, quarrelsome and disorderly propensities, and negligently failed to control his conduct and allowed him to strike the plaintiff.

The general rule of the common law as to tort liability arising out of the sale of intoxicating beverages is stated in Cole v. Rush, 45 Cal.2d 345, 348, 289 P.2d 450, 452, quoting from 30 American Jurisprudence 573, section 607, as follows:

> " 'The common law gives no rememdy for injury or death following the mere sale of liquor to the ordinary man, either on the theory that it is a direct wrong or on the ground that it is negligence, which imposes a legal liability on the seller for damages resulting from the intoxication.' " (Citations.)

The evidence herein does not show that Weyant was known to appellants to be vicious, violent or quarrelsome. Weyant had never had any argument or trouble with the plaintiff prior to the occasion here involved. He had been a regular customer at the Fairground Inn for several years and went there approximately 200 times a year, often taking his meals there. While he sometimes spoke in a loud voice, he had had no argument in the inn except on one occasion in 1952, and that was with his wife, during which he took her out of the back door of the inn. Plaintiff had known Weyant for approximately two years and had never seen him fight with or swing at any one. Appellant Gust Paleologos had known Weyant for several years prior to November 6, 1953, had never seen him in an intoxicated condition, and had never seen him fight with any one nor quarrel with any one except his wife on one occasion in 1952. None of the many witnesses who testified at the trial had ever seen Weyant fight with or strike any one.

[2, 3] The proprietor of an inn is under a duty to protect his patrons from injury, annoyance and mistreatment but he is not an insurer of their safety (27 Cal.Jur.2d, Innkeepers, Sec. 25), his obligation in this respect being limited to the exercise of reasonable care, and he is liable only when he is negligent in receiving or harboring guests of known violent or vicious propensities. (27 Cal.Jur.2d, Innkeepers, Sec. 27, p. 278; 28 Am.Jur., Innkeepers, Sec. 54, p. 577.) In Rahmel v. Lehndorff, 142 Cal. 681, 685, 76 P. 659, 661, 65 L.R.A. 88, it is said:

> "An innkeeper is, no doubt, guilty of negligence if he admits to his hotel, or permits to remain there, whether as guest or servant, a person of known violent and disorderly propensities, who will probably assault or otherwise maltreat his guests, and for the consequence of such negligence he may be liable in damages. But the plain ground of his liability in such case would be his negligence in harboring persons dangerous to the peace and comfort of those for whose comfort he is bound to provide."

[4, 5] The evidence herein, considered in the light of these authorities, is insufficient to support a judgment against these appellants based on negligence. Weyant was not known to them as a vicious or dangerous person. He had never been known to strike a guest in the inn although he had been a regular patron thereof for several years. The bartender took prompt and effective action in terminating the argument between Weyant and Kepley and his admonition to "break it up" was heeded by Weyant. There was then no reasonable probability that Weyant would assault any one, for he immediately started to leave the inn. The bartender could not reasonably be required to anticipate the action of the plaintiff in attempting to restrain Weyant as he was leaving the establishment and it cannot be said that the acts or conduct

of appellants were the proximate cause of plaintiff's injuries.

There is no notice of appeal on behalf of the defendant Weyant in the record before us, or a request to prepare the record on appeal. We therefore do not pass upon the order granting a new trial as to the defendant Weyant.

The order granting a new trial is reversed as to the appellants Gust Paleologos and Nick Paleologos.

BARNARD, P. J., and GRIFFIN, J., concur.



148 Cal.App.2d 717

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Louise WILLIAMS, Rose Skipper, Evelyn Moore, and Henry Thomas, Defendants,

Rose Skipper and Henry Thomas, Defendants and Appellants.

Cr. 5744.

District Court of Appeal, Second District, Division 3, California.

Feb. 26, 1957.

Defendants were convicted of burglary in that they entered grocery store with intent to commit theft. The Superior Court of Los Angeles County, H. Burton Noble, J., rendered judgment and orders denying new trials. Defendants appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to sustain convictions.

Affirmed.

1. Burglary ⇐41(1)

Evidence was sufficient to sustain conviction for burglary in entering grocery store with intent to commit theft.

2. Conspiracy ⇐13

A conspirator is bound by acts of co-conspirator done in presence and furtherance of conspiracy. West's Ann.Pen.Code, § 31.

3. Burglary ⇐41(1)

In prosecution for burglary in entering grocery store with intent to commit theft therein, even if one of the defendants had merely sat on stool outside store during commission of crime, evidence was sufficient to establish conspiracy between her and other defendants to burglarize store. West's Ann.Pen.Code, § 31.

Walter L. Gordon, Jr., Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow and Morris Schachter, Deputy Attys. Gen., for respondent.

VALLÉE, Justice.

By information defendants-appellants Rose Skipper and Henry Thomas, together with Louise Williams and Evelyn Moore, were charged with burglary in that on February 22, 1956 they entered the store of Joe's Food Town with intent to commit theft therein. In a trial by the court without a jury each defendant was found guilty. Skipper was sentenced to California Institution for Women. She appeals from the judgment and the order denying her motion for a new trial. Thomas was granted probation. He appeals from the order denying his motion for a new trial. The contentions are that the corpus delicti was not established and the evidence is insufficient to sustain the findings of guilt.

About 8 a. m. on February 22, 1956 Henry Young, the owner of a grocery store in Huntington Park, observed Skipper, Williams, and Moore in his store. The women walked around about fifteen minutes and left without making a purchase. About 9:30 a. m. an employee of Lloyd's Market in Huntington Park observed the three women enter the market. On February 22

M. Sakamoto operated a grocery store on East First Street in Los Angeles from which articles were later found in defendants' possession.

Joe's Food Town was a store on Brooklyn Avenue in Los Angeles. About 11 a. m. on February 22 Notrica, an employee, saw all four defendants in the store. Thomas purchased one pear then went out and stood in front of the store. Williams and one of the other women walked out of the store through the grocery and produce departments. Notrica testified he believed Skipper was the woman with Williams and that the other woman, Moore, was sitting at the store's hot dog stand.

As Notrica stood watching the two women walk out of the store, Williams dropped a can of coffee to the floor. She picked it up immediately. Notrica waited for her to put it back into a bag but she did not do so. Instead she walked out to an automobile parked directly in front of the store at a fireplug. Notrica hurriedly checked to see whether Williams had paid for the coffee, then ran to the automobile and opened the rear door. All four defendants were in the automobile. Thomas was in the driver's seat. The floor of the automobile was covered with cans of coffee, canned ham, juice, and jars of mayonnaise. Notrica accused Williams of having taken the coffee without paying for it. He picked up the can from the seat of the automobile and Williams stepped out. Thomas drove away and Notrica obtained the license number. The police were then called. Before they arrived Williams departed. In addition to the can of coffee, a can of Hafnia ham was missing from the store.

The four defendants were arrested about noon. There were various items of merchandise on the floor of the automobile: three cans of ham and several cans of Folger's coffee from Young's store; two jars of mayonnaise and a can of orange juice from Sakamoto's store; the can of Hafnia ham from Joe's Food Town, several 2-pound cans of Hills Bros. coffee, cans of corn, other cans of ham, a sack of potatoes, and two bottles of Coca-Cola.

Skipper told a police officer her name was Waters; later she admitted it was Skipper. She told him the group would meet in Watts and either she or the other women would go with Thomas "on these little tours picking up coffee." The officer asked her if it was true they had set a goal of ten 2-pound cans of coffee each; Skipper replied affirmatively and said it was kind of a standard—that this way it made about $8.00 for them and they could give Thomas $4.00 or $5.00 each when the day was over. She told the officer she had not gone into Joe's Food Town, that she had bought a hot dog and had remained on the sidewalk eating it while Williams and Moore went inside. She said the mayonnaise had come from a little place on Brooklyn Avenue before they got "to the market where we were caught." He asked her about the hams. She said each of them had taken a ham "out of the Chinaman's place," the mayonnaise had come from a place on Brooklyn Avenue operated by a Chinese or Japanese, and she had entered the store where the mayonnaise was taken.

Thomas took a police officer to the various markets he (Thomas) had visited with the women. He told the officer that the women got "all sorts of things. But mostly it is coffee." The officer asked Thomas how they disposed of the merchandise. Thomas said he would drive the women each time they wanted to go, they would pick up the merchandise and then peddle it house-to-house in the vicinity of Watts; the women ordinarily gave him $3 or $4 apiece for gas money.

Skipper testified she was in the automobile with the other defendants in the area of Joe's Food Town on February 22; she remained in the car and did not enter any grocery store that day and did not take anything out of any store; she did

not know anything which had not been paid for had been taken from a store. She testified she was sitting in the back seat. She first denied having seen the merchandise found in the automobile as depicted in a photograph. Later she admitted that some of the merchandise was in the back seat but she guessed she did not notice it. Thomas did not testify.

[1–3] A can of coffee and a ham were in Joe's Food Town immediately before defendants entered. Shortly after they left, the can of coffee and the ham were missing and they were later found in Thomas' automobile. They had not been sold and the proprietor had not given anyone permission to take them. The corpus delicti was established. People v. Kross, 112 Cal.App. 2d 602, 609, 247 P.2d 44.

The evidence was manifestly sufficient to sustain the findings of guilt. As to Thomas, it is inconceivable that any other finding could have been made. As to Skipper, the reasonable inferences deducible from the evidence warrant the conclusion she participated in the burglary of Joe's Food Town. She argues she merely sat on a stool outside eating a hot dog. However, Notrica testified he believed Skipper was the person he saw walking out of the store with Williams at the time the latter dropped the can of coffee. The evidence was sufficient to establish a conspiracy between the four defendants to burglarize stores, including Joe's Food Town. Skipper, being a party to the conspiracy, is bound by the acts of her coconspirators done in pursuance and furtherance of the conspiracy. Further, a reasonable inference from the evidence is that Skipper aided and abetted her codefendants in the commission of the offense. All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet its commission, are principals. Penal Code, § 31.

As to defendant Skipper, the judgment and the order denying the motion for a new trial are affirmed. As to defendant Thomas, the order denying a new trial is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



148 Cal.App.2d 731

The PEOPLE of the State of California and Robert A. Heinze, Warden of California State Prison at Folsom, Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF PLACER, and Lowell L. Sparks, Judge of the Superior Court of the State of California, in and for the County of Placer, Respondents.

Civ. 9220.

District Court of Appeal, Third District, California.

Feb. 26, 1957.

Proceeding on petition for writ of prohibition to prevent the Superior Court, Placer County, Lowell L. Sparks, J., from further proceedings pursuant to a writ of habeas corpus requiring a state prison to produce a prisoner before said court for purpose of inquiring into cause of his imprisonment. The District Court of Appeal, Peek, J., held that Superior Court of county other than one in which prisoner was detained had no jurisdiction to entertain his petition for habeas corpus.

Writ issued.

1. Habeas Corpus ⇐48

Superior court of county other than one in which prisoner was detained had

no jurisdiction to entertain his petition for habeas corpus.

2. Witnesses ⇐18

A writ of habeas corpus for purpose of producing a prisoner in a state penitentiary as a witness was invalid where there was no showing that such writ came within provisions of Penal Code dealing with prisoners as witnesses, and no showing that any proceedings were taken under such provisions. West's Ann.Pen.Code, §§ 2620, 2621.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for petitioners.

Al. B. Broyer, Dist. Atty., Auburn, for respondents.

William Henry Crosby, real party in interest, pro se.

PEEK, Justice.

Petitioners seek a writ of prohibition to prevent the respondent superior court of Placer County from further proceedings in action number 20242 now pending in that court.

It appears that the respondent court has issued a writ of habeas corpus directing the petitioner Heinze as warden of Folsom State Prison to produce William Henry Crosby, the real party in interest herein, before said court for the purpose of inquiring into the cause of his imprisonment and detention pursuant to a proceeding previously filed by him in said court. Crosby is presently imprisoned at Folsom State Prison which is located in Sacramento County and was not at the time of the issuance of said writ, nor is he now, imprisoned within the county of Placer.

[1] It is the established law of this State that: "The jurisdiction of the superior court is limited to issuance on behalf of persons in actual custody in their respective counties, or to cases where one within the county has removed the subject therefrom in order to evade the writ and there is reason to suppose that he may be compelled to produce him, although the process of the superior court in the exercise of the jurisdiction is statewide. Thus, the superior court of a county other than the one in which the petitioner is detained ordinarily has no jurisdiction to entertain his petition for habeas corpus." 24 Cal.Jur.2d 525–526.

[2] Even if it could be argued that the writ previously issued by the respondent court was for the purpose of producing Crosby as a witness, it would be invalid since there is no showing whatever that it comes within the provisions of Penal Code, §§ 2620 and 2621, nor were any proceedings taken thereunder.

Let the writ issue.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



148 Cal.App.2d 676

Ann ROUSSEAU, Plaintiff and Appellant,

v.

Paul O'GARA and Gerald O'Gara, each individually and the Law Firm of O'Gara & O'Gara, etc., et al., Defendants and Respondents.

Civ. 17019.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1957.

Hearing Denied April 25, 1957.

Action against attorneys for damages for preparing findings that omitted certain allegedly conclusive evidence. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment in favor of attorneys and plaintiff appealed. The District Court of Appeal, Dooling, Acting P. J., held that complaint was insufficient to state a cause of action.

Affirmed.

1. Attorney and Client ⇐26

In action against attorneys for adverse party in prior litigation for damages for failure to include in findings prepared by such attorneys certain allegedly conclusive evidence, complaint was insufficient to state a cause of action.

2. Trial ⇐393(2)

The trial judge is responsible for the findings; the counsel who prepares the findings at judge's direction is not responsible.

3. Attorney and Client ⇐26

Attorneys cannot be held liable in damages to opposing litigants for preparing findings in accordance with decision of trial judge rendered after judge has heard the conflicting evidence presented to him in trial of case.

4. Attorney and Client ⇐26

No attorney can be liable for omitting from findings of facts, those facts which after a full hearing the trial judge has concluded are not true.

Ann Rousseau, in pro. per.

O'Gara & O'Gara, James A. O'Gara, San Francisco, for respondents.

DOOLING, Acting Presiding Justice.

This is an appeal from a judgment in favor of defendants entered after an order sustaining a demurrer without leave to amend to plaintiff's first amended complaint.

Appellant appears in propria persona. Respondents are attorneys who represented certain parties adverse to appellant in a prior action. A review of that action is necessary to an understanding of the present appeal.

In April of 1950 appellant commenced an action in the superior court in which she sought to quiet title to certain real property. This property was the principal estate of one Josephine B. McConnon, the grandmother of appellant, who died in 1949 at the age of 86. Appellant claimed the property by virtue of a purported deed from her grandmother dated January 5, 1931, and recorded February 5, 1931. The trial court found that the deed through which appellant claims, although recorded, had not been executed or signed by Mrs. McConnon, and that Mrs. McConnon had not delivered it to appellant or to anyone else for her. On appeal it was held that the findings of non-execution and non-delivery of the deed were amply supported by substantial and credible evidence. Rousseau v. Hurtado, 122 Cal.App.2d 705, 265 P.2d 580. These findings were filed February 11, 1952. The judgment for defendants in that action was affirmed.

While the amended complaint is in two counts the gist of the attempted statement of a cause of action is found in count one and these allegations of that count are incorporated into count two by reference. Stripped of allegations of conclusions of law and repetitious matter the appellant stands on the following allegations:

"Defendants herein knew that there was conclusive evidence of the proper execution and proper acknowledgment of a deed in fee simple absolute to Ann Rousseau, grantee, which occurred in the offices of Tobin and Tobin, San Francisco, California, on the 5th day of February, 1931. Defendants knew through the conclusive evidence that the said deed had been recorded the same day of its proper execution and proper acknowledgment; and that the notary public who acknowledged the proper execution had as her business address the law firm of Tobin and Tobin during the entire year of 1931. This conclusive evidence was entirely omitted from the 'findings of fact' and 'conclusions of law' and defendants herein allowed, cooperated, and have willfully and aggressively attempted to divest Plaintiff herein of her property through fraud."

[1–3] A reading of the opinion in Rousseau v. Hurtado, supra, 122 Cal.App.2d 705, 265 P.2d 580, shows that the evidence re-

cited in the complaint of the alleged execution and delivery of the deed from her grandmother to appellant herein was presented to the court in that case, including the fact that the notary whose typed name appeared on the acknowledgment of the purported deed as recorded had her office with Tobin and Tobin in 1931. 122 Cal. App.2d 713–714, 265 P.2d 585. The quoted allegations of the complaint in this regard amount to an assertion that these facts were conclusive evidence that the purported deed was actually executed and acknowledged by the purported grantor, that defendants knew these facts and with knowledge of them prepared and presented findings to the court which omitted this conclusive evidence. In fact the evidence was not conclusive as held by the trial court and the District Court of Appeal in that case. The charge amounts to no more than that counsel prepared findings in accordance with the order for judgment made by the court in that case and presented them to the judge, omitting therefrom facts against the truth of which the trial judge had expressly found. The trial judge is responsible for the findings, not counsel who prepares them at his direction. Hathaway v. Ryan, 35 Cal. 188. The matter was fully litigated and with all the evidence before him the trial judge found that the deed was not executed by the purported grantor. Appellant no doubt sincerely believes that this decision was a gross miscarriage of justice but the defendants in this case cannot be held liable in damages to appellant for preparing findings in accordance with the decision of the trial judge after hearing the conflicting evidence presented to him in the trial of that case.

[4] We need not decide whether an attorney might be held liable in damages for knowingly presenting false evidence in a case. The allegations here fall far short of such a situation. We are satisfied that no attorney can be liable for omitting from findings facts which after a full hearing the trial judge has concluded are not true.

Judgment affirmed.

KAUFMAN, J., and DRAPER, J. pro tem., concur.



148 Cal.App.2d 972

Ann ROUSSEAU, Plaintiff and Appellant,

v.

Cyril R. TOBIN, Individually, and the Law Firm of Tobin & Tobin, etc., et al., Defendants and Respondents.

Civ. 16987.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1957.

Hearing Denied April 25, 1957.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Ann Rousseau, in pro. per.

Tobin & Tobin, John J. Hopkins, San Francisco, for respondents.

DOOLING, Acting Presiding Justice.

This case is similar to Rousseau v. O'Gara, Cal.App., 307 P.2d 376. Respondents are attorneys who represented parties adverse to appellant in the prior action, Rousseau v. Hurtado, 122 Cal.App. 2d 705, 265 P.2d 580. The amended complaint contains allegations similar to those found in the O'Gara case. Respondents' demurrer to appellant's amended complaint was sustained without leave to amend. For the reasons given in our opinion in that case the judgment must be affirmed.

Judgment affirmed.

KAUFMAN, J., and DRAPER, J. pro tem., concur.

148 Cal.App.2d 619

Ben GREENBLATT and Al Freed, Individually and on behalf of Ralph Kushner Construction Company, a co-partnership, consisting of Ralph Kushner, Al Freed, Ben Greenblatt and Bernard Schonfeld, Plaintiffs and Appellants,

v.

STATE BOARD OF EQUALIZATION, William G. Bonelli, George R. Reilly, James H. Quinn, Paul R. Leak, as members thereof, Defendants and Respondents.

Civ. 21959.

District Court of Appeal, Second District, Division 2, California.

Feb. 21, 1957.

Rehearing Denied March 18, 1957.

Action for a sales tax refund. The Superior Court, Los Angeles County, Roger Alton Pfaff, J., entered judgment adverse to taxpayers and they appealed. The District Court of Appeal, Fox, J., held that evidence sustained finding that services performed or offered to be performed by plaintiffs in connection with sales reflected in tax imposed by State Board of Equalization were incidental and subsidiary to sale of building materials and did not constitute plaintiffs as building contractors, or a service organization within meaning of sales and use tax ruling exempting contractors or service organization from sales tax on tangible personalty used incidentally in rendering such services.

Judgment affirmed.

1. Appeal and Error ⇐989

When a finding of fact is attacked on ground that there is not any substantial evidence to sustain it, power of an appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.

2. Appeal and Error ⇐996

When two or more inferences can reasonably be deduced from the facts, reviewing court is without power to substitute its deductions for those of the trial court.

3. Appeal and Error ⇐931(1), 994(3), 1012(1)

Where, on appeal from an adverse judgment, findings of fact are attacked on ground of lack of evidence to sustain them, District Court of Appeal must view evidence in light most favorable to prevailing party in lower court, and bear in mind that it is function of trial court to pass on credibility of witnesses and determine weight to which their testimony is entitled.

4. Licenses ⇐34

In action for sales tax refund, evidence sustained finding that services performed or offered to be performed by plaintiffs in connection with sales reflected in tax imposed by State Board of Equalization were incidental and subsidiary to sale of building materials and did not constitute plaintiffs as building contractors, or a service organization within meaning of sales and use tax ruling exempting contractors or service organizations from sales tax on tangible personalty used incidentally in rendering such services.

5. Trial ⇐105(4)

Where, in action for refund of sales tax, no objection was made to admission into evidence of certain exhibits purporting to be agreements for sale of building materials by taxpayers to buyers, such exhibits would be deemed properly admitted into evidence.

6. Trial ⇐54(1)

To confine admitted evidence to something less than its natural scope there must be agreement by the court, and in the absence of an express understanding between counsel and the court that evidence is limited to a particular matter, the court will be authorized to consider it for any purpose for which it is competent and relevant to the issues.

Wolver & Wolver, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann and James C. Maupin, Deputy Attys. Gen., for respondents.

FOX, Justice.

Plaintiffs were engaged, generally, in providing pre-cut lumber and other building materials for "do-it-yourself" builders. Believing they were entitled to a sales tax refund, plaintiffs brought this action. They have appealed from an adverse judgment.

It is plaintiffs' position that they were exempt from the state sales tax because they were either contractors or a service organization. They also challenge the sufficiency of the evidence to sustain adverse findings on these issues. The State Board of Equalization levied the tax on the theory that plaintiffs primarily were selling materials and that the services rendered their customers were minor and incidental to these sales. Hence they are not basically either a service organization or building contractors.

There is no issue as to the method by which the tax was computed nor as to the accuracy of the computation.

The Ralph Kushner Construction Company (hereinafter sometimes referred to as Kushner) is a partnership which was engaged in the business here under review in 1947. The modus operandi was substantially as follows:

Kushner's salesmen sought out people who were interested in building a house or an addition to their home, with a view to selling them pre-cut building materials. Each transaction was evidenced by a document signed by the customer and, on occasion, by a representative of plaintiffs. This document was headed "Material Contract Only." The customer was referred to as "Purchaser" and Kushner as "Seller." There were also printed on the face of the instrument these words: "Agreement for Materials Listed by Seller." Just below this line, on the left of the page, were the printed words: "Material List." Below these words were thirteen blank lines,[1] following which was a space for the total price of the materials listed.

Under the transaction with Kushner, the purchaser received certain pre-fabricated materials which, with the help of a set of do-it-yourself plans supplied by Kushner, would enable a customer with some skill in carpentry to erect the contemplated structure. The lumber was pre-cut by Kushner and put together much on the order of a jig-saw-puzzle. The plans which Kushner furnished its customers were prepared by one Eagle. They were denominated "key plans" suitable for use by a layman, and showed where each piece of lumber sold by Kushner was to be placed. No provision for furnishing either plumbing or electricity was included in the transaction.

Kushner assisted the customers in securing financing with a bank on FHA terms, in securing building permits, and in obtaining final approval by building authorities. There was evidence that Kushner had an oral agreement with the lending institution to the effect that it would see that the structures financed by the bank would ultimately be completed.

Kushner did not purchase materials by the job but in bulk. Kushner maintained a yard in Wilmington to pre-cut the lumber in accordance with the plans. After the lumber was cut to size it was delivered to the jobs. If a customer did not understand the plans, or did not know how to do the work, plaintiff furnished a man to explain the instructions and show him how he should proceed. These employees of plaintiff assisted a customer where necessary and upon occasion did particular items of the work for the customer. This type of assistance varied from minor matters to more important ones. Mr. Spencer, whose job it was to oversee construction and offer advice when a customer requested it, estimated on direct examination that 75 percent of the customers required some assistance. However, on cross-examination, Spencer appeared to modify this percentage by

1. In the space on Exhibit "A", after listing the materials to be furnished, is the following in handwriting: "Material contract only No labor Nothing else"

stating: "I do know it is about ten" percent.

After about the middle of July no new transactions were entered into. So far as the preexisting transactions were concerned, there is testimony that Kushner was obliged, pursuant to its oral arrangement with the bank, to assist in completing 65 percent of its customers' unfinished projects.

There was also testimony that plaintiffs replaced, without cost, material stolen from the job site or destroyed during construction.

The owner either did the plumbing and electrical work or hired a licensed contractor to do it. Where a customer was unable to do such work, Kushner would assist the customer to get additional financing in order to enable him to hire a contractor. Plaintiffs' men were sometimes called on for assistance in plastering.

Kushner's total income for 1947 from these operations was $1,045,706.25. Yard wages for the period were $44,580.57. Total material purchases were $630,094.86.

The trial court found: "All services performed or offered to be performed by the plaintiffs or any of them in connection with the sales reflected in the measure of tax imposed by defendant State Board of Equalization were incidental and subsidiary to the sale of building materials, and did not constitute the plaintiffs or any of them as building contractors, repairers of property, or a service organization."

[1–3] In passing on plaintiffs' contention that this finding is lacking in evidentiary support, the following principles must be observed: "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. [Citations.] When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. [Citations.]" Primm v. Primm, 46 Cal.2d 690, 693-694, 299 P.2d 231, 233. Thus we must "view the evidence in the light most favorable to the respondent," Estate of Isenberg, 63 Cal.App. 2d 214, 216, 146 P.2d 424, 425, and bear in mind that it is the function of the trial court to pass on the credibility of the witnesses and determine the weight to which their testimony is entitled.

[4] Applying these principles, it is clear there is ample evidence to support the challenged finding. The record reveals (1) that plaintiffs sold pre-cut lumber and building materials to customers, together with plans and instructions for a "do-it-yourself" building operation; (2) that for every fourteen dollars of plaintiffs' costs for materials only one dollar was spent for labor; (3) that the instruments executed by plaintiffs and their customers, which were prepared by plaintiffs, were in form and content for materials only and without any obligation, or even suggestion, that plaintiffs were to build the contemplated structures; (4) that in only a portion of the transactions, the percentage of which was never satisfactorily established, was assistance given to purchasers, the extent of such assistance being left in a state of nebulous uncertainty. These facts provide substantial evidentiary support for the questioned finding.

While plaintiffs gave testimony indicating they rendered their customers substantial assistance, much of it was so vague and uncertain as to be lacking in probative value. The record discloses that plaintiffs' principal witnesses failed to enlighten the court with respect to the details of plaintiffs' operations and testified in generalities amounting almost to equivocation. This is illustrated by the remarks of the trial court near the conclusion of the trial when he observed: "This is the funniest million-dollar business I ever heard of. Here are two partners and there isn't any partner that knows anything about what went on in the business." Also, in evaluating the credibility of the plaintiffs and in passing on the weight of their testimony,

the court was entitled to take into consideration their interests in the outcome of the case. It certainly cannot be said on this record that the trial court was required to find that plaintiffs were in fact operating as building contractors or conducting a service operation.

The trial court's finding that all services performed or offered by plaintiffs were "incidental and subsidiary to the sale of building materials" is a reasonable inference from the evidence, and adequately disposes of plaintiffs' argument that they were operating a service organization and hence were exempt on that ground from the state sales tax.

In support of their contention that they are exempt from sales tax as a service enterprise, plaintiffs refer to Sales and Use Tax Ruling No. 1 then in effect (18 Cal. Adm.Code, sec. 1901), promulgated by the State Board of Equalization, which provided: "Persons engaged in the business of rendering service are consumers, not retailers, of the tangible personal property which they use *incidentally* in rendering the service. Tax, accordingly, applies to the sale of the property to them. If in addition to rendering service they regularly sell tangible personal property to consumers, they are retailers with respect to such sales and they must obtain permits, file returns and remit tax measured by such sales * * *." (Italics added.)

The difficulty with plaintiffs' position is that they did not establish themselves as consumers of tangible personal property incidental to a service operation. The evidence and findings demonstrate that plaintiffs did not use the pre-cut lumber and building materials "incidentally" in rendering a service. Rather, plaintiffs' service was merely "incidental" to the sale of its products, pre-cut lumber and building materials, and the trial court reasonably so found.

In support of their contention that plaintiffs were contractors, they rely on Sales and Use Tax Ruling 11 (18 Cal.Adm.Code, sec. 1921), promulgated by the State Board of Equalization. So far as pertinent here, that ruling, during the time with which we are concerned, provided:

"(1) The term 'contractor' as used herein includes both general contractors and subcontractors and includes contractors engaged in such building trades as carpentry, bricklaying, cement work, steel work, plastering, sheet metal work, roofing, tile and terrazzo work, electrical work, plumbing, heating, air conditioning, painting and interior decorating.

"(2) The term 'construction contract' as used herein means a contract for erecting, remodeling, or repairing a building or other structures on land and includes lump-sum, cost-plus, and time-and-material contracts. The term 'construction contract' does not include a contract for the sale and installation of machinery or equipment.

"(3) The term 'materials' as used herein means tangible personal property which when combined with other tangible personal property loses its identity to become an integral and inseparable part of the completed structure.

* * * * * *

"(b) Materials Used by Contractors: (1) Contractors are the consumers of materials used by them in fulfilling construction contracts and the tax applies to the sale of such materials to the contractors * * *."

If plaintiffs were contractors and thus consumers of the building materials here in question they would not be subject to the state sales tax.

Examination of Ruling No. 11 discloses that plaintiffs are not within the protection of that ruling as "the consumers of materials" because they did not use the materials "in fulfilling construction contracts" with their customers. See last paragraph of ruling, supra. Plaintiffs had no such contracts with their customers.[2] The documents in

2. There is testimony that independent of plaintiffs' dealings in pre-cut lumber and other building supplies they built "about 12 houses" during the period here under consideration.

evidence are headed "Material Contract Only." The customer is designated as "Purchaser" and plaintiffs as "Seller." The document is described as an "Agreement for Materials Listed by Seller." In the fine print near the bottom of the page appear other statements referring to the parties as purchaser and seller. The document is conspicuous by the absence of any agreement on the part of Kushner to perform any construction work. The record discloses they were primarily selling precut lumber and other building materials. The fact that their testimony revealed they rendered to inexperienced customers certain services and assistance and occasional technical advice with respect to the proper utilization of materials sold does not put them in the primary calling of building contractors. For, as found by the court on substantial evidence, such services were merely "incidental and subsidiary to the sale of building materials."

Plaintiffs argue that their oral agreement with the bank that they would assume responsibility for the completion of unfinished buildings effected a modification of their contracts with their customers. It is obvious that such agreements with a third party were collateral to any agreement with the customer, and did not directly modify such agreements. The trial court could reasonably conclude that the arrangement with the bank made Kushner a guarantor that the buildings would be completed, rather than a contractor that was itself obligated to complete the buildings. Furthermore, the fact that upon occasion Kushner, in order to make good on its obligation to the bank, arranged to have certain structures completed, did not transform its primary function from a vendor of pre-cut lumber and other building materials with do-it-yourself kits for its customers' use into building contractors.

[5, 6] Plaintiffs further contend that Exhibits "A" and "B" were not properly admissible into evidence. Both exhibits were properly in evidence, no objection having been made to their admission. Plaintiffs assert that the McMonigle document (Exhibit "B") was offered for a limited purpose. The record discloses no such limitation. To confine admitted evidence to something less than its natural scope there must be agreement by the court. "In the absence of an express understanding between counsel and the court that evidence is limited to a particular matter, the court will be authorized to consider it for any purpose for which it is competent and relevant to the issues." Sears v. Starbird, 78 Cal. 225, 230, 20 P. 547, 549; Sill v. Reese, 47 Cal. 294, 340. Plaintiffs also contend that Exhibits "A" and "B" were merely informal documents not indicative of the complete agreement with its customers and that the entire agreement could be shown by parol testimony. The record reflects that the trial court fully explored the extrinsic circumstances relative to plaintiffs' transactions before reaching its conclusion that they were primarily sellers of material.

Levine v. State Board of Equalization, 142 Cal.App.2d 760, 299 P.2d 738, is of no assistance to Kushner since the appellant therein was a contractor building tanks under *bona fides* construction contracts. At page 768 of 142 Cal.App.2d, at page 744 of 299 P.2d the court recognizes the principle here applicable when it stated: "Where the appellants had no construction contract but were merely selling their materials to purchasers out-of-state, they were reselling personal property."

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

148 Cal.App.2d 776

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Leroy Kenneth BARDIN, Defendant and Appellant.

Cr. 5695.

District Court of Appeal, Second District, Division 3, California.

Feb. 27, 1957.

Rehearing Denied March 13, 1957.

Hearing Denied April 25, 1957.

Defendant was convicted of bookmaking, unlawfully keeping and occupying store building for purpose of recording and registering bets on horse races, and with having recorded and registered bet or bets on horse races. After denial of his motion for new trial, the defendant appealed from judgment and order of the Superior Court of Los Angeles County, Clement D. Nye, J. The District Court of Appeal, Shinn, P. J., held, in part, that police officer was properly allowed to state opinion that symbols on papers found on defendant's store premises at time of arrest represented wagers on horse races, and that list of names and numbers represented accounting method used by bookmakers.

Judgment and order affirmed.

1. Criminal Law ⇐478(1)

Testimony of expert witnesses familiar with the notations and symbols used by persons engaged in the bookmaking trade is admissible for the purpose of interpreting the meaning of the symbols, in prosecution for bookmaking and related offenses. West's Ann.Pen.Code, § 337a, subds. 1, 2, 4; West's Ann.Code Civ.Proc., § 1863.

2. Criminal Law ⇐472

Police officer was properly allowed to state opinion in prosecution involving bookmaking and related offenses that certain written symbols on papers found on the defendant's store premises at time of arrest represented wagers on horse races, and that list of names and numbers represented accounting method used by bookmakers. West's Ann.Pen.Code, § 337a, subds. 1, 2, 4; West's Ann.Code Civ.Proc., § 1863.

3. Criminal Law ⇐680(1)

Where papers discovered on defendant's premises at time of arrest on charges involving bookmaking and related offenses had been marked for identification in evidence in criminal prosecution, and testimony of police officer relating thereto was foundational, and papers were ultimately admitted in evidence, court did not improperly permit police officer to explain meaning of symbols before papers themselves had been received in evidence. West's Ann.Pen.Code, § 337a, subds. 1, 2, 4.

4. Criminal Law ⇐781(2)

Where police officer testified that after denying he was a bookmaker defendant refused to answer any more questions, instructions on effect of a defendant's silence or evasive response in face of accusatory statements was properly given in bookmaking prosecution. West's Ann.Pen.Code, § 337a, subds. 1, 2, 4.

5. Criminal Law ⇐814(17)

"Two reasonable theories" instruction is proper in criminal case only when prosecution relies either wholly or substantially upon circumstantial evidence.

6. Criminal Law ⇐1173(2)

Failure of court in prosecution for bookmaking and related offenses to give "two reasonable theories" instructions requested by defendant was not prejudicial, where evidence of guilt was so strong as to admit of no reasonable belief in defendant's innocence. West's Ann.Pen. Code, § 337a, subds. 1, 2, 4.

7. Criminal Law ⇐1173(2)

Failure of court in criminal prosecution to grant "two reasonable theories" instruction requested by defendant is reversible error only if it is improbable that jury would have reached same result had instruction been given.

Joseph W. Fairfield and Ethelyn F. Black, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Leroy Kenneth Bardin was charged by information in Count I with bookmaking; in Count II with unlawfully keeping and occupying a store building for the purpose of recording and registering bets on horse races; and in Count III with having recorded and registered a bet or bets on horse races, Pen.Code, § 337a, subds. 1, 2 and 4. Trial was to a jury. Defendant was convicted on all three counts and his motion for a new trial was denied. Bardin was placed on probation for three years and fined $250. He appeals from the judgment, Pen.Code § 1237, and the order denying him a new trial.

Fredrick L. Smith, a police officer, was the chief witness for the People. The following is the substance of his testimony. Acting on a tip from an anonymous informant, Officer Smith and his partner Officer Kubiak entered an electrical appliance store located at 5980 West Pico Boulevard in Los Angeles shortly after noon on December 15, 1955. As they entered they saw defendant conversing with a female customer. Defendant asked the officers whether he could help them and they replied that they wanted to look at some television sets. Presently a man entered the store, handed defendant a small slip of white paper, which Bardin put in his left-hand pocket, and said: "That's in the first at Los Alamitos." Then the telephone rang and defendant answered the call. Officer Smith heard him say: "Is that in the first? * * * What number?" and saw Bardin making notes on a piece of writing paper on the desk in front of him. After defendant hung up, he dialed a number and said: "I have one here in the first, Number 9 horse, 20 to win, and I also have one in the first at Los Alamitos, 30 and 20. Do you want to take that, too?" When this conversation was completed the officers identified themselves, placed Bardin under arrest, and made a search of his person and the premises. Officer Smith identified papers found on the premises, including one taken from defendant's pocket. They contained numerous notations such as "30–20–X," "1–9–20XX," "3–1–FG–1XX 12.15" and names such as "Spee Damion," "Crossbow Girl," etc. and certain initials. The witness identified the symbols as the record of bets, the names and initials as those of horses and tracks, and he testified that horses so indicated had run at the tracks and in the races indicated. Also in evidence was a sheet of paper, found under a blotter, with numerous names and figures, followed by a plus or minus sign. This the officer identified as a bookmaker's "owe sheet." Other papers identified as betting markers were found in a wastebasket.

Officer Kubiak testified that he had a conversation with Bardin immediately after the arrest. He asked defendant what he was doing with the pieces of paper which had been recovered from his person and from the top of the desk. Defendant told him that he bet on the horses once in a while and that the notations on the slips represented his own bets. He denied that he was a bookmaker but refused to answer any more questions about his activities on the premises.

Milton Jaffe, testifying in defendant's behalf, stated that he was in the appliance store on business when the officers arrived. He denied passing the slip of paper bearing the notation "Samia Gamal 30–20–X" to defendant.

Defendant, testifying in his own behalf, denied, generally, the testimony of the officers. He did not know what the figures "1–9–20XX" on the large sheet taken from the desk meant and thought that they might refer to the model number of some merchandise. He said the numerals "3–1, 1XX, 12.15" represented a bet he had himself made on a horse. He testified that the figures on the "owe" sheet represented debts which he owed or

which were owing to him but that they were unconnected with bets.

The first assignment of error to be considered is that the court erred in allowing Officer Smith to testify, over defendant's objections, to the meaning of the symbols on the papers recovered from defendant's person and from the premises. (Defendant concedes that his claim of the insufficiency of the evidence is but a restatement of this contention.) In this connection, defendant argues that the symbols were intelligible to the ordinary layman, hence not a proper subject for expert testimony, and that the witness was erroneously permitted to give an opinion as to the ultimate facts in issue. The argument is without merit.

[1, 2] With reference to the sheet of white paper found on top of the desk in the store, defendant asserts that "Even to one totally uninitiated in the science of improving the breed it was obvious that some of the figures therein related to horse racing." He also claims that the list of names followed by plus and minus signs and numerals "did not contain any type of cryptogram nor code requiring interpretation." There is little plausibility to these assertions. Symbols such as we have mentioned do not readily yield their significance to the uninformed reader. The testimony of expert witnesses familiar with the notations and symbols used by persons engaged in the bookmaking trade is admissible for the purpose of interpreting the meaning of the symbols. Code Civ.Proc. § 1863; People v. Hinkle, 64 Cal.App. 375, 379, 221 P. 693; People v. Newman, 24 Cal.2d 168, 175, 148 P.2d 4, 152 A.L.R. 365. These considerations apply equally to the document which Officer Smith described as an "owe" sheet. We have no doubt that if a qualified expert may state his opinion that certain written symbols represent wagers on horse races, he may also state his opinion that a list of names and numbers (such as was discovered in the circumstances of the instant case) represents an accounting method used by bookmakers.

[3] Defendant also argues that the court should not have permitted Officer Smith to explain the meaning of the symbols until the papers themselves were received in evidence. The papers had been marked for identification, the testimony was foundational, and the papers were ultimately admitted in evidence. There was no error.

[4] The next assignment of error to be considered is that the court erred in giving at the People's request the two instructions which we have set out in the margin.[1, 2] Defendant asserts that he answered all the questions put to him by the arresting officers, hence the court improperly instructed the jury as to the effect of his silence or evasive response in the face of accusatory statements. This assertion is not borne out by the record. Officer Kubiak stated that after denying he was a bookmaker Bardin refused to answer any more questions. Defendant admitted on direct examination that when the officers asked him whether he was

1. "If you should find from the evidence that there was an occasion when the defendant, under conditions which fairly afforded him an opportunity to reply, failed to make denial [, or made false, evasive or contradictory statements,] in the face of an accusation, expressed directly to him or made in his presence, charging him with the crime for which he now is on trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, such [silence] [and] [or] [conduct] on his part may be considered against him as indicating an admission that the accusation thus made was true. Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only to explain the conduct of the accused in the face of it; and unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement."

2. "The law of this state requires that you view with caution any evidence that purports to relate an oral admission of the defendant [or an oral confession by him.]"

bookmaking on the premises he did not answer the question and did not tell them he was not bookmaking. On cross-examination he stated that he would refuse to reply to a "silly question" and that if he were asked whether he was a bookmaker he would either ignore the question or answer in the negative; he did not remember whether he answered "no" to Officer Kubiak's question. In the light of defendant's evasive replies the instructions were proper. People v. Willmurth, 77 Cal.App.2d 605, 615, 176 P.2d 102.

[5] The final assignment of error is that the court erred in refusing to give the "two reasonable theories" instruction which was requested by defendant.[3] He argues that since the evidence which tended to establish his guilt was circumstantial, he was entitled to an instruction defining the jury's duties in weighing the reasonable inferences to be drawn from that evidence, and the court's failure to so instruct the jury was prejudicial error, citing People v. Bender, 27 Cal.2d 164, 163 P.2d 8; People v. Goldstein, 139 Cal.App.2d 146, 293 P.2d 495; People v. Yrigoyen, 45 Cal.2d 46, 286 P.2d 1. The instruction requested by defendant is proper only when the prosecution relies either wholly or substantially upon circumstantial evidence. People v. Thompson, 147 Cal.App.2d 543, 305 P.2d 274. The attorney general concedes that the testimony of Officer Smith in explanation of the papers found on Bardin's person and on the premises was circumstantial, see People v. Goldstein, supra, 139 Cal.App.2d 146, 153–154, 293 P.2d 495, and admits that as to Count II (occupying a store for the purpose of registering bets) the instruction should have been given. As to Count I (bookmaking) and Count III (recording and registering bets) it is argued that the evidence of guilt was direct, hence no instruction need have been given with respect to those counts. The attorney general also argues that the court's failure to give the requested instruction was not prejudicial error and that no miscarriage of justice resulted. We agree with this latter contention.

[6, 7] The question is whether it is improbable that the jury would have reached the same result had the instructions been given. People v. Goldstein, supra, 139 Cal.App.2d 146, 156, 293 P.2d 495. We are of the opinion that the evidence of guilt was so strong as to admit of no reasonable belief in defendant's innocence. The officers witnessed a betting transaction between Bardin and another man in the store; they overheard telephone conversations in which Bardin relayed wagers; they recovered papers in defendant's handwriting which contained lists of bets and an accounting system kept by defendant with respect to horse race wagers. Defendant's denials and explanations of the evidence against him were implausible; his replies to the officers' questions were evasive. Refusal to give the instruction was not reversible error.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

3. "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

"You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

"Where the guilt of the defendant is predicated upon circumstantial evidence, the character of the evidence must not only be consistent with the hypothesis of guilt but inconsistent with any rational hypothesis of innocence."

148 Cal.App.2d 720

M. BROWN, Plaintiff and Respondent,

v.

FRIESLEBEN ESTATE COMPANY, a corporation, Defendant and Appellant.

Civ. 8920.

District Court of Appeal, Third District, California.

Feb. 26, 1957.

Rehearing Denied March 22, 1957.

Hearing Denied April 25, 1957.

Action for reasonable value of legal services rendered corporate defendant. The Superior Court, Butte County, Dudley G. McGregor and J. F. Good, JJ., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence supported trial court's determination that attorneys from whom plaintiff received an assignment for collection, were employed for corporate defendant and that it agreed to pay reasonable value of their legal services.

Judgment reduced by amount of interest allowed prior to entry of judgment, and as so modified affirmed.

See also 139 Cal.App.2d 1, 292 P.2d 952.

1. Interest ⇐39(3)

Interest on a judgment for value of legal services rendered was not allowable prior to entry of judgment.

2. Attorney and Client ⇐166(2)

In action for reasonable value of legal services rendered corporate defendant, evidence supported trial court's determination that attorneys from whom plaintiff received an assignment for collection were employed for corporate defendant and that it agreed to pay reasonable value of their legal services.

3. Attorney and Client ⇐166(3)

In action for legal services rendered corporate defendant, evidence sustained finding that amount earned by attorneys for services was $10,000.

4. Appeal and Error ⇐219(2)

Where no proper request for special findings was made, and findings made by trial court were as broad as the pleadings in the cause, District Court of Appeal would not reverse for want of findings unless trial court was compelled as a matter of law to make requested findings.

5. Accord and Satisfaction ⇐26(3)

In action for legal services rendered to corporate defendant, where evidence concerning negotiations about payment tended to prove attorneys had fully performed their contract of services and that defendant owed them a reasonable value therefor, even if an accord was established, evidence failed to prove a satisfaction and thus failed to prove a discharge of the obligation to pay compensation in a reasonable sum to attorneys.

Winston Churchill Black, San Francisco, Rich, Carlin & Fuidge, Marysville, for petitioner, Friesleben Estate Co.

Clewe, Blade & McDonald, Oroville, for plaintiff and respondent.

VAN DYKE, Presiding Justice.

[1] Plaintiff-respondent brought this action to recover a judgment for the reasonable value of legal services rendered to defendant-appellant. We shall refer to appellant as Friesleben. Respondent sued as an assignee for collection. She obtained a judgment in the sum of $10,000, together with interest thereon at the rate of 7% per annum from a date prior to judgment, the interest amounting to $1,625.49. It may be stated here it is conceded on appeal that interest was not allowable prior to the entry of judgment, and, therefore, if the judgment be affirmed, it is to be modified to that extent.

The following appears from the record. Friesleben is a corporation of the kind sometimes referred to as a family corporation. Five-sevenths of the issued stock was owned by Mrs. Alma M. Friesleben, a

woman of advanced age, one-seventh was owned by her two grandchildren, and the remaining seventh by a person unidentified by the record. Winston Churchill Black, hereinafter called Black, is an attorney at law, first employed by Friesleben in April or May of 1944. He has since been its attorney, a director and the secretary of the corporation. He testified that, owing to the advanced age of Mrs. Friesleben, decisions with respect to Friesleben affairs were generally arrived at by him in consultation with the minority stockholders, and that Mrs. Friesleben's health was such that she was not active in corporation matters. In May of 1944 the sole asset of Friesleben was a 1,700-acre ranch near Marysville. Friesleben, in that month, entered into an agreement for the sale of the ranch to Arnold Christenson, hereinafter called Christenson, and a few days later made another contract for the sale of the same ranch to Kesterson Lumber Corporation, hereinafter called Kesterson, which corporation, as purchaser, went into possession. Christenson thereupon brought suit for the specific performance of his prior contract and for damages suffered by him through the letting into possession of Kesterson. After prolonged litigation, Christenson prevailed, the judgment awarding him specific performance and damages applied by way of a reduction of the amount unpaid on the purchase price. Friesleben appealed from that judgment. Shortly thereafter, Kesterson filed suit against Friesleben to recover the sum of $50,000 which it had paid as a down payment on its purchase agreement with Friesleben. Thereupon, a settlement was made between Christenson and Friesleben, pending appeal. Ray Manwell and Ernest Clewe had been, and were at the time of the settlement, attorneys for Christenson and had represented him in his suit against Friesleben. Black and Senator W. P. Rich had been and were the attorneys for Friesleben. They had filed an answer and cross-complaint in the Kesterson suit wherein they sought to charge Kesterson with the profits from its possession of the ranch and with the value of personal property disposed of. It was anticipated that Friesleben might recover on this cross demand a sum large enough to offset the $50,000 down payment which Kesterson was demanding and also to obtain a money judgment for an amount of over and above the offset. Christenson and Friesleben settled their case by Christenson's granting a reduction in his damage award and by Friesleben's promising to pay him one-half of any sum it might recover from Kesterson above Kesterson's $50,000 demand. A few weeks after the settlement Manwell and Clewe agreed with Christenson as to the amount of their fees for their services to him in his suit against Friesleben. He agreed to pay them an amount in cash and, in addition, to assign over to them whatever he should receive from the ultimate outcome of Friesleben's cross action against Kesterson. The assignment was executed. Manwell and Clewe had, during this time, represented the general interests of the minor stockholders in Friesleben and in that sense represented parties interested in the outcome of the Kesterson litigation. It was arranged between them and Black that, for these minority stockholders, they would file a complaint in intervention in the Kesterson suit. They did this. It was further understood, however, that in the matter of this intervention Friesleben would be under no obligation to compensate them for any services they performed for their stockholders. In due course, upon motion by Kesterson, the court struck the complaint in intervention from the files. Thereupon, Manwell and Clewe, for their clients, requested permission from Black to join as counsel for Friesleben in the Kesterson litigation. Consent was given, but upon the agreement again that for such activities Friesleben would not be obligated to pay them. From that time on their names appeared as attorneys of record on all filings made in the case. That was the situation when, on December 16, 1946, the parties and their counsel in the Kesterson litigation appeared in court for the trial of that action. Manwell and Clewe testified that, although they wanted

for their minority stockholder clients to sit in on the trial of the action, they did not expect to participate in the trial work and had not undertaken to do so. They testified further that, before the trial opened, Black and Rich requested them to actively participate in the trial and to try the case with the exception of an opening statement to be made by Rich and the examination by Rich of Black as a witness. This request, they said, was based upon the intimate knowledge of the facts and the issues gained by Clewe and Manwell in conducting the Christenson litigation, it appearing that in particular the cross demand against Kesterson involved generally the same proof used by Christenson in proving his demand against Friesleben. The trial began, and the plan of trial agreed upon was followed. Manwell and Clewe testified in this action that shortly after the trial began, they broached the matter of compensation from Friesleben in view of the changed aspect of their participation, and that Black agreed they would be paid by Friesleben. Manwell testified that a little later in the trial he asserted to Black that their compensation should be substantial, and that Black concurred. The Kesterson litigation was prolonged, the issues, however, revolving almost entirely around the cross demand against Kesterson. After a three-day trial upon the matter of whether or not Friesleben had a valid cross demand, the trial court so ruled and ordered an accounting. Thereupon, the trial was resumed at a later date. An account was taken, and the cross demand was established in a sum which exceeded the $50,000 demand of Kesterson by $5,820.12 with interest. Under the settlement agreement between Christenson and Friesleben, one-half of the amount recovered was payable to Christenson. And, by virtue of his assignment, Clewe and Manwell were entitled to receive it as a part of his payment to them of the attorneys' fees he had agreed upon. The judgment of Friesleben against Kesterson was affirmed on appeal, and ultimately one-half of the amount awarded in excess of the $50,000 demand of Kesterson, the half amounting then to $4,600.80, was paid to Clewe and Manwell by Black.

The pleadings in this action were in common count form. The complaint was entitled "Complaint for Money Due for Services Rendered", and it generally alleged the employment, the rendition of services thereunder, the reasonable value thereof and nonpayment. The answer consisted of general denials. No affirmative defenses were specially pleaded.

[2] Friesleben asserts, in support of its appeal, that there was no testimony that anyone had authority on its behalf to hire Manwell and Clewe. The contention is without merit. It is undisputed on the record that Manwell and Clewe became attorneys of record in the case by arrangement between themselves and Black, and that they remained so throughout the proceedings preliminary to trial, throughout the trial and throughout the appeal. Black testified that he had been, throughout the time material here, a director and the secretary of the corporation, and that due to the inability of the principal stockholder to participate in corporation affairs, he had customarily made decisions in such matters by consultation with minority stockholders. Not only was he attorney for the corporation in respect of the Kesterson litigation, but he was its general counsel also. It is apparent from the record that he was chief counsel in the Kesterson litigation. Finally, when the issue of employment arose after the litigation was concluded, Black wrote to Clewe: "The corporation appointed me to represent them in the action and authorized me to employ additional counsel. I got specific authorization to have you and Ray join with counsel on the basis that I discussed with you in Oroville." There is ample support for the implied finding of the court that Black, in his plural capacities of general counsel, director-secretary of the corporation and chief counsel in the action, participated in an arrangement whereby Manwell and Clewe became counsel for

the corporation along with himself and Rich, even though it also appears that the first arrangements were that Friesleben should not be liable to pay for their services. The same considerations justified the trial court in the further implied finding that, based upon the changed relationship before the trial began, Black agreed for Friesleben that Manwell and Clewe should be reasonably compensated for their work from that time forward. Presumably, the directors of the corporation possessed the knowledge of the director-secretary and general counsel; and, of course, we must accept the trial court's determination that, in respect of the change in relationship and the agreement for compensation, the facts were as testified to by Manwell and Clewe. So accepting that determination, it is presumed that Black acquainted the corporate officers with the arrangements he had made, just as appears from his letter. It also appears that no question of the legality of employment was raised against Manwell and Clewe by anyone for the corporation until after the full rendition of the services. Finally, on this issue, and as appears more fully hereafter, Black claimed, for the corporation, to have made with them binding arrangements for their payment by an accord. Under such circumstances the record substantially supports the trial court's determination that Manwell and Clewe were employed for the corporation, and that the corporation agreed to pay the reasonable value of their services.

[3] Friesleben contends that the court's award of $10,000 for services rendered by Manwell and Clewe is unreasonable and exorbitant, asserting that their original association with the case was solely on behalf of the minority stockholders by whom they were to be paid and that their additional employment by Friesleben confined their additional work to the trial in the superior court in aid of Friesleben's other counsel in the prosecution of its cross-complaint. These arguments could well be addressed to the trial court and no doubt were. On appeal, however, we cannot say that, in view of the whole record, the trial court's finding as to the amount reasonably earned by Manwell and Clewe for services is not justified.

Friesleben further contends that the testimony of Manwell and Clewe concerning their employment and concerning other matters hereafter discussed as to an asserted accord is all inherently improbable and incapable of belief. We think no extended discussion is necessary in disposing of this assignment, for we find nothing inherently improbable and nothing incapable of belief.

Although the complaint was in common count form and the answer consisted of general denials, and although the findings of the court did not go beyond these general issues posed by the pleadings, nevertheless and without objection Friesleben introduced proof in defense of the cause sued upon of certain arrangements made after the services had been concluded and the obligations of Manwell and Clewe had been fully performed with nothing remaining save the ascertainment of the reasonable value of their services and the payment thereof by Friesleben. Notwithstanding the lack of affirmative pleadings, we will, under the circumstances, treat these matters as sufficiently presented and, therefore, to be decided on the merits.

Shortly before the remittitur came down, Manwell wrote to Black concerning compensation and suggested that for all legal services rendered by the four attorneys he and Clewe should receive $10,000 and Black and Rich should receive $15,000. Clewe also wrote to Black during this period, citing authorities in support of a suggestion he made that Friesleben could bring an action upon an attachment bond which Kesterson filed when he began his action against Friesleben and upon a second bond which Kesterson filed to maintain that attachment in force pending Kesterson's appeal from the judgment in that action. The idea appears to have been that fees expended by Friesleben in the litigation brought by Kesterson might be considered

as damages within the terms of the attachment bonds. In the following letter Clewe suggested that a determination ought to be reached as to the proper charges for all legal services rendered in the Kesterson suit. Black answered, discussing the subject of fees rather generally. After the remittitur came down, Clewe took up the matter of fees again and asked that progress be made; and Black replied, discussing the suggested litigation on the attachment bonds, saying: "As to attorney fees, I thought that we had reached an understanding, viz that we would ask in the damage suit [the proposed suit on the attachment bonds] for total attorney fees of $25,000.00, with the understanding that you and Ray would be included under a blanket bill of Bill Rich and mine to the company for that amount and with the understanding between us that in the event we recovered $25,000.00 for attorney fees that you and Ray would receive a total of $10,000.00 *which would include the amount to which you are entitled of one-half of the present judgment,* or as it would most likely be paid prior to that time the company would be given a credit off of the $10,000.00 for the sum already received in the Kesterson judgment. [This refers to the recovery Friesleben had made against Kesterson over and above the Kesterson claim for $50,000 which excess by Friesleben's settlement with Christenson belonged to Christenson as hereinbefore recited. It was the same fund or claim which Christenson had assigned to Manwell and Clewe.] In the event the company recovers a sum of less than $25,000.00, you and Ray are to receive two-fifths of any such sum, less the offset of all payments from the one-half due you from the Kesterson judgment." This appears to have been a proposal to partially pay Manwell and Clewe by giving them their own money earned by them while serving Christenson. Clewe answered, stating among other things: "The understanding with respect to attorneys' fees as set forth in your letter is entirely satisfactory to us and, I am sure, is also to Manwell." At the trial in this action Clewe testified, perhaps due to the fact that seven years had elapsed between the assignment to himself and Manwell by Christenson of Christenson's rights to the money now being offered to them in payment of their services to Friesleben, that he had entirely forgotten that the fund belonged to them. Shortly after Black wrote the above letter, he sent to Clewe a check for $4,600.80, and in the letter of transmittal Black wrote: "I am making the check in your name in accordance with your instructions so that it will facilitate your settling with Ray Manwell, but for the purpose of my records this payment is the amount due both of you, under our previous arrangement, at this time." Clewe wrote Black the next day, acknowledging receipt of the check and then, notwithstanding his apparent acceptance of Black's proposals concerning the way in which he and Manwell should be paid by Friesleben wrote: "Would it not be in order at the present time to send us the difference between $10,000.00 and the amount of the check which we have now received. If this were done then * * * our total fee will have been paid in full." We now quote from Friesleben's opening brief on appeal: "That was of course turned down because it was not in the agreement, and in the second place there was certainly nothing definite that the attorney fees would be collected from Kesterson. Thereafter the correspondence from Clewe and Manwell goes upon the assumption that the balance of the $10,000.00 was due and payable immediately, whether or not it was ever collected from Kesterson." After considerable controversy, however, Clewe finally wrote Black protesting against their having to await the outcome of the suit on the attachment bonds for their fees and saying: "I feel certain that you and Bill are not permitting compensation to you to depend upon the outcome of the pending action, and if you are not, neither should we nor will we." In this letter Clewe also asserted that the money that had been received was the money which was owed by Friesleben to Christenson and already belonged to

himself and Manwell by assignment and that "This was apparently overlooked by us throughout our previous correspondence." The parties at this point broke off diplomatic relations, and Manwell and Clewe, through their assignee for collection, began the present action to recover $10,000 as the reasonable value of their services to Friesleben.

[4] As stated before, the trial court made no specific findings upon the matters just discussed. Friesleben complains of this lack of findings, and certainly the work of this court would have been easier if specific findings had been made and we had had the benefit of knowing what decisions the court made. On the other hand, no proper request for special findings thereon was made, and the findings made actually were as broad as the pleadings in the cause. Unless necessary, therefore, we are not disposed to reverse for want of findings. When findings were proposed, Friesleben's counsel filed a document entitled "Objections to Proposed Findings of Fact * * *." Therein they objected to the finding of employment of Manwell and Clewe, to the finding that they performed services at the special instance and request of Friesleben and stated that their objections were based upon the following grounds: That the findings did not show Manwell's and Clewe's employment to represent the majority stockholders; that they did not show that their services were rendered to those majority stockholders; that they did not show that any employment of the attorneys was for services in addition to those to be rendered to the minority stockholders; that they did not show that in April and May of 1953 Friesleben agreed with Manwell and Clewe to the payment of $4,600.80 as their fees for services rendered and did not show that they accepted that payment as payment in full; that the findings did not show it was agreed that an additional sum would be due only if and when Friesleben received attorneys' fees from Kesterson; and that in that event the sum to be paid would be two-fifths of the amount received up to $10,000, less $4,600.80 already paid. There was no request in the document filed for findings upon issues presented by proof and counter-proof of the dealings concerning the compensation to be paid Manwell and Clewe and the manner and time of its payment. At best, request is made that findings on that subject matter be made favorable to Friesleben. Unless, therefore, the trial court was as a matter of law compelled to make the findings requested and unless such findings would have constituted a defense to the action, the trial court was not required to respond.

Friesleben's counsel have not informed this court in their briefs and arguments as to the exact legal theories on which they contend that they have proved a defense to the action against the corporation. On the main issues we have already said that the court's judgment adverse to the corporation must be sustained, and we are now concerned, therefore, only with whether or not the matters last discussed constitute a defense, had the trial court found as Friesleben requested. We are convinced that they do not. In our view, the evidence concerning the negotiations about payment tends to prove an accord. Manwell and Clewe had fully performed their contract of services, and Friesleben owed them the reasonable value thereof. "An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled." Civ.Code, sec. 1521. "Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction." Civ. Code, sec. 1523. On the subject of when an obligation is discharged by accord and satisfaction, we now refer to Restatement of the Law of Contracts, section 417, et seq., and herein we are assuming that by the correspondence and the conduct of the parties an accord was made out. "The following rules are applicable to a contract to accept in the future a stated performance in satis-

faction of an existing * * * duty to make compensation: (2) Such a contract does not discharge the duty, but suspends the right to enforce it as long as there has been neither a breach of the contract nor a justification for the creditor in changing his position because of its prospective nonperformance. (b) If such a contract is performed, the previously existing duty is discharged. (c) If the debtor breaks such a contract the creditor has alternative rights. He can enforce either the original duty or the subsequent contract. (d) If the creditor breaks such a contract, the debtor's original duty is not discharged. The debtor acquires a right of action for damages for the breach, and if specific enforcement of that contract is practicable, he acquires an alternative right to the specific enforcement thereof. If the contract is enforced specifically, his original duty is discharged." Sec. 417, supra. There is an exception to the rule that an accord does not discharge the duty, and it is stated in Section 418, as follows: "A subsequent contract may itself be accepted as immediate satisfaction and discharge of a pre-existing * * * duty to make compensation; and if so accepted the pre-existing duty is discharged and is not revived by the debtor's breach of the subsequent contract." In Comment under Section 418, supra, it is stated that it is a question of interpretation whether a subsequent agreement shall immediately discharge the earlier duty or whether it is only performance of that subsequent agreement which will have that effect. Section 419 is declared to give aid to that interpretation and it is as follows: "Where a contract is made for the satisfaction of a pre-existing * * * duty to make compensation, the interpretation is assumed in case of doubt, if the pre-existing duty is an undisputed duty * * * to make compensation * * *, that only performance of the subsequent contract shall discharge the pre-existing duty; * * *." And in the Comment we find: "If a claim for an unliquidated sum is overdue it is designated as a duty to make compensation. Where the * * * claim is overdue, the creditor generally will not enter into a bargain for an immediate cancellation of his claim without obtaining satisfaction and not merely a promise of it." Applying the foregoing, we hold that the trial court would have been fully justified in determining that the accord itself was not, and was not intended to be, accepted as a discharge of the duty to pay compensation to Manwell and Clewe. Again assuming that Friesleben proved an accord and a part performance of it through transmittal of Black's check for $4,600.80, nevertheless, no discharge of the original duty to pay reasonable compensation for the attorneys' services is thus shown, for Friesleben's proof stopped at this point. It did not prove that it ever brought the suit against Kesterson and his bonding company or what result was attained if litigation was begun. In short, it did not prove accord and satisfaction and thus failed to prove a discharge of the obligation to pay compensation in a reasonable sum to Manwell and Clewe. But Friesleben argues further that, in any event, it was entitled to a credit of $4,600.80 upon the amount fixed by the trial court as the reasonable value of services rendered to it. It does not follow as a matter of law that, having made the accord and partially performed it, it is entitled to a credit upon the original obligation. For instance, under the rules we have quoted from Restatement, if Manwell and Clewe, obligated by the accord to await the outcome of the litigation against Kesterson, filed this suit and thus breached their duties under the accord, the remedy of Friesleben would be either to assert a cause of action for damages for the breach or seek the specific enforcement of the accord in equity; and in either event, proof being made to the satisfaction of the court that the accord was based upon a mistake of fact as to the rights of Manwell and Clewe as to the only funds they received, Friesleben might be denied either

damages or specific enforcement. These matters are speculative and we state them merely to show that when Friesleben stopped where it did in its reliance upon the accord, it had made out neither total nor partial defense to the original obligation reflected in the judgment from which this appeal has been taken.

The judgment appealed from is reduced by the amount of interest allowed prior to entry of judgment, and as so modified it is affirmed.

SCHOTTKY and PEEK, JJ., concur.



148 Cal.App.2d 761

In the Matter of the ESTATE of Helen Elizabeth GILBERT, Deceased.

Ruby Stone ANGELL, Lucy Ruth Stone, Bessie Jane Stone, Dorothy White Gough, Contestants and Appellants,

v.

The TOWN OF WEST BROOKFIELD, MASSACHUSETTS, Amherst College, et al., Legatees and Respondents.

Civ. 21627.

District Court of Appeal, Second District, Division 3, California.

Feb. 27, 1957.

Rehearing Denied March 27, 1957.

Hearing Denied April 25, 1957.

Will contest was instituted by first cousins of testatrix, on ground that devises and bequests were invalid under the Probate Code because the will was not executed at least thirty days before the death of testatrix, and on ground that testatrix was mentally incompetent to execute the will. The Superior Court of Los Angeles County, J. Howard Ziemann, J., entered judgment for proponents, and the contestants appealed. The District Court of Appeal, Shinn, P. J., held that evidence was insufficient to take issue of mental incapacity to jury and that verdict was properly directed in favor of the proponents, and that cousins of a testator are not "descendants" or "ancestors" of testator within meaning of statute providing that all property bequeathed or devised to a charity within thirty days of death of testator, shall go to spouse, brother, sister, nephew, nieces, "descendant" or "ancestor" of testator.

Judgment affirmed.

1. Wills ⇐50

Testatrix was competent to make a will if she had mental capacity to be able to understand the nature of the act she was doing, to understand and recollect the nature and extent of her property, and to be able to remember and understand her relation to the persons who were the natural objects of her body.

2. Trial ⇐171

The power of a court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit.

3. Trial ⇐139(1), 142

A nonsuit or a directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if a verdict were given.

4. Trial ⇐142

Where evidence raises an inference that a fact exists, and either party produces evidence of nonexistence of the fact that is clear, positive, uncontradicted, and of such a nature that it cannot be rationally disbelieved, nonexistence of the fact is established as a matter of law, and inference is dispelled as a matter of law, and if fact inferred is necessary to establish an essential element of plaintiff's case, a nonsuit or directed verdict is proper.

5. Wills ⇐324(2)

In a will contest, on ground that testatrix lacked mental capacity, evidence

was insufficient to take issue of mental incapacity to jury, and court properly directed a verdict for proponents.

6. Wills ⇐13(3)

Cousins of a testator are not "descendants" or "ancestors" of testator within meaning of statute providing that all property bequeathed or devised to a charity within thirty days of death of testator, shall go to spouse, brother, sister, nephew, niece, "descendant" or "ancestor" of testator. West's Ann.Prob.Code, § 41; West's Ann.Code Civ.Proc., § 1858.

See publication Words and Phrases, for other judicial constructions and definitions of "Ancestor" and "Descendant".

7. Wills ⇐13(3)

The words "descendant" and "ancestor" as used in statute providing that all property bequeathed or devised to charity within thirty days of death of testator shall go to spouse, brother, sister, nephew, niece, "descendant" or "ancestor" of testator, if and to extent that they would have taken property but for such devises or legacies, were intended to be given their commonly accepted definitions, and "descendants" are children, grandchildren, and their children to the remotest degree, and "ancestors" are those who have preceded another in a direct line of ascent. West's Ann.Prob. Code, § 41; West's Ann.Code Civ.Proc., § 1858.

8. Trial ⇐169

On motion for directed verdict, it is not improper for counsel making the motion to contend that evidence of defense overcomes, as a matter of law, the case of the opposition, since a verdict is properly directed for a defendant if a complete defense has been made out by uncontradicted evidence.

9. Wills ⇐327

In will contest, it was proper for counsel for proponents to argue on motion for a directed verdict certain facts to which their own witnesses had testified.

Maurice Norcop and Milo V. Olson, Los Angeles, for appellants.

Gibson, Dunn & Crutcher; Henry F. Prince, Sherman Welpton, Jr., Los Angeles, for respondents Town of West Brookfield, Massachusetts and Amherst College.

SHINN, Presiding Justice.

By her will Helen Elizabeth Gilbert left all her large estate to Amherst College, the Town of West Brookfield, Massachusetts, Massachusetts Institute of Technology, and Pomona College. It named Dr. James S. Montague executor and he proposed the will for probate. A contest was instituted by Ruby Stone Angell, Lucy Ruth Stone, Bessie Jane Stone and Dorothy White Gough who are first cousins of testatrix. The will was dated September 20, 1954 and Helen died September 29, 1954. The grounds of the contest were that the devises and bequests were invalid under section 41 of the Probate Code, in that the will was not executed at least 30 days before the death of Helen, and the further ground of incompetency.

Trial was to a jury. After all the evidence was in, on motion duly made, the court directed a verdict in favor of the executor and the beneficiaries as proponents of the will. The contestants appeal. We shall refer to appellants as contestants and to the respondents as proponents.

We shall consider first the contention of appellants that there was sufficient evidence to support a finding of incompetency.

Contestants introduced the testimony of 15 witnesses, proponents, the testimony of 11 witnesses. The résumé of the testimony introduced on behalf of contestants occupies 70 pages of their opening brief. The proponents' résumé occupies 46 pages of their brief. It covers the same ground as the statement of the contestants and adds some of the evidence introduced by proponents.

We shall give what we consider to be somewhat more than an adequate summary of contestants' evidence. At the time of

her death Helen was 47 years of age. The family had consisted of her mother and father and her brother Philip, some two years her senior, who had been born while the family was living in Massachusetts. In April 1916 the Gilberts and their children were living in California. Helen was then about 9 and Philip about 11. Helen was described as a "bubbly, vivacious youngster with beautiful dimples." The two children, while playing on the beach, were buried in a cave-in; Helen was rescued but Philip perished. Within a few months thereafter a change took place in Helen's manner; she became quite melancholy. She was educated in the grammar schools, Berkeley Hall School, Los Angeles High School, Barnard, Columbia, UCLA and the University of California at Berkeley. After her college days she spent a couple of years in London away from the family. Between the years 1934, when she was about 27 years of age, and 1950, she lived alone in New York; she was unemployed except for about two weeks when she worked in a bookstore. She was morose, uncommunicative and disinclined to develop friendships. She would answer questions in monosyllables, would sometimes stare at people with a childlike expression and developed a habit of rolling her eyes and partially closing them. The witnesses testified to many incidents in which Helen's conduct was strange. When visiting in the East and invited out to dinner she complained bitterly of having to get up at 7 in the morning and traveling to another city for Christmas dinner, saying that she was not used to getting up until after noon. When she was about 18 years of age she failed to make an appearance on two occasions when she was invited to the opera and the theatre. She quarreled with her mother and upon one occasion packed a suitcase and threatened to leave. A former neighbor, who lived next door to the Gilberts, testified to having heard Helen quarrel with her father, telling him she hated him and that she heard the sound of scuffling in the Gilbert house. In 1929 the Gilberts went to Europe and the following year Mr. Gilbert passed away. Helen's mother died in 1950 and Helen became possessed of an estate of more than a half million dollars. Prior to that time she had had no business experience or occupation and had subsisted upon remittances from her parents. In fact she never engaged in any activity that made demands upon her time other than to attend to her properties after she became possessed of them.

Contestants produced evidence that shortly after her mother's death, when Helen was a dinner guest she suddenly asked to be taken home while dessert was being served. She was "very frantic looking, very wild looking." While being driven home she said nothing. She was trembling and highly nervous. Nearly all of proponents' witnesses testified to her extreme nervousness. At about the time of the dinner incident Helen promised Mrs. Swift a trip to Europe or South America, but she became displeased with a travel agent they consulted and said nothing more to Mrs. Swift about the trip. She wore her hair combed straight back which the witnesses who commented upon it designated as stringy and slightly unkempt. She dressed plainly; some thought in an untidy manner; others that her clothing was good and not in bad taste. She cared nothing for young men and had but few friends, with none of whom was she intimate. In 1949 she had aged perceptively, her face was lined and her complexion sallow. While she was living in New York in 1940 she said she had no friends; that she slept during the day and went out about 11 o'clock at night to some bar to talk to bartenders, who were the only friends she had; she did not sleep well and said she took 10 or 15 aspirin tablets at night. She left her clothing in disarray about her bedroom. On one occasion when taken out to dinner she had drinks and smoked but ate nothing and said her physician had told her she would have to stop drinking and smoking if she wanted to live longer.

In January 1950, when Helen was in New York, her mother became seriously ill; Mrs. Bridenbecker, a nurse, called Helen to tell of her mother's illness; Helen requested

that good doctors be obtained for her and asked to be called every night as to her mother's condition, which was done. Her mother passed away the middle of February. Helen was very much upset because she had not been advised of the serious condition of her mother. She authorized Mrs. Bridenbecker to make the funeral arrangements. Helen came on from New York the day preceding the mother's funeral and met Mrs. Bridenbecker at the Gilbert apartment. She complained bitterly of the condition of the apartment. After the funeral there was an unpleasant incident concerning the disposition of Mrs. Gilbert's personal belongings and a wheelchair that was in the apartment. Mrs. Bridenbecker testified that Helen became angry and said that for two cents she would throw Mrs. Bridenbecker out of the window and she scratched her arm. About a week later Mrs. Bridenbecker saw her on the street and Helen ran across the street and crouched down behind an automobile. She seemed frightened. Shortly afterwards there was a similar incident. She would hold her hands up in the air and clench her fists. Another witness, Mrs. Davitt, testified she had met Helen in London in 1930 where Helen had been for two or three years, and she also met her in Paris. This witness also testified that in 1932 when she and her then fiance, Dr. Davitt, called at Mrs. Gilbert's apartment to take Helen and her mother out to dinner, Helen came into the room nude; her mother remonstrated with her; Helen threw a heavy book at her mother, knocked her over a chair, returned to her room and decided not to go to dinner. A few days after Mrs. Gilbert's death Mrs. Davitt visited Helen for about an hour; Helen looked untidy, was drinking and extremely nervous. After Helen took over the apartment she decorated it by hand. She pasted a piece of fern on the refrigerator door, covered it with clear nail polish and tinted it green in order to cover up a crack. She painted the window sills of the breakfast room, the refrigerator, inside and out, and decorated them with pearls and other ornaments from a dime store. Helen thought it was all very beautiful. In those days she would drink either a highball or some imported liquor. A witness named Lavine who ran a grocery and liquor store sold Helen liquor for about 19 months previous to August 1952. She bought expensive imported liquors, including Yugoslavian and Serbian Slivovitz. Her purchases cost from $5 to $9 per bottle. Helen's dress seemed completely out of pattern to this witness and she did not appear to him to be an up-to-date-looking woman. Helen had trouble with her landlady, Mrs. White. She continually complained that her apartment was neglected, she would deduct $10 from her rent check and when she did not pay her rent on time, Mrs. White would give her a three days' notice to quit. The owner of the apartment house brought suit and obtained a judgment for Helen's eviction from the apartment. She was greatly distressed over her threatened eviction, which was to be enforced about the 27th day of September, 1954. With two friends she had made some effort to find another apartment, but did not seem interested.

Seven of the witnesses of contestants who testified to one or more of the incidents above mentioned expressed opinions that Helen was irrational and of unsound mind, based upon her physical appearance, actions, statements and mannerisms which they had described.

There was ample evidence that Helen led a most unhappy home life, due principally to absence of congeniality between herself and her mother. She preferred to live alone. She was lonely, morose, not sociably inclined, wilful, and given to exhibitions and conduct which was erratic and eccentric. It was such conduct as we have mentioned that led the several witnesses to their opinions that Helen's conduct was irrational and that she was of unsound mind. She was, as we have said, extremely distressed over the impending eviction from her apartment. She was due to leave it September 27th. When a friend, Ruth Billheimer, called her on that day and got no response, she telephoned the manager of the apartment. Helen was found in her apartment, lying on

the floor unconscious. Beside her was a note in her handwriting "To whom it may concern. I have taken luminal. Helen Gilbert." She was taken to the hospital where she passed away on the second day without regaining consciousness. Contestants did not undertake to prove the cause of the death but it is immaterial whether it was a suicide, inasmuch as the circumstances indicated an attempted suicide. The foregoing constitutes the substance of the evidence upon which contestants relied and now rely as sufficient to require that the issue of competency be submitted to the jury.

[1] At this point we may mention familiar rules of law to which the facts must be applied. Helen Gilbert was competent to make a will if she had mental capacity to be able to understand the nature of the act she was doing and to understand and recollect the nature and extent of her property and to be able to remember and understand her relation to the persons who were the natural objects of her bounty. In re Estate of Sexton, 199 Cal. 759, 251 P. 778; Estate of Smith, 200 Cal. 152, 252 P. 325; In re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25; In re Estate of Lingenfelter, 38 Cal. 2d 571, 241 P.2d 990.

[2, 3] The rule applicable to rulings upon motions for a directed verdict is stated in the brief of contestants as a quotation from In re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579: " 'It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted "only when, *disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence,* the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given." ' "

Contestants earnestly argue that the testimony as to Helen's eccentricities was sufficient to establish prima facie a mental deficiency in all the particulars enumerated. In other words they contend that it constituted substantial evidence that Helen was unable to understand the nature of her act in making a will, that she did not know what property she owned or its value, and that she did not understand her relation to the persons who were the natural objects of her bounty. Without discussing the value of the opinion evidence, standing alone, we shall assume purely for the purpose of discussing the point, that it could have been inferred from the evidence of the peculiarities of conduct which Helen exhibited that she was so bereft of reason as to be wholly lacking in testamentary capacity. Even upon this assumption it is clear that any such inference was effectually dispelled by other evidence of the contestants to which we shall refer. The witnesses for contestants did not testify that Helen was lacking in mental capacity, the ability to reason or to remember. They did not testify that she ever suffered from any delusion or hallucination or that her mental faculties were failing. With respect to those matters there was other evidence of contestants which was direct and, we think, conclusive.

[4] A rule applicable to directed verdicts was stated by the Supreme Court in Leonard v. Watsonville Community Hosp., 47 Cal.2d 509, 305 P.2d 36, 39, as follows: "It is settled that where the evidence raises an inference that a fact exists, and either party produces evidence of the nonexistence of the fact that is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved, the nonexistence of the fact is established as a matter of law. See Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868. In these circumstances the inference is dispelled as a matter of law, and, if the fact inferred is necessary to establish an essential element of the plaintiff's case, a nonsuit or directed verdict is proper. Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059 [directed verdict]; Crouch v. Gilmore

Oil Co., Ltd., 5 Cal.2d 330, 54 P.2d 709 [nonsuit]; Ceranski v. Muensch, 60 Cal. App.2d 751, 141 P.2d 750 [directed verdict]; Johnston v. Black Co., 33 Cal.App.2d 363, 91 P.2d 921 [insufficiency of evidence]." The evidence referred to above, consisting of the opinions of witnesses as to Helen's incompetency and the reasons for their opinions, did not touch directly upon the factors which are controlling as to Helen's possession of testamentary capacity. None of those witnesses testified to any discussion with her concerning the property she owned with the exception of the witnesses Geraldine Congdon and Marion Luenberger. Mrs. Congdon testified that when she learned that Helen was having trouble with the manager of her apartment she asked her if she was in financial difficulties and Helen replied "Oh, no, I have more money than I know what to do with." Mrs. Luenberger, a friend of long standing, testified that she told Helen that with all her money she could go many places and do many things and Helen replied "No, the money came too late. I am past forty and I can't use this money when I am past forty. I should have had it when I was twenty-five and I am not interested in it and I don't want to go anyplace and I want to stay right here." No witness testified that Helen ever drank immoderately.

One of contestants' witnesses was Ruth Billheimer, society editor for many years of the Pasadena Star News. She and her family had been friends of the Gilberts since she and Helen were small children. Under subpoena of contestants, Ruth produced a series of writings she had received from Helen. In the early part of September 1954, Helen had asked Ruth to render certain services for her in the event of her death, and Ruth accepted. She received a letter from Helen dated September 26, 1954. Upon Helen's death other writings were found which Dr. Montague had been requested to hand to Ruth. There was a sheet of paper containing the names and addresses of six women friends and a listing of items of personal property they were to receive from Ruth Billheimer. Dorothy Gough was among those named. There was another writing indicating that the Town of West Brookfield, Massachusetts was to receive books and other objects. There was a note, evidently intended for Dr. Montague, respecting tenants of Helen's buildings, stating that rent bills should be sent to them but no receipts, that the tenants were responsible for all repairs, window glass, plumbing, and painting, owner only for exterior walls and roof. There was a memorandum expressing the wish that Mr. Hitchcock of Bodkin, Breslin and Luddy, handle the probate of Helen's estate. All the foregoing were in Helen's handwriting. Also in evidence was a copy of a letter in Helen's handwriting addressed to Amherst College. There was a letter to Mr. Hitchcock, expressing a desire that he act temporarily in handling estate affairs until the firm of O'Melveny & Myers should take over and a letter to Mr. O'Melveny who had handled the estate of Helen's father, requesting them to handle her own estate. There were two other letters addressed to Dr. Montague.

Helen owned nine commercial rental properties in Los Angeles. Ruth Billheimer testified that Helen dictated to her and she typed for her the legal description of these several properties. She also mentioned to Ruth the names of her cousins who are the contestants. She said that she had rarely seen them, had had nothing to do with them, did not feel any responsibility toward them and did not wish to remember them in her will.

At Helen's request Ruth arranged for Mr. Hitchcock to see Helen about the preparation of a will. She was present when the draft of the will was read to Helen by Mr. Hitchcock. Helen made changes in it. She asked Mr. Hitchcock to eliminate the disinheriting clause. She discussed every provision of the will and saw to it that they met with her wishes. In her letters to Ruth, Helen expressed her thanks for Chistmas presents she had received on two occasions. The letters were warmly affec-

tionate and were expressive of Helen's appreciation of kindness and friendship. One of the letters evidenced her knowledge of the properties which she possessed, spoke of her dealings with real estate agents, with her tenants, rentals and repairs, mentioned the fact that buildings her father had constructed while "neither impressive nor particularly attractive * * * were simple, functional and durable buildings." In a letter dated September 19, 1954, which Dr. Montague handed to Ruth, Helen expressed a desire for the cremation of her body with "no funeral service, no obituary notice, and no embalming. No stone of any sort is to be erected to my memory." With the letter were $300 in cash and a cashier's check payable to Ruth for $4,000. The money was directed to be used for funeral expenses, for the shipment of personal effects to the people listed and what was left over Helen requested Ruth to spend for herself "for something—a trip—a car—a fur coat—that will give her pleasure." Helen wrote to Ruth again September 26th. The letter spoke of Helen's pleasure at being with Ruth the past week. It spoke of the probate of her mother's estate as something of an ordeal and her distress at her impending eviction from her apartment. The letter indicated that Helen might be contemplating suicide. It expressed the hope that the request she was making of Ruth would not be too much of an ordeal and it stated that Dr. Montague had another letter giving further instructions. It ended "many, many thanks and much love, Helen." There was a letter to Dr. Montague, whom Helen had known since childhood, calling attention to papers in a desk relating to Mrs. Gilbert's estate which might be helpful. He was requested to confer with Amherst College officials and urge them to accept a gift proposal for a magazine. Of her estate she said "It came to me much too late to give me any pleasure. Rather it has been a source of added unhappiness and down-right misery. I would like to believe that it will be used for the project I planned, and at Amherst, since that was Father's college and it is really his estate." The letter expressed her gratitude to Dr. Montague for his being willing to assist her. It stated that she had pointed out to him the things she wished sent to West Brookfield. It stated "I am very tired. I have been so isolated that death has seemed to present terrible problems and you and Ruth have helped me overcome the obstacles in the way. Most affectionately, Helen." In another letter to Dr. Montague, dated September 25th, Helen wrote at length concerning the rental of her properties, the monthly check she received from the Mutual Life Insurance Company and interest on U. S. Savings Bonds. She spoke of the painting of one of her properties, the cost of hauling away rubbish from another one, arrangements made for the replacement of broken window panes and straightening frame work and the necessity for some metal work. She spoke of a high insurance rate on one of the properties and the fact that she was always notified when insurance policies were about to expire. The letter stated that all the roofs of the properties save one were in good repair and that the Owen Roofing Company would always make an inspection without charge. She had inspected one of her buildings the previous Monday. Three parcels of property had been sold and there remained only 9 rental properties. She suggested the name of an accountant who had handled her income tax returns. Helen spoke of a check for $500 in favor of Gene Chamberlain and that if it could not be delivered to her that if it was possible "I should like to apply it to some fund to provide that all heirs at law and all executors be given a pamphlet of simple instructions at the 1st Probate Hearing outlining the legal procedure involved—such as—right to choose a lawyer—right to protest a co-executor—basic facts about appraisals—basic facts about pro-rated fees of attorneys & executors. It's certainly needed." The letter stated "The money was kept for its own sake far too long—it has never really seemed to belong to me and I have had little use of it, though many

troubles and problems in connection with it, not the least being the problem of how to leave it."

There was a letter dated September 22nd to Amherst College. It stated, in part, "Because this is fundamentally my father's estate, I wish this gift to go to Amherst. But it has been mine legally for a brief time and I feel very strongly that the money would be far more wisely and usefully spent on a magazine than on scholarships. I believe that it is wiser to spend money and expend it on things of value rather than to guard and protect it as something of value in itself. There are so many scholarship funds and scholarships under the G. I. bill, that the need for them seems less than formerly." (The reference to the magazine was to the desirability of developing a short story magazine. Helen read many of these.)

These were the letters of a highly intelligent woman with an active mind and an ability to do her own thinking. The letters were well composed and expressed Helen's wishes clearly and directly. They evidenced her knowledge of her rental properties and the income that she received from them and from other sources. They furnished convincing evidence that Helen suffered from no loss of memory or any approaching mental debility. Her mental processes were vigorous. The letters to Ruth Billheimer expressed her loneliness and her responsiveness to the friendship and kindness of one who was not related to her. She stated that the Christmas presents she received from Ruth were the only ones she had received. Even though she felt she had a duty to the memory of her father to leave the greater part of her estate to Amherst College and to make bequests to other institutions, and her father's town of Brookfield, because she felt her wealth would thereby accomplish the most good, she nevertheless made a list of friends to whom she left small bequests as evidence that they had not been forgotten.

[5] From a consideration of the evidence of contestants, wholly apart from that of proponents, we are convinced that a verdict in favor of contestants would have been contrary to law, for the reason that there was no substantial evidence that testatrix lacked testamentary capacity.

Contestants assert as a separate ground of contest that they have a right to claim invalidity of the will because it was executed within 30 days preceding the death of Helen and the entire estate was left to charity. In order that they may contest the will upon this ground contestants must be within one of the classes to whom the right is limited by section 41, Probate Code, namely, "spouse, brother, sister, nephew, niece, descendant or ancestor" who would otherwise inherit.

With respect to wills executed within 30 days of death the section as enacted in 1931 provided that all bequests and devises of property to "charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, unless done by will duly executed at least thirty days before the death of the testator" were void and the subject property would go to the "residuary legatees or devisees, or heirs, according to law." The section was amended in 1937. By the amendment there was deleted the sentence "All dispositions of property made contrary hereto shall be void, and go to the residuary legatees or devisees or heirs, according to law." and there was added to the section the following: "All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected."

Contestants assert that "first cousins are certainly collateral descendants or ancestors" because they and Helen had a common

ancestor. Nothing could be more clear than that it was the intention of the legislature, by the 1937 amendment, to grant the right of contest to those who are in the direct line of ascent or descent and to brothers, sisters, nephews and nieces who would be heirs of the testator and to exclude all others who were not in the direct line of descent or ascent. Ruby Stone Angell, Lucy Ruth Stone and Bessie Jane Stone are full first cousins; Dorothy White Gough and Helen were maternal first cousins of the half blood.

[6, 7] Under the meaning of "descendant" and "ancestor" contended for by contestants, a brother, sister, nephew or niece of a decedent would be an ancestor; therefore, it is argued by contestants, Helen was their collateral ancestor. Giving this meaning to "ancestor" would render the naming of brothers, sisters, nephews and nieces in the 1937 amendment redundant and defeat the very purpose of the amendment. The intention was to recognize those in the direct line of descent or ascent as one class who would be entitled to object to charitable bequests and, as another class, brothers, sisters, nephews and nieces. In re Estate of Cottrill, 65 Cal.App.2d 222, 150 P.2d 214. Appellants contend that cousins were not mentioned in the latter class because they are included in the first. Their argument not only ignores the purpose of the 1937 amendment, which is expressed as clearly as the legislature could have expressed it, but urges a construction which would do violence to elementary rules of statutory interpretation. In the enumerations of relatives who are neither descendants nor ancestors, those who were not included must be deemed to have been intentionally excluded under the rule *"expressio unius est exclusio alterius."* Jones v. Robertson, 79 Cal.App.2d 813, 816, 180 P.2d 929. Cousins were omitted; and they must remain omitted and without right to object unless and until they are added by the legislature to the class of brothers, sisters, nephews and nieces. § 1858, Code of Civil Procedure; In re Estate of Bunn, 33 Cal.2d 897, 206 P.2d 635. The words descendant and ancestor were intended to be given their commonly accepted definitions. Descendants are children, grandchildren and their children to the remotest degree. Ancestors are those who have preceded another in a direct line of ascent. Bouv. Law Dict., Rawle's Third Revision; Black's Law Dictionary, 4th Ed., 1951; Jewell v. Jewell, 28 Cal. 232. Contestants say that if the legislature had used the words descendant and ancestor as applying only to those in the direct line of descent or ascent it would have designated them as lineal descendants and lineal ancestors. The argument is specious. Under the commonly accepted meaning of the words they would not include a brother, sister, nephew or niece. The legislature understood this and therefore those relatives were mentioned as a separate class. Cases cited by contestants from other jurisdictions in which the words ancestor and descendant have been given a broader meaning are not in point. The instant case involves only a question of construction of section 41 of the Probate Code in the light of its history. No benefit can be derived from a study of the decisions of other courts interpreting entirely different statutes, serving different purposes. The contention of contestants is untenable and does not merit further discussion.

[8, 9] A further point is made that counsel for proponents improperly argued on their motion for a directed verdict certain facts to which their own witnesses had testified and thereby endeavored to impress upon the court the strength of their defense of the will. It is not improper for counsel to contend, upon such a motion, that the evidence of the defense overcomes, as a matter of law, the case of the opposition, for, as stated in Kohn v. National Film Corp., 60 Cal.App. 112, 117, 212 P. 207, a verdict is properly directed for a defendant if a complete defense has been made out by uncontradicted evidence. Such an argument was not inappropriate in the present case. But the motion should have been granted upon the ground that contestants produced no substantial evidence of

the incompetency of the testatrix and we assume it was granted upon that ground.

The notice of appeal lists numerous orders and rulings of the trial court which are not appealable. All purported appeals other than the appeal from the judgment are dismissed; the judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER, J., dissenting.



148 Cal.App.2d 782

In re ESTATE of Laura Belle HUGHES, Deceased.

H. M. S. RICHARDS, Appellant,

v.

Rosalind HUGHES, Respondent.

Civ. 5354.

District Court of Appeal, Fourth District, California.

Feb. 27, 1957.

Proceeding in the matter of the estate of decedent. From a decree of the Superior Court of Kern County, Gordon L. Howden, J., a legatee appealed. The District Court of Appeal, Barnard, P. J., held that where will disclosed that testatrix was interested in advancing religious work and bequest to Seventh Day Adventist School was immediately followed by residuary clause wherein bequest was made to person who had been broadcasting over national networks on religious subjects for many years, words used were sufficient to create a trust for charitable purpose as against contention that legacy was made for such broadcaster's personal benefit.

Affirmed.

1. Wills ⇐13(2)

Findings were not insufficient to sustain order that a bequest to individual for broadcasting purposes was a charitable bequest and hence limited to one-third of distributable estate, on theory that petition did not allege that legatee was a charitable or benevolent society or corporation or that gift to him was in trust for charitable uses, where allegations of petition, which court found to be true, obviously referred to requirements of statute regarding charitable bequest, and there was implied finding that gift to legatee for broadcasting work was one in trust for charitable uses. West's Ann.Prob.Code, § 41.

2. Wills ⇐671

Where will disclosed that testatrix was interested in advancing religious work and bequest to Seventh Day Adventist School was immediately followed by residuary clause wherein bequest was made to person who had been broadcasting over national networks on religious subjects for many years, words used were sufficient to create a trust for charitable purpose as against contention that legacy was made for such broadcaster's personal benefit.

3. Appeal and Error ⇐1177(1)

A decree would not be reversed for sole purpose of taking evidence with respect to fact which was admitted to be true.

Musick, Peeler & Garrett, Theodore A. McCabe, Jr., Los Angeles, for appellant.

Edwin W. Wilson, Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a decree of final distribution in this estate insofar as it denies to the appellant the full amount of the residue of the estate.

The decedent's will recited that she was a widow and that she had no close relatives other than her adopted daughter, Rosalind Hughes, and the son of that daughter. She then gave bequests of $900 to that daughter and $200 to the grandson, and three specific bequests to other individuals. This was followed by a gift of $400 to the Seventh Day Adventist School, and immediately

thereafter she gave the residue of her estate "to H. M. S. Richards, Box 155, Los Angeles (53), California, for his broadcasting work." The report of the inheritance tax appraiser, which was approved and affirmed by the court, found that this bequest to Richards was a gift to charity and exempt from the payment of inheritance tax.

The final account and petition for distribution recited that there was available for distribution the sum of $3,636.26. After reciting the amounts of the specific bequests, and stating that the will gave to Richards the residue of said estate for his broadcasting work, the petition alleged:

> "10. The total charitable bequests are limited by law to one-third of the distributable estate, and therefore the residuary bequest to H. M. S. Richards, for his broadcasting work, is limited to ⅓rd of $3,636.26 or $1,212.09, less $400.00 bequeathed to the Seventh Day Adventist School, or the sum of $812.-09; and that the balance of the residium should be distributed to Rosalind Hughes, daughter and sole descendant of decedent herein, in the sum of $924.17."

With respect to the residue of $1,736.26 the petition asked for a distribution to Richards for his broadcasting work of $812.09, and that the balance, amounting to $924.17, be distributed to Rosalind Hughes as the surviving heir. Due notice was given the appellant of the time and place of hearing the petition, but he did not appear at the hearing and no opposition was filed. The court approved the account, found that all of the allegations of the petition are true, and distributed the residue in accordance with the petition. This appeal followed and is presented on a clerk's transcript.

[1] It is first contended that the court's findings are insufficient to sustain the order made. It is argued that the court merely found that all of the allegations of the petition for distribution are true; that the petition did not allege that the appellant is a charitable or benevolent society or corporation, or that the gift to him was in trust for charitable uses, which are the only two reasons under section 41 of the Probate Code for denying him the full amount of the residue of this estate; that it follows that there is no finding that this was a gift to the appellant in trust for charitable uses; and that in the absence of such a finding there is nothing to justify the failure of the court to distribute to the appellant the entire amount of the residue. The petition alleged that the total charitable bequests are limited by law to ⅓rd of the distributable estate and that "therefore" the residuary bequest to Richards for his broadcasting work is limited to ⅓rd of the distributable estate, with allowance being made for the amount bequeathed to the Adventist School which is admittedly charitable in nature. These allegations, which the court found to be true, obviously refer to the requirements of the law as expressed in section 41 of the Probate Code. These findings are sufficient when the necessary effect of the allegations is considered, and there is an implied finding that the gift to Richards for his broadcasting work was one in trust for charitable uses.

[2] It is next contended that the gift to the appellant is clearly not one in trust for charitable uses. It is argued that at best the words "for his broadcasting work", as used in the will, evidence an intent to reward Richards for his past services to the cause of religious radio broadcasting; that they are the equivalent of "in recognition of his broadcasting work"; that they express only the motive for making the gift and therefore do not create a trust in the donee; that before a trust could arise it must appear that the testatrix intended to impose an imperative obligation on Richards to perform some act; that there is no such obligation here; that at best there is merely a suggestion concerning how he would use the money; that a mere statement of the purpose for which a gift is made does not *per se* show an intent to make the donee a trustee to accomplish that

purpose; and that there is not the slightest indication in the residuary clause of this will that a trust was intended or created.

It is admitted that Mr. Richards is "roughly the equivalent of Edward R. Murrow in the field of religious broadcasting", and that he has broadcast over national networks on religious subjects for years under the name "Voice of Prophecy". It is clear from the terms of the will that the testatrix was interested in advancing religious work. She gave five specific bequests and, with the exception of that to her daughter, the one to the Adventist School is the largest. That bequest was immediately followed by the residuary clause in question. It is quite clear from the terms of the will that this residuary clause was intended for the specific purpose of enabling Richards to carry on or extend his broadcasting work, which was of a religious nature, and that it was not intended for his personal benefit. The contentions here made are sufficiently answered in the decision in In re Estate of Hamilton, 181 Cal. 758, 186 P. 587, 590, and the principles there applied are applicable here. In that case the court said: " 'The question for determination is whether the devisee or legatee is the beneficiary, or merely a trustee for others, of the gift bestowed upon him; * * *.' " It was pointed out that the legacy there in question was intended to be used for paying others for certain services and not to be used by the donee for his own benefit or as he saw fit, and the court said: "This is no more than saying that it was given upon a trust * * *" and that an obligation existed to use the legacy for a certain purpose. It was further pointed out that it was not necessary, in order to create a trust, that the testator intended that the obligation imposed should be one which would be enforceable by the courts, the court saying:

> "The true rule is, we believe, that, in the absence of anything indicating an intention on the testator's part that it should so be enforced, it is sufficient if it appear that the testator did intend to place upon the legatee an obligation as to whose performance the latter has no discretion and which he cannot fail to perform in good conscience and in good faith toward the testator."

In this case, as in the Hamilton case, the words of gift and the words of request or direction are immediately coupled together in the same sentence. It is apparent that they were connected together in the testator's mind, and it clearly appears that both were a part of a single purpose which she was seeking to accomplish. Moreover, there is nothing in the record to indicate that there was any relationship or bond of any kind between this testatrix and the legatee which would make him the natural object of her bounty, and no such claim is advanced in his behalf.

It cannot reasonably be thought that the testator intended that Richards personally should be the beneficiary of this gift, or that the bequest was made to him with the intention that he was to be free to do as he pleased with it. The words here used were sufficient to create a trust for the purpose named. In re Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071. This bequest was given for the benefit of a series of religious broadcasts in which the testatrix was interested and which she considered to be for the benefit of people in general. The court construed the will in that manner and its construction is a reasonable one which should not be disturbed on appeal.

[3] It is true that there is no evidence in the record showing that the broadcasting being done by the appellant was religious broadcasting. It may be assumed in support of the judgment that the trial judge had knowledge of this fact, and the court sufficiently found that this bequest was one in trust for charitable uses. In any event, this is an admitted fact and it would be a useless thing to reverse the order made for the sole purpose of taking evidence with respect to a fact which is admitted to be true. Under the admitted facts, a reversal could be of no benefit to the appellant.

The decree appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

148 Cal.App.2d 695

Robert H. DREHER, Plaintiff and Appellant,

v.

The FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation; The Fidelity and Deposit Company of Maryland, a corporation; A. B. Leckie; William Scott Brewster; First Doe, Second Doe, Third Doe; First Doe Corporation, Second Doe Corporation, and Third Doe Corporation, Defendants and Respondents.

Civ. 17075.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1957.

Hearing Denied April 25, 1957.

Slander action against private detectives who were residents of Los Angeles County and action on detectives' bonds, against nonresident, corporate sureties whose principal place of business in state was San Francisco County. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., granted defendants' motion for change of venue to the Superior Court for Los Angeles County, and plaintiff appealed. The District Court of Appeal, Kaufman, J., held that joinder of actions against detectives and against sureties on their bonds was proper and where action was instituted in court of residence of both corporate defendants, action was commenced in a proper court.

Reversed.

1. Venue ⇐2

Where there is only one cause of action and different forms of relief are sought, form of action for purpose of venue is determined by "main relief" rule. West's Ann.Code Civ.Proc., § 395.

2. Action ⇐48(1)

Where claims forming basis of actions have arisen out of the same transaction, it is permissible to join such actions. West's Ann.Code Civ.Proc., §§ 379, 379b.

3. Action ⇐50(4)

Where plaintiff brought slander action against private detectives and action against corporate sureties on detectives' bonds which ran in favor of any member of public, there were two causes of action, one in tort against the individual defendants only and one based on contract against the corporate defendants only and they were properly joined. West's Ann.Bus. & Prof. Code, §§ 7545–7547, 7549; West's Ann. Code Civ.Proc., §§ 379, 379b.

4. Venue ⇐22(1)

Where plaintiff brought action for slander against private detectives who were residents of Los Angeles County and action on detectives' bonds against nonresident corporate sureties whose principal place of business within state was San Francisco County, and actions were commenced in the Superior Court for San Francisco County, actions were commenced in a proper court and detectives were not entitled to a change of venue to Los Angeles County. West's Ann.Code Civ.Proc., §§ 379, 379b, 395; West's Ann.Cal.Const. art. 12, § 16.

Dale I. Stoops, Nat Frankel (Robert H. Dreher, in pro. per.), Oakland, for appellant.

Bodkin, Breslin & Luddy, Henry G. Bodkin, Jr., Los Angeles, for respondents, Brewster, Leckie and The Fidelity and Casualty Co. of New York.

Frank Wickhem, Los Angeles, for respondent, The Fidelity and Deposit Co. of Maryland.

KAUFMAN, Justice.

This is an appeal from an order granting respondents' motion for a change of venue from the Superior Court of the City and County of San Francisco to the Superior Court in and for the County of Los Angeles.

Defendants and respondents A. B. Leckie and William Scott Brewster are private

detectives licensed by the State of California. Appellant, Robert H. Dreher, a practicing attorney in Alameda County, California, instituted action against the above respondents and against respondents, The Fidelity and Casualty Company of New York, a corporation, and the Fidelity and Deposit Company of Maryland, a corporation by filing a complaint entitled "Complaint on Surety Bonds and in Tort. The respondent detectives were charged with a slander committed against appellant in the course of an investigation made in the State of Arizona. The corporate defendants were sued as sureties on the bonds which they had furnished to the private detectives as required by sections 7546, 7545, 7547, and 7549 of the Business and Professions Code, which run in favor of any member of the public.

The individual respondents, both residents of Los Angeles County, filed their joint notice of and motion for a change of venue supported by affidavits. The corporate defendants and respondents both filed consent to the change of venue. Said motion was granted on October 24, 1955.

Appellant contends that the motion was erroneously granted since the corporate defendants, both foreign corporations, had their principal place of business in this state in San Francisco. Section 16 of Article XII of the Constitution of the State of California provides that "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." Section 395, Code of Civil Procedure provides that the county of residence of the defendants "or some of them" is the proper county of venue. It is admitted by all parties that the principal place of business of the corporate respondents is San Francisco, and that the residence of the individual respondents is Los Angeles.

[1] Appellant admits that if the complaint is held to state two transitory causes of action against multiple defendants, some individual and some corporate, then the individual defendants, respondents herein, were properly granted their motion for change of venue. It is appellant's position that the complaint states but a single cause of action. Where there is only one cause of action and different forms of relief are sought, the form of the action for the purpose of venue is determined by the "main relief" rule.

[2, 3] Clearly, this is not a case where one cause of action is pleaded in several counts according to different legal theories, such as a case where the complaint seeks recovery by pleading a contract in one count, and in other counts the same obligation based on the common counts. The claim stated herein against the individual respondents, the private detectives, is clearly a tort claim for slander. The claim against the corporate respondents, the sureties, arises out of their bonds, required by statute to run in favor of any member of the public injured by their principals. This is obviously an obligation based upon contract. The tort claim is against the individual defendants. Appellant cannot argue that he has a tort claim against the surety, nor a contract claim against the principals. It is true that both claims have arisen out of the same transaction and that it is therefore permissible to join such actions. Code of Civ.Proc. sections 379, 379b. In Kane v. Mendenhall, 5 Cal.2d 749, 56 P.2d 498, a case wherein the principal, a real estate broker, and his surety on the statutory bond were joined as defendants, the court held that the joinder was permissible both because of the statute permitting such a joint action and the fact that the claims had arisen out of the same transaction, referred to the claim against the principal as being ex delicto and that against the surety as an obligation based on contract. See, also, Grier v. Ferrant, 62 Cal.App.2d 306, 313, 144 P.2d 631. And in the recent case of Atherley v.

MacDonald, Young & Nelson, 135 Cal.App. 2d 383, 387, 287 P.2d 529, involving a contract to indemnify it was noted that the joinder of an action in tort with a joinder of an action against one who by contract has assumed a direct liability for such tort was proper. In view of these cases, it cannot be doubted that we are here concerned with two causes of action, one in tort against the individual defendants only; one based on contract against the corporate defendants only, and that they have been properly joined.

Respondent maintains that when two transitory causes of action have been joined in one complaint, and there is more than one defendant the causes must be viewed separately for venue purposes, citing Pacific Bal Industries v. Northern Timber, Inc., 118 Cal.App.2d 815, 259 P.2d 465, 471. That case is distinguishable from the instant case, however, in that both the individual defendants and the corporate defendants were all residents of Los Angeles County. Plaintiff sought to have the action tried in Marin County. Although the court found that the action as to three of the counts could properly be brought in Marin County against the corporation, under section 16 of Article XII of the California Constitution, the individual defendants had the right to have the cause transferred to Los Angeles County. The court there stated that "when an individual, a non-corporate defendant established his right to transfer as to one count, his motion should be granted irrespective of what showing he makes concerning other counts of the complaint." This language, of course, does not necessarily mean that if an individual defendant would have a right to transfer as to one count the action must be transferred if there are other *resident* defendants, corporate or noncorporate in the county where the action is brought.

In the cases of Goossen v. Clifton, 75 Cal.App.2d 44, 170 P.2d 104; Erwin v. Cee-Tee Construction Co., 114 Cal.App.2d 364, 250 P.2d 287 and Standard Machinery Co. v. Coleman, 140 Cal.App.2d 748, 296 P.2d 89, cited by respondents, reiterating the principle that if a plaintiff pleads two transitory causes of action in a complaint and defendant has the right to have one of them tried in the county of his residence but not the other, the cause must be transferred to the county of his residence, the actions had not been brought in a county which was the residence of any defendant in the case, and therefore the problem was not presented which is involved in this case.

In Monogram Co. of California v. Kingsley, 38 Cal.2d 28, 237 P.2d 265, plaintiff brought an action against several defendants for libel, slander and unfair competition in Alameda County where one of the defendants admittedly resided. All other defendants had residence in Los Angeles. The complaint contained 20 counts charging acts of libel and slander and unfair competition committed by defendants, in some counts by all of them, in others by some of them. The Los Angeles defendants asked for change of venue to the county of their residence, arguing that the case was distinguishable from those wherein a single cause of action was stated against a number of defendants, one of whom was a resident of the county where the action was instituted, and urged that since in 10 causes of action in the case then before the court, only nonresident defendants were named, these defendants were entitled to a change of venue when not opposed by the resident defendant. They cited in support of this position the case of Hagan v. Gilbert, 83 Cal.App.2d 570, 189 P.2d 548, 551, which stated that "When a nonresident defendant is entitled to a change of venue upon one cause of action stated in a complaint, he may not be deprived of that right because plaintiff included other causes of action in the same complaint upon which such defendant is not entitled to a change of venue." The Supreme Court pointed out that this proposition had been staed in cases involving the joinder of local and transitory causes of action or the contract exception to the

general venue provision [38 Cal.2d 28, 237 P.2d 267] "and where *none* of the defendants resided in the county in which the respective actions were commenced * *" It therefore follows that these last mentioned cases properly apply only where *all* of the defendants are nonresidents of the county in which the action is commenced and the plaintiff has not shown facts entitling him to have the action tried in some county other than that constituting the residence of a defendant. The principle as applied in Hagan v. Gilbert, supra, was expressly disapproved.

In the Monogram case, [38 Cal.2d 28, 237 P.2d 267] the court stated that "By reason of the liberal statutory joinder rules, a number of causes of action may properly be joined in the same complaint, Code Civ. Proc., sec. 427, and it is not necessary that each defendant be included in every cause of action. Code Civ.Proc., sec. 379b. As so noted, these joinder provisions must be correlated with the venue provisions—the former prescribing what causes and parties a single action may include and the latter prescribing where such action as an *entirety* may be tried. No objection is raised here with regard to Lewis as a properly named defendant in 12 of the 20 transitory causes of action joined in the present complaint. Accordingly, the action as an entire cause was properly retained in the county of his residence." (Emphasis ours.)

It is said in 1 Witkin, California Procedure, p. 755, sec. 240, that under the modern rule it is not necessary that each cause affect every party joined in the complaint, and that venue statutes "relate not to causes of action but to *actions,* and prescribe the place where *an action in its entirety* may be tried." Where the joinder is not made in good faith but is simply an attempt to defeat the right of a defendant to trial at his residence, such defendants' residence under section 395, Code of Civ.Proc., is not to be considered in determining the proper place for trial. In the present case the motion was based solely on the ground that the second cause of action was against the Los Angeles defendants only, and that the Superior Court of Los Angeles County was therefore the proper court for trial. The defendants did not urge improper joinder of defendants in the trial court nor have they made such contention on appeal.

It is stated in 1 Witkin, California Procedure, p. 763, sec. 246 that "The general rules governing joinder of defendants and the effect of such joinder on venue apply whether the defendants are individuals or corporations. Hence, if a cause of action is stated against both, and the joinder is in conformity with the statutes, the plaintiff may fix venue at the residence of either the individual or the corporation. (Winterburn v. Sheriff, 1923, 61 Cal.App. 531, 535, 215 P. 406; Aisbett v. Paradise Mt. Min. & Mill. Co., 1913, 21 Cal.App. 267, 131 P. 330; Hale v. Bohannon, 1952, 38 Cal. 2d 458, 472, 241 P.2d 4 (dictum).)"

[4] Since the joinder of the causes of action against the principals and the sureties was entirely proper, Kane v. Mendenhall, 5 Cal.2d 749, 56 P.2d 498, supra, it appears that the appellant having instituted his action in San Francisco, the residence of both corporate defendants, commenced said action in a proper court. This conclusion is inescapable in view of the decision of Monogram Co. of California v. Kingsley, supra. It was said in Kane v. Mendenhall, supra, 5 Cal.2d at page 751, 56 P.2d at page 499, that "It would be unfortunate if an interpretation of our Code provisions relating to jurisdiction and to joinder required plaintiff herein to prosecute two separate actions. The liability of the principal and the liability of the surety, though differing in amount, * * rest alike upon acts of fraud committed by the principal to the damage of plaintiff, and require the examination of questions common to both principal and surety. Actions separately tried might result in different judgments. A judgment against the principal is not conclusive in a separate action against the surety."

We must regard this matter as two distinct actions, one against the principals and

one against the surety. It then follows that the action against the surety was brought in the proper court, since it was brought at the residence of the sureties.

It is our view that the venue was properly in the City and County of San Francisco and that the lower court was in error in granting the motion for change of venue.

Order reversed.

DOOLING, Acting P. J., and DRAPER, J. pro tem., concur.



148 Cal.App.2d 733

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

David S. MITCHELL, Defendant and Appellant.

Cr. 2732.

District Court of Appeal, Third District, California.

Feb. 26, 1957.

Defendant was convicted of violating statute relating to contributing to the delinquency of a minor. The Superior Court, Lassen County, Ben V. Curler, J., imposed sentence, and defendant appealed from order denying motion for new trial and from judgment. The District Court of Appeal, Warne, J. pro tem., held that evidence warranted conviction.

Order and judgment affirmed.

1. Infants ⇐13, 20

Under provisions of statute relating to contributing to delinquency of a minor, any act which tends to cause or encourage a minor to become a delinquent is made criminal; a case is made out when evidence proves acts on part of defendant which tend to cause or encourage minor to lead dissolute, lewd, or immoral life; it is not necessary to show that act actually did so. West's Ann.Welfare & Inst.Code, § 702.

2. Infants ⇐20

Essentially, under statute relating to contributing to delinquency of a minor, whether conduct of accused tends to cause or encourage minor to become delinquent is question for jury. West's Ann.Welfare & Inst.Code, § 702.

3. Infants ⇐20

Evidence warranted conviction under statute relating to contributing to delinquency of a minor. West's Ann.Welfare & Inst.Code, §§ 700(k), 702, 5500 et seq.

Harold L. Abbott, Susanville, for appellant.

Edmund G. Brown, Atty. Gen., by Lloyd Hinkleman, Deputy Atty. Gen., for respondent.

WARNE, Justice pro tem.

The defendant was convicted by a jury of a violation of section 702 of the Welfare and Institutions Code.

Appellant appeals from an order denying his motion for a new trial and from the judgment entered.

The record reveals that a motion for a new trial was made and denied on August 29, 1956. Thereafter, there was a hearing in the superior court to determine whether the appellant was a sexual psychopath within the meaning of chapter 4 of part 1 of division 6 of the Welfare and Institutions Code, § 5500 et seq. The pronouncement of sentence was suspended pending the hearing. After hearing this matter, the proceedings were dismissed, and the appellant was referred back to the superior court, sitting as a juvenile court. He was then sentenced to one year in the county jail.

Davis S. Mitchell was accused of violating section 702 of the Welfare and Institutions Code, contributing to the delinquency of a minor. The information specifically charged that he "* * * willfully and

unlawfully fondled the genitals of one Lewis * * * then of the age of sixteen." It further charged that such acts "caused or tended to cause and encourage the said Lewis * * * to become and remain a minor child * * * who is in danger of leading an idle, dissolute, lewd and immoral life."

Briefly, the facts are: Lewis approached Mitchell for a job on his ranch. Mitchell refused to hire Lewis unless he was 16. To verify the boy's age, the two drove to Lewis' home where his mother showed Mitchell Lewis' birth certificate which showed the boy was 16. The mother then gave Lewis permission to drive to Reno with Mitchell where Mitchell intended to purchase fencing material for his ranch. The trip was made. The two returned. Lewis then obtained permission to spend the night at Mitchell's home. Lewis was shown to his bedroom, he undressed and went to bed. Later Mitchell got into bed with Lewis. Lewis testified that after Mitchell was in bed with him, "* * * all of a sudden he grabbed my privates; and I say, why, what you doing; and he made a chuckle." Mitchell then turned over, and after he went to sleep, Lewis dressed and left the house. Mitchell awoke while Lewis was still in the house. He followed Lewis who went to the police station to seek help. While awaiting the arrival of the police, Mitchell drove up and asked Lewis to return. Lewis told the police that "* * * this old guy, or geezer, 'promised me a job, took me home and put me to bed and got in bed with me and got fresh.'" While talking to police officers, Lewis appeared to be frightened, his face was chalk-white, he was very frustrated. Mitchell denied the act.

The sole claim on this appeal is that the evidence is insufficient to sustain the verdict.

[1–3] Under the provisions of section 702 of the Welfare and Institutions Code, any act which tends to cause or encourage a minor to become a delinquent is made criminal. A case is made out when the evidence proves acts on the part of the defendant which tend to cause or encourage minors to lead a dissolute, lewd, or immoral life. It is not necessary to show that the act actually did so. Deliberately grabbing the genitals of a minor boy could tend to cause or encourage him to lead a dissolute, lewd, or immoral life. Essentially, whether the conduct of the accused does so tend is a question for the jury. The jury impliedly found that Mitchell grabbed Lewis' genitals, and that this act tended to cause Lewis to come within the purview of section 700(k) of the Welfare and Institutions Code. We feel that such a finding is reasonable and is fully justified by the evidence. People v. Deibert, 117 Cal.App. 2d 410, 415–416, 256 P.2d 355.

The order denying defendant's motion for a new trial and the judgment are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



148 Cal.App.2d 755

Judith Kelly HOWARD, Plaintiff and Appellant,

v.

Lindsay Coleman HOWARD et al., Defendants,

Lindsay Coleman Howard, Respondent.

Civ. 19774.

District Court of Appeal, Second District, Division 2, California.

Feb. 27, 1957.

Rehearing Denied March 22, 1957.

Hearing Denied April 25, 1957.

Divorce proceedings. Wife appealed from order of the Superior Court of Los Angeles County, Stanley Mosk, J., denying her allowance of additional reasonable attorney's fees to enable her to resist husband's appeal from prior order awarding her reasonable attorney fees in connection

with another appeal in same litigation. The District Court of Appeal, Fox, J., held that there was no abuse of discretion by trial court.

Order affirmed.

1. Divorce ⇐184(4)

In support of trial court's order in divorce proceeding, it is proper to assume that even though no reasons were assigned therefor, it was based on pertinent legal principles.

2. Divorce ⇐223

Matter of awarding an attorney's fee in divorce action is within the sound discretion of the trial court.

3. Divorce ⇐182

Husband having the means is required to underwrite good faith appeal of necessitous wife, but the allowance of particular fee applied for is not a matter of absolute right unrelated to factor of antecedent allowances which were granted for attorney's fees.

4. Divorce ⇐284

In divorce proceeding, trial court's denial to wife of allowance of additional attorney's fee to enable her to resist husband's appeal from prior order of court awarding wife $10,000 attorney's fees in connection with another appeal in the same proceeding and involving much the same issues, was not an abuse of discretion.

Edward M. Raskin, Los Angeles, for appellant.

Franklin W. Peck, Los Angeles, for respondent.

FOX, Justice.

Writing in the second century A.D., the classic poet Juvenal, a mordant commentator on the mores of ancient Rome, inquired: "Tell me, what do pleaders get for their services in the courts and for those huge bundles of papers which they bring with them?" (Satire VII, lines 106–107, Ramsey Translation.) This antique question has been before the courts apparently since the dawn of jurisprudence. It likewise engrosses our attention in the instant matter.

In the current phase of this judicial odyssey, which has meandered through the appellate courts with rhythmic regularity,[1] plaintiff wife originally appealed from five separate orders of the trial court denying her an attorney's fee in proceedings subsequent to the entry of an interlocutory decree of divorce. Upon reevaluation of her situation, and conditioned in part by the implications of our opinion in Howard v. Howard, 141 Cal.App.2d 234, 296 P.2d 592 (with special reference to the footnote at pages 243 and 598 respectively), plaintiff has elected to abandon four of her five appeals. Accordingly, the appeals numbered 19734, 19758, 19776 and 19827 are dismissed.[2] The remaining appeal, No. 19774, in its pristine form, constituted an attack on three orders of the court made on October 31, 1952. Plaintiff has likewise abandoned her appeal from two of these orders. There remains for consideration only an appeal from one of the orders made on October 31, 1952, which will be more fully set out after a chronological resume of those elements of the former proceedings here germane.[3]

1. The antecedent chapters in this voluminous saga of litigation are reported, sub nomine Howard v. Howard, as follows: 119 Cal.App.2d 122, 259 P.2d 41; 128 Cal.App.2d 180, 275 P.2d 88; 128 Cal.App.2d 188, 275 P.2d 93; 141 Cal.App.2d 233, 296 P.2d 592; 142 Cal. App.2d 222, 298 P.2d 48.

2. In the interest of brevity, we have omitted encumbering the record with a delineation of the gambits and countermoves which precipitated those appeals.

3. The district Court of Appeal may take judicial notice of its own records in prior proceedings. Corum v. Hartford Acc. & Ind. Co., 67 Cal.App.2d 891, 893, 155 P.2d 710; Collins v. City & County of San Francisco, 112 Cal.App.2d 719, 725, 247 P.2d 362.

Proceedings for a divorce, and for the settlement of rights arising from the marriage, were instituted by the parties in 1951. Thereafter, plaintiff moved for the allowance of attorney's fees pendente lite. In June, 1951, the court made an order under which plaintiff was awarded an attorney's fee in the sum of $12,000 on account of services to be rendered in the pending litigation.

An interlocutory judgment granting plaintiff a divorce was entered on June 9, 1952. This decree, signed by Judge Mosk, contained a provision awarding plaintiff an additional attorney's fee of $15,690. Both plaintiff and defendant appealed from certain portions of the judgment, defendant posting a bond to effect a stay of execution.[4]

Lacking resources to prosecute her own appeal or to resist the appeal taken by defendant, plaintiff made a motion for an order for an attorney's fee and costs to meet the expenses of appellate proceedings. On September 23, 1952, Judge Mosk ordered defendant to pay a $10,000 attorney's fee and $1,200 costs for services necessitated by the appeals from the judgment. Defendant also appealed from this order and again stayed execution.

Plaintiff next moved for an order requiring defendant to pay plaintiff a reasonable sum as attorney's fees and court costs to enable her to resist defendant's appeal from the order last mentioned.[5] The motion was supported by affidavits of plaintiff and her counsel from which it appeared that plaintiff had no independent income from which to pay fees for her attorney, that defendant had the ability to pay for such services, and that her resistance of defendant's appeal was taken in good faith. Defendant's attorney filed a counter-affidavit which did not directly controvert these facts, but alleged in substance that the previous award of counsel fees made any additional award unnecessary.[6]

On October 31, 1952, Judge Mosk heard argument on the motion. At this hearing, plaintiff's counsel referred the court to the case of Kyne v. Kyne, 74 Cal.App.2d 563, 169 P.2d 272, as indicative of its power to grant additional attorney's fees to resist an appeal from a prior order awarding attorney's fees. Defendant's counsel argued that the award of attorney's fees theretofore made was adequate to cover such services and another allowance was unwarranted. At the conclusion of the argument, the court made its order denying plaintiff attorney's fees with which to resist defendant's appeal from the order of September 23, 1952, awarding an attorney's fee of $10,000 for services in connection with the previous appeals from the interlocutory judgment. The court did not assign any ground for denial of the application.

[1] It is plaintiff's position that because of her showing of good faith and lack of resources coupled with defendant's ability to pay, she was entitled as of right to an attorney's fee to resist defendant's appeal and, in any event, she insists the court abused its discretion in denying her an award. Placing principal reliance on Kyne v. Kyne, supra, she contends "that the able trial judge was under the erroneous impression that once he had awarded an attorney's fee to plaintiff's counsel, it was not within his power to grant an additional fee for the protection of the original fee which he had awarded, in spite of the defendant's appeal from the original award." However, nowhere does the record reveal, affirmatively

4. In Howard v. Howard, 128 Cal.App.2d 188, 275 P.2d 93, this court affirmed the award of the attorney fee of $15,690. Much of the factual background of this litigation is reported in Howard v. Howard, 128 Cal.App.2d 180, 275 P.2d 88.

5. In Howard v. Howard, 141 Cal.App.2d 233, 296 P.2d 592, the award of $10,000 embodied in this order was affirmed by this court. The history of defendant's contumacious opposition to orders of the court awarding alimony and counsel fees to plaintiff is fully recounted in the opinion.

6. Defendant agreed, however, to pay the amount of $1200 awarded as costs on appeal and abandoned that portion of his appeal.

or by implication, that the trial court harbored such a misconception. On the contrary, in his argument below, plaintiff's counsel cited the Kyne case, which stands for the proposition that in a domestic relations proceeding, upon proper showing, an attorney's fee should be awarded to permit the prosecution of an appeal from a prior order disallowing attorney's fees upon appeal. Furthermore, despite Judge Mosk's statement that he was familiar with that case, counsel quoted extensively from that authority in support of the proposition that an attorney's fee could and should be allowed in the premises. It is therefore difficult, even if it were fair, to ascribe the trial court's denial of an attorney's fee to his unfamiliarity with the case authority which permits such an award upon a proper showing. In support of the court's order, it is proper to assume it was based on other pertinent legal principles.

[2, 3] Thus, it is more logical to infer that in denying plaintiff's current application, Judge Mosk, in the exercise of the discretion vested in him, took into consideration the fact that some five weeks earlier he had awarded plaintiff $10,000 as an attorney's fee in connection with the appeals from the interlocutory judgment; that among the questions presented by those appeals was whether it was an abuse of discretion to award plaintiff $15,690 as an attorney's fee for services at the trial; that this identical issue, except as it related to legal services incident to an appeal, was the only one presented upon defendant's appeal from the award of $10,000, and that in view of the substantial award already made for services on a pending appeal involving a similar legal point, an additional award was not necessary. It is fundamental that the matter of awarding an attorney's fee in a divorce action is left to the sound discretion of the trial court. Kellett v. Kellett, 2 Cal.2d 45, 49–50, 39 P.2d 203. Also, it is elemental that a husband having the means is required to underwrite the good faith appeal of a necessitous wife. However, the question whether a particular fee applied for should be granted is not, as plaintiff appears to suggest, a matter of absolute right unrelated to the factor of antecedent allowances which have been granted for attorney's fees. The law is established that in fixing the amount of an attorney's fee for services on appeal, or in determining whether such an award is required at all, the trial judge may take into account the orders for fees which have been previously made in the litigation. Berry v. Berry, 140 Cal. App.2d 63, 64, 294 P.2d 766; Harrold v. Harrold, 117 Cal.App.2d 664, 666, 256 P. 2d 626; Bailey v. Bailey, 60 Cal.App.2d 291, 297, 140 P.2d 693; Frazier v. Frazier, 115 Cal.App.2d 560, 562, 252 P.2d 698. See Leupe v. Leupe, 21 Cal.2d 145, 153, 130 P. 2d 697.

[4] Berry v. Berry, supra, succinctly expresses the controlling law. There plaintiff husband and defendant wife had each taken appeals from a judgment and orders made in connection with their divorce litigation. Defendant wife applied for attorney's fees for the purpose of prosecuting her appeals and defending against plaintiff's cross-appeal. The trial court made its order denying the application. In reviewing the facts on appeal from this order, the appellate court noted that defendant wife had been previously awarded $6,000 as attorney's fees for trial of the action and for an accounting proceeding, as well as an additional $3,000 in prosecuting a prior appeal. In affirming the order of denial, the court stated [140 Cal.App.2d 63, 294 P.2d 767]: "Previous allowances of attorney's fees may afford support for a trial court's conclusion that no need exists for any additional allowance. [Citations.] The rejection of an application on that ground lies within the sound discretion of the trial court, and in order to set aside its order refusing the application a very strong case must be made in favor of the applicant. [Citation.]" We do not perceive any arbitrary exercise of the court's discretion in the disallowance of the fee requested. Taking cognizance that a fee of $10,000 had recently been awarded in connection with the appeals from the

interlocutory judgment, and that the question of the reasonableness of attorney's fees was an issue in those appeals and the only issue in the appeal from the award of $10,000, thus permitting the research of the law on that question to be used in both appeals, see Barker v. Barker, 139 Cal.App. 2d 206, 218, 293 P.2d 85, we cannot say, as a matter of law, that an additional fee should have been allowed and that the court abused its discretion in refusing the allowance applied for.

The order appealed from is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

Hearing denied; SPENCE, J., dissenting.



148 Cal.App.2d 649

The PEOPLE of the State of California, acting by and through the DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent,

v.

Louis B. SAMMIS, a/k/a L. B. Sammis, Miriam F. Sammis, Rocca Bella Olive Association, a cooperative corporation, Calaveras County Abstract and Title Company, a corporation, as trustee, Berkeley Bank for Cooperatives, a federal corporation, California Pacific Title Insurance Company, a corporation, as trustee, Anna Louise Naylor, Southern Pacific Railroad Company, a corporation, Southern Pacific Company, a corporation, Edward C. Robarts, Ruby E. Robarts, Corporation of America, a corporation, as trustee, Central Bank of Calaveras, a corporation, Defendants and Appellants.

Civ. 8827.

District Court of Appeal, Third District, California.

Feb. 25, 1957.

Suit to condemn land for highway purposes. From judgment of Superior Court, Calaveras County, J. A. Smith, J., property owners appealed. The District Court of Appeal, McMurray, J. pro tem., held that evidence was sufficient to support finding that taking of potential spur track right of way did not result in severance damage to property owners' remaining property.

Judgment affirmed.

1. Appeal and Error ⇐930(1)

On appeal, every inference from evidence will be construed in favor of party prevailing in trial court.

2. Eminent Domain ⇐205

In suit to condemn land for highway purposes where only contiguity between land on which potential spur track was to be located and remainder of owners' land on which olive processing plant was located was a strip 3.3 feet wide, evidence was sufficient to support finding that taking of proposed spur track location did not result in severance damage to owners' remaining property.

3. Evidence ⇐555

The fact that expert witness in land condemnation suit estimated value of land belonging to olive processing plant on acreage basis went to weight of evidence rather than legal admissibility of evidence.

4. Trial ⇐295(1)

District Court of Appeal will read and consider instructions as a whole in determining assignment that trial court failed to properly instruct jury.

Arthur M. Sammis, Hutchinson & Quattrin, San Francisco, Airola & Airola, San Andreas, for appellant.

Robert E. Reed, Holloway Jones, Jack M. Howard, Joseph F. DeMartini and John P. Horgan, San Francisco, for respondent.

McMURRAY, Justice pro tem.

After a jury trial, at which the defendants were awarded damages for the taking of certain property for highway purposes, and at which the jury found no damages

as severance damages, the defendants' motion for a new trial was denied, and this appeal is taken by the defendants from the entire judgment entered in accordance with that verdict. The appellants' main contentions are that as a matter of law the jury was bound to return a verdict for damages resulting from the severance of a potential spur track right of way to the property remaining in their ownership; also that diminishing the depth of the defendants' land in front of their olive-processing plant necessarily resulted in a severance damage, and, furthermore, appellants urge that the court erred in failing to give certain instructions upon the effect and evaluation of expert testimony and also erred in not striking some expert testimony, which appellants contend was invalid for any purpose. Appellants also complain that they were entitled to damages by reason of the separation of their land from the underlying fee in a preexisting highway, which is now embraced within the limits of the new highway. During the trial the appellants offered no proof and made no contention in connection with the severance damage by reason of the isolation of their underlying fee in the existing highway. Therefore, that question cannot be considered by this court, since such matters cannot be raised for the first time on appeal. Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 83 P.2d 942; Marra v. Ætna Construction Co., 15 Cal.2d 375, 101 P.2d 490; 18 Cal.Jur.2d, Eminent Domain, Sec. 339.

[1–3] A reading of the entire record in this matter discloses that there is substantial evidence to support the jury's findings and verdict in all respects, and, under the familiar rule of indulging every inference favorable to the prevailing party, this court should not reverse a judgment upon such ground. During the trial two parcels of the land taken were shown to be in the ownership of defendant Sammis, but there was testimony that he held them in trust for the corporation, Rocca Bella Olive Association. The court considered that all parcels concerned in the trial constituted a single parcel and so instructed the jury. This was in accordance with appellants' contentions at the trial, and it is difficult to see how they can now complain because the court so ruled. There was testimony adduced at the trial that one parcel was feasible and available for a spur track. There was testimony by appellants' witnesses that the taking of this parcel resulted in substantial severance damage to the remainder of the larger parcel. Respondent's witnesses testified that they believed there was no severance damage by reason of the loss of the spur track possibility. It cannot here be said that the jury's finding of no severance damage was unsupported when the physical characteristics of the land involved in this action are considered. The only contiguity between the parcel which was considered as being feasible and available for spur track purposes and the land on which appellants' plant was located was a strip 3.3 feet wide, and there was testimony that in order to install the spur track, it would be necessary to obtain more property from an abutting landowner. The jury, therefore, might well have felt that the possibility of a spur track installation was so speculative as to require a finding of no severance damage. Assuredly there is a conflict in the evidence relative to the claim of damage from the reduction in length of the loading zone. However, the jury was acting well within its province in determining that there was no severance damage resulting from the taking of the land from such zone, as there was, indeed, no testimony, other than statement of counsel, as to the length of trucks or the loading methods used at the plant. Certain expert testimony is attacked by appellants upon the ground that one of respondent's witnesses estimated the land value upon an acreage basis. This mere fact, standing alone, is not sufficient to require such evidence to be completely discarded, as it goes to the weight of the evidence, rather

than to its legal admissibility. People v. Loop, 127 Cal.App.2d 786, 274 P.2d 885.

[4] Appellants further complain that the court failed properly to instruct the jury relative to the evaluation of expert or opinion evidence. A reading of the entire charge to the jury does not support appellants' contention in this respect, and this court is bound to read and consider the instructions as a whole. Huston v. Schohr, 63 Cal.App.2d 267, 146 P.2d 730; Shuey v. Asbury, 5 Cal.2d 712, 713, 55 P. 2d 1160.

The judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



148 Cal.App.2d 760

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Roland AYALA, Defendant and Petitioner.

Cr. 5858.

District Court of Appeal, Second District, Division 2, California.

Feb. 27, 1957.

Proceeding on motion for leave to file a belated appeal from a judgment of conviction. The District Court of Appeal held that where petitioner failed to sustain burden of showing substantial delay of approximately two years in perfecting his appeal was attributable to prison authorities, and since timely appeal was jurisdictional, motion would be denied.

Motion denied.

Criminal Law ⇐1069(1)

Where petitioner seeking leave to file a belated appeal from his judgment of conviction failed to sustain burden of showing that substantial delay of nearly two years in perfecting his appeal was attributable to prison authorities, and since timely appeal was jurisdictional, motion for leave to file a belated appeal would be denied.

Robert Roland Ayala in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

PER CURIAM.

The matter before us involves a motion by petitioner, Robert Roland Ayala, for leave to file a belated appeal from a judgment of conviction. The judgment was entered on January 25, 1955. The current motion was filed in this court on January 18, 1957.

Seeking to justify the delay of nearly two years in instituting an appeal from the judgment, petitioner's verified motion purports to state facts showing he did everything within his power to perfect an appeal within the time prescribed by law. Relying on People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868, he alleges that during and shortly after the statutory time for appeal, he attempted to file a notice of appeal, but his attempts to do so were frustrated by refusal of his jailors to mail his notice and by erroneous advice as to his right of appeal given him by prison officials. In opposition to petitioner's motion, the People submitted counter-affidavits by three of the prison functionaries identified by petitioner as having obstructed his efforts to proceed with an appeal.

Upon consideration of the showing made, we find petitioner has failed to establish that he used reasonable diligence to accomplish the timely filing of his notice of appeal or that prison officers or employees were responsible for the failure of such notice to be filed within the time specified by law. Therefore, petitioner has failed to sustain the burden of showing that the substantial delay in perfecting his appeal is

attributable to prison authorities. Since petitioner's attempted appeal was not taken in time, this being a jurisdictional requirement, In re Horowitz, 33 Cal.2d 534, 203 P.2d 513, his motion must be denied.

Motion denied.



148 Cal.App.2d 652

Emanuel H. METTLER, Plaintiff and Appellant,

v.

Benjamin F. BRALY, Defendant and Respondent.

Benjamin F. BRALY, Plaintiff and Respondent.

v.

Emanuel H. METTLER, Defendant and Appellant.

Civ. 5349.

District Court of Appeal, Fourth District, California.

Feb. 25, 1957.

Tenant's action for declaratory relief against landlord to construe legal rights and duties of parties under lease and action was brought by landlord against tenant seeking to recover for breach of lease. The Superior Court of Tulare County, Robert K. Meyers, J., entered judgment for landlord and tenant appealed. The District Court of Appeal, Griffin, J., held that under lease providing that tenant agreed to pay amount of taxes assessed against all improvements made by tenant upon leased land, tenant was obligated to pay for all improvements made by him to such land and not just improvements designated as such by county assessor on tax bill.

Affirmed.

1. Declaratory Judgment ⇐186

Where lease covering unimproved agricultural land provided that tenant would pay amount of taxes assessed against all improvements made by tenant upon leased land, and there was a dispute between landlord and tenant as to whether such clause obligated tenant to pay taxes assessed against all improvements or against only improvements designated as such on tax bill, ambiguity or uncertainty as to intent of parties was properly submitted to trial judge. West's Ann.Civ.Code, § 1647; West's Ann.Code Civ.Proc., §§ 1859–1861; West's Ann.Rev. & Tax.Code, § 105.

2. Landlord and Tenant ⇐148(2)

Where lease of unimproved agricultural lands provided that tenant should pay amount of taxes assessed against "all improvements" made by tenant upon leased land, evidence and the entire lease disclosed that clause obligated tenant to pay for all improvements to land made by him and not only for amount of taxes assessed against improvements designated as such by county assessor on tax bill. West's Ann.Rev. & Tax.Code, §§ 105 607.

See publication Words and Phrases, for other judicial constructions and definitions of "All Improvements".

3. Appeal and Error ⇐1008(3)

Where construction given a contract by the trial court appears to be consistent with the true intent of the parties as shown by the evidence, its interpretation will not be reversed upon appeal.

Ohanneson & Mortimore, Shafter, for appellant.

Walter C. Haight and Leonard M. Ginsburg, Visalia, for respondent.

GRIFFIN, Justice.

In the first of these two consolidated actions appellant, Emanuel H. Mettler brought an action for declaratory relief against respondent Benjamin F. Braly to construe the legal rights and duties of

the parties pertaining to a certain lease of land in Tulare County respecting the payment of taxes. Thereafter, respondent brought an action against appellant seeking to recover $4,191.78 plus attorneys' fees and costs for a claimed breach of the lease in this respect. The same issue is presented by each action.

According to the evidence and the lease of the 320 acres of dry, unleveled wheat land involved, wihch lease was dated February 14, 1949, effective July 1st, and its subsequent modification of June 7, 1949 to include an additional 120 acres, respondent Braly, then 86 years of age, leased to appellant the 320-acre tract at $3,200 and the 120-acre tract at $1,200 per year. Respondent testified that appellant told him he was going to level the land, put down wells, install pumps and irrigate the land and put houses on it; that appellant had a lease prepared by a "real estate man" and left it with respondent (this proposed lease had no provision in reference to increased taxes); that he told appellant before he would sign it appellant would have to pay the "raise in taxes * * * on all the improvements they put on there * * * houses—wells—pipe lines, and the leveling", with the right of removal, and that he understood from the conversation that appellant agreed he would do that and change the lease accordingly; that thereafter he went to the real estate office and signed the lease as changed, and that at that time it had been signed by the appellant. Appellant took immediate possession of the property, drilled wells, installed pumps and pipe lines, leveled and fertilized the soil, moved certain buildings onto the property and generally made other betterments to the leased premises. The lease was for a period of ten years with five years' option to extend, plus option to purchase certain land at $150 per acre. It also provided for reasonable attorneys' fees. Each lease contained this provision, which is the crux of this action:

> "The lessee covenants and agrees to pay the said rental at the time and in the manner hereinabove set out and to pay or reimburse lessor, when due, for the amount of taxes assessed against all improvements made by the lessee upon the leased land during the term of this lease."

At the trial it was agreed that there was a great increase in the assessment and taxes on the real estate in the following four years due to the plaintiff's betterment of the land, and that the additional taxes thereon amounted to $4,191.78. It was further agreed that appellant Mettler paid all taxes assessed upon improvements, as improvements are defined in section 105 of the Revenue and Taxation Code, as treated independent of the land in the tax statement issued for the leased premises and for the period in question, and that respondent Braly paid all taxes assessed upon the land. He now claims reimbursement from appellant to the extent that appellant's amelioration and betterment of the land caused increase in such taxes.

It is appellant's claim that the clause in the lease above quoted is clear and not ambiguous and should receive the interpretation placed on the word "improvements" as expressed in sections 105, 607, and other provisions of the Revenue and Taxation Code, and that no resort to surrounding circumstances by parole evidence was needed or authorized to interpret it, citing such authority as Terminal Investment Co. v. Pope Estate Co., 122 Cal.App. 281, 283, 10 P.2d 139; Los Angles Land & Water Co. v. Consumers Rock & Gravel Co., 3 Cal.2d 77, 43 P.2d 281; and 12 Cal.Jur.2d p. 325, sec. 119.

[1] It is respondent's claim that the term "all improvements", contained in the lease, is to be considered in its popular sense and includes all improvements or betterments made to the real property, and includes the preparation of wild or raw land for agricultural purposes, citing 27 Am. Jur. pp. 260–261, secs. 1–4, and Cumulative Supplement, page 21; and that the lease agreements show on their face that the definition of "improvements", as defined

by section 105 of the Revenue and Taxation Code, was not contemplated by the parties. There is some merit to this argument. The first agreement, executed by the parties, provides that it is understood between the parties that while this lease starts on July 1, 1949, the lessee is hereby given the right to take immediate possession "for the purpose of drilling a well and/or other improvements". It is quite clear that respondent did intend the word "improvements" there used to apply to the well as an improvement, contrary to the provisions of section 105 of the Revenue and Taxation Code. Read in connection with this clause, the use of the modifying adjective *all* improvements, had some significance. Appellant testified that in connection with the tax clause it was his understanding that the only improvements he would have to pay taxes on were "removable improvements", and that he would not have to pay taxes assessed against trees, since they were not removable. Even though trees are not removable they are assessed under section 105, supra, as improvements. These several interpretations, therefore, might well give rise to an uncertainty as to the construction of the clause. The fact that appellant commenced this action for declaratory relief alleging that the legal rights and duties of the respective parties are in controversy, is some indication of the uncertainty of the terms of the agreement in regard to the payment of taxes. For its proper construction this ambiguity or uncertainty as to the intent of the parties was properly submitted to the trial judge for determination so that he might be placed in the position of those whose language he is to interpret. Secs. 1859, 1860 and 1861, Code Civ.Proc.; Sec. 1647, Civ.Code; 12 Cal.Jur.2d p. 324, sec. 119.

[2, 3] From the evidence produced and from a reading of the entire lease, the trial court was justified in finding that the obligation upon the lessee was to pay or reimburse the lessor for the amount of taxes assessed against "all improvements made by the lessee" and was not, as appellant would construe the clause, an obligation to pay only the amount of taxes assessed against improvements designated on the tax bill by the county assessor as improvements. The cases relied upon by appellant are factually dissimilar. It is a cardinal rule that where the construction given a contract by the trial court appears to be consistent with the true intent of the parties, as shown by the evidence, its interpretation will not be reversed on appeal. Decter v. Stevenson Properties, Inc., 39 Cal. 2d 407, 417, 247 P.2d 11. A judgment for respondent in the sum of $4,191.78, plus $820 attorneys' fees, was authorized.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



148 Cal.App.2d 662

Forrest M. ROTH, Plaintiff and Respondent,

v.

Ruby Faye SCHAAF, Defendant and Appellant.

Civ. 5357.

District Court of Appeal, Fourth District, California.

Feb. 25, 1957.

Action by holder of note executed by defendant's husband and defendant, by defendant's husband, under authority of a general power of attorney executed by defendant. The Superior Court, Fresno County, Philip Conley, J., entered judgment for holder and defendant appealed. The District Court of Appeal, Mussell, J., held that finding that holder neither knew nor had reasonable ground to believe that defendant's husband was exceeding authority granted to him by general power

of attorney by defendant was supported by substantial evidence.

Judgment affirmed.

1. Trial ⇐404(1)

Findings of trial court are to receive such a construction as will uphold, rather than defeat, its judgment thereon, and are to be read and construed together and liberally construed in support of judgment.

2. Principal and Agent ⇐97

A general power of attorney to do acts for use and benefit of person conferring power does not confer power on donee to do acts for benefit of donee or for benefit of a third person.

3. Principal and Agent ⇐132(1)

In determining whether a comaker on a note is bound by acts of comaker's agent, who had signed note for comaker under general power of attorney, notice is the important element, and where it does not appear that holder of note knew or should have known that money was not to be used for comaker's benefit, comaker is bound by acts of agent.

4. Husband and Wife ⇐25(1)

Where comaker's signature on a note had been signed by comaker's husband under a power of attorney, and power of attorney had authorized husband to sign and execute in comaker's name notes, receipts and evidences of debt, and holder neither knew nor had reasonable ground to believe that husband was exceeding authority granted by power of attorney, comaker was liable on note.

5. Husband and Wife ⇐25(6)

In action on notes signed by comaker's husband under a general power of attorney, finding that holder neither knew nor had reasonable ground to believe that comaker's husband was exceeding authority granted to him by general power of attorney was supported by substantial evidence.

Bradley & Bradley, Visalia, for appellant.

Ted R. Frame, Coalinga, for respondent.

MUSSELL, Justice.

This is an action on a promissory note executed by Chester Loyd Schaaf, now deceased. The note is dated April 20, 1954, and provides for the payment to plaintiff, Forrest M. Roth, of the sum of $3,000 on or before September 30, 1954. The note was for money advanced to Schaaf by plaintiff. It was signed by Chester Schaaf and by defendant Ruby Faye Schaaf, by Chester Schaaf, under the authority of a general power of attorney executed by her on February 27, 1954. The trial court rendered judgment in favor of plaintiff for the amount of the note, together with attorney's fees and costs, and the defendant appeals from the judgment. Her contentions are that her husband, Chester Schaaf, had no authority under his power of attorney to borrow money from plaintiff and to cosign her name to the note without showing that the money borrowed was for her use and benefit and that plaintiff should have had knowledge that the money borrowed was for the use and benefit of defendant before he could hold her liable.

On April 20, 1954, defendant and her husband were living together as man and wife and came to Dinuba on a vacation trip to visit his mother. At about 8:00 a. m. on April 20, 1954, Schaaf told his wife, he was going over to Huron to see the plaintiff, whom he had not seen for a long time. He arrived at Huron about noon and visited for about forty-five minutes with plaintiff and his wife, who operated a tavern, bar and cardroom. Schaaf then left, returned at about 8:00 p. m. and told plaintiff that he needed $3,000; that "if he didn't have $3,000, that they were going to lose their ranch and that he never even had any grocery money. He was broke, in other words." When plaintiff asked him how long he would need the money, Schaaf stated he had his ranch up for sale, that he figured five or six months would be sufficient time, and the note would be paid off then. Plaintiff thought the matter over and then talked with his wife about it, after which he told Schaaf he could not

lend him the money without his wife's signature. Schaaf then produced a written general power of attorney, dated February 27, 1954, recorded March 1, 1954, which, by its terms, authorized Schaaf to sign and execute in his wife's name, notes, receipts and evidences of debt. Schaaf stated that the reason he had the power of attorney "was to come down and borrow some money." Plaintiff examined the document and "didn't see anything wrong with it." He then agreed to lend Schaaf $3,000 and sent for a blank note which Schaaf then signed for both himself and his wife. Plaintiff then paid Schaaf $3,000 in cash and Schaaf left the place.

Defendant testified that she did not authorize the loan and did not find out about it until after the death of her husband, which occurred on October 25, 1954; that her husband may have told her about the loan but that when he returned to Dinuba on April 21st, he did not tell her about it and did not tell her he had signed her name to a promissory note.

The trial court found, in part, that Schaaf signed the note with defendant's consent; that plaintiff neither knew nor had reasonable ground to believe that Schaaf was exceeding the authority granted to him; that on April 20, 1954, defendant and her husband needed money for living expenses and to satisfy community obligations; that at said time and prior thereto Chester Schaaf had handled the business affairs of himself and defendant and customarily had charge of the payment of community debts; that it is untrue that the note sued on was executed without any consideration whatever on the part of the defendant. Defendant contends that these findings are not supported by the evidence. However, she testified that she and her husband were living on a cattle ranch; that there was a loan of $4,000 due to a bank on April 24, 1954; that the income from their ranch was $250 per month; that her husband handled their business affairs and paid the bills and kept the books; that on April 20, 1954, her husband might have had sizeable obligations unknown to her; that she executed the general power of attorney for her husband to enable him to execute a deed for a right of way for road purposes across her separate property and she revoked the power of attorney on May 21, 1954. While her testimony was to the effect that the power of attorney was executed for the limited purpose stated by her, the document itself, as shown to plaintiff, contained no such limitation, and the finding that plaintiff did not have reasonable grounds to believe that Schaaf was exceeding the power granted to him is supported by substantial evidence.

In this connection, there was evidence that plaintiff knew that Schaaf lost money on his cattle ranch; that he had previously loaned money to Schaaf and his wife and had obtained a note signed by them; that plaintiff had known Schaaf for about forty years. Plaintiff's wife testified that on April 20, 1954, Schaaf told her they were desperate and one of the occupants of the restaurant at the time the loan was made heard Schaaf state that he had to have $3,000 or they would lose everything they had. While plaintiff did not ask Schaaf what he was going to do with the money, the trial court could infer and find from the testimony that Schaaf was procuring the loan in part for defendant's use and benefit.

[1] The findings of the court are to receive such a construction as will uphold, rather than defeat its judgment thereon, and are to be read and construed together and liberally construed in support of the judgment. Metcalf v. Hecker, 127 Cal. App.2d 634, 638, 274 P.2d 188.

Defendant admits that the power of attorney authorized Schaaf to sign promissory notes in defendant's name, but contends that there could be no implied authority given to him to cosign a note given for money borrowed for his own use. As authority for this contention, the case of New York Life Ins. Co. v. Daley, 25 Cal. App. 376, 143 P. 1033, is cited. In this case

it was held that formal instruments conferring authority to bind another must be strictly construed in accordance with the plain import of the language of the document, and its interpretation cannot be extended by implication so as to authorize acts beyond those specified, unless absolutely necessary to carry out the powers expressly delegated, and that the power was restricted to those acts only which were for the defendant's use and benefit.

[2–5] While the rule is well settled that a general power of attorney to do acts for the use and benefit of the person conferring the power does not confer the power on the donee to do acts for the benefit of the donee or for the benefit of a third person, in the instant case the trial court could reasonably infer that the loan involved was made for the benefit of the defendant for the payment of community obligations and to prevent the loss of property in which she had an interest. Notice is the important element and where it does not appear that the plaintiff knew or should have known that the money was not to be used for defendant's benefit, the defendant is bound by the acts of her agent. Bank of America Nat. Trust & Savings Ass'n v. Perry, 41 Cal.App.2d 133, 137, 106 P.2d 53. In Kiekhoefer v. United States Nat. Bank, 2 Cal.2d 98, 104–105, 39 P.2d 807, 810, 96 A.L.R. 1244, the court, in discussing a general power of attorney, such as is here involved, said:

> "'* * * The purpose and effect of a power of attorney of this kind are to vest in the attorney full authority to transact any and all kinds of business for the principal. Every phrase in it defining the authority of the attorney, is in broad and unrestricted terms, and such terms are to be given an interpretation in harmony with the scope and purpose of the instrument, read as a whole. It is true that, where a power is given for a limited or specific purpose, general words following the declaration of the particular purpose are to be limited to such acts as may be necessary to accomplish such particular purpose. Washburn v. Alden, 5 Cal. 463; Billings v. Morrow, 7 Cal. 171, 68 Am.Dec. 235; 1 Am. & Eng.Ency. of Law (2d Ed.), p. 1000. But this rule has no application to such an instrument as the one now under consideration. Nowhere in this power of attorney is there any language limiting the scope of the business which may be performed by the attorney, and the generality of the terms employed clearly includes authority to execute the instruments of renewal.' To the same effect are the cases of Hellmann v. Potter, 6 Cal. 13, and Seymour v. Oelrichs, 162 Cal. 318, 322, 122 P. 847."

In the instant case the trial court found that "plaintiff neither knew nor had reasonable ground to believe that Chester Schaaf was exceeding the authority granted to him by the defendant." The findings of the trial court are supported by substantial evidence and cannot be here disturbed.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

148 Cal.App.2d 786

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank LITTLEJOHN, Defendant and Appellant.

Cr. 1220.

District Court of Appeal, Fourth District, California.

Feb. 27, 1957.

Defendant was convicted of unlawful possession of heroin and unlawful furnishing of heroin to minor. The Superior Court, Fresno County, Philip Conley, J., entered judgment and order denying new trial, defendant appealed. The District Court of Appeal, Griffin, J., held that where officers conducting lawful search of premises in connection with arrests for automobile theft saw box containing heroin, in view of fact that possesser of that drug was committing felony in officer's presence and all tenants on premises were placed under arrest on such charge, their further search of premises for paraphernalia connected therewith was justified as being incidental to lawful arrest.

Judgment and order affirmed.

1. Poisons ⇐9

Evidence sustained convictions for unlawful possession of heroin and unlawful furnishing of heroin to a minor. West's Ann.Health & Safety Code, §§ 11500, 11714.

2. Arrest ⇐68, 71

Where officers who saw women drive reportedly stolen automobile to their residence informed such women of their arrest and opened screen-door of residence for purposes of making arrest, they sufficiently complied with statute allowing breaking open of doors to make arrest, and when officers were then informed by another tenant who was under suspicion for using such automobile to peddle narcotics that it belonged to a stranger, it was proper for the officers to examine the premises to ascertain whether such person was present and to see whether there was any evidence relating to charge of operating automobile without owner's consent and to determine whether other tenant was connected with the charge. West's Ann.Health & Safety Code, §§ 11500, 11714; West's Ann.Pen. Code, §§ 836, subd. 5, 844; West's Ann. Vehicle Code, § 503.

3. Arrest ⇐63(3), 71

Where officers were making lawful search of premises in connection with arrest for automobile theft, and they saw box containing heroin which was in plain sight, they could properly make arrest for possession of heroin and make further search incident with such arrests as they were not required to blind themselves to such merely because it was disconnected with purpose for which they entered. West's Ann.Health & Safety Code, §§ 11500, 11714; West's Ann.Pen.Code, §§ 836, subd. 5, 844; West's Ann.Vehicle Code, § 503.

4. Arrest ⇐71

Where officers conducting lawful search of premises in connection with arrests for automobile theft, saw box containing heroin, in view of fact that possesser of that drug was committing felony in officer's presence and all tenants on premises were placed under arrest on such charge, their further search of premises for paraphernalia connected therewith was justified as being incidental to lawful arrest. West's Ann.Health & Safety Code, §§ 11500, 11714; West's Ann.Pen.Code, §§ 836, subd. 5, 844; West's Ann.Vehicle Code, § 503.

5. Criminal Law ⇐394

Where entry and search are rightful and there is present no element of trespass or fraudulent invasion of rights of citizens, evidence of any crime discovered in course of search may not be excluded.

6. Criminal Law ⇐1159(2, 4)

Reviewing court may not appraise credibility of witnesses and reweigh evidence.

J. E. Hahesy, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was convicted by a jury on one count of an information charging violation of section 11500 of the Health and Safety Code (unlawful possession of heroin), and on three counts of another information charging violation of section 11714 of the Health and Safety Code (unlawful furnishing of heroin to a minor) on three separate occasions. He admitted three prior convictions.

Defendant's appeal is predicated primarily on the contention that the trial court erroneously, over timely objections, admitted evidence which was unlawfully obtained without a search warrant and was prejudicial to this defendant.

Defendant and appellant was living at a house in Fresno with his sister Lydia Ruiz and one Ernest Johnson. Two members of the narcotics squad previously learned of an all-points bulletin in reference to the theft from San Francisco of a green Mercury Montclair coupe with a certain Washington State license number, and that one Janet Jones was a suspect and had been charged with stealing it. This car had been previously seen by the officers around Fresno being driven by defendant and also by one Dolores Villarreal. The officers received word from Tacoma, Washington, that the car was registered to one Yippee Fung of Seattle, who had moved to San Francisco. One officer testified that other officers working the Chinatown beat, called him on two or three occasions and told him they had information that defendant was peddling narcotics from the vehicle and that he had questioned defendant one night at a Drive-In while seated in the car with one Dolores Villarreal, whom he took to be Janet Jones; and that defendant then told him the car belonged to Janet Jones. Upon this information and the fact defendant and Lydia were registered as co-tenants at this house, these officers arranged a stakeout in a near-by warehouse and watched the operations of defendant and the occupants of the house over a period of several days. On the evening of April 7th, at about 10 o'clock this car drove up and was parked in a carport. Two women, Dolores and Lydia, stepped out. When just inside the screen-door, the officers approached, exhibited their badges and told them they were under arrest on suspicion of car theft. They had neither a warrant of arrest nor search warrant. There is some conflict as to whether the screen-door had been closed when the officers walked in. However, if it was closed the officers opened it and stepped inside. Defendant, Johnson and one Helen Gonzales were there seated in the living room. Defendant was questioned about the car and he said it belonged to Janet Jones, a friend of his in San Francisco, that she had loaned it to him, and that his license was in the car. Defendant was told by the officer that defendant had no license in the car because he knew it had been revoked some months previously. Without objection by anyone, one officer looked through the house to see if Janet Jones was there. As he stepped into the front bedroom, which had been occupied by defendant, he saw a black box sitting on the night table next to the bed. It was partially opened. He saw a wad of cotton and on top of it a gelatin capsule containing a brown powder which proved to be heroin. The officer returned to the living room and asked defendant about it. Defendant replied: "That isn't mine, that is something Janet left here." Defendant then asked the officer if he had a search warrant and the officer replied in the negative. He then advised those present they were all under arrest on suspicion of possession of narcotics. A general search was made of the house and there was found a spoon and an eyedropper with traces of heroin on them, two hypodermic needles, and a box containing gelatin capsules. Defendant stated he and his sister were renting the house and the front bedroom in which the box was found was his. Dolores, aged 17, in the presence of defend-

ant, stated she would take the rap because she had not been in trouble before and defendant agreed. She then said the outfit belonged to her. She testified at the trial that it belonged to defendant and that she lived at this house; that defendant slept alone in the front bedroom and she slept on a couch in the living room; that she did the housework and washed clothes; that she started using heroin in the arm while living at another address with Janet Jones and defendant; that on the evening of April 6th or 7th, one of the days charged in the information, defendant furnished her with a capsule of heroin, placed the contents in the spoon with water, lit a match and heated it, picked it up with an eyedropper and needle and injected it into her arm, and that thereafter he injected a similar portion in his arm; and that he made no charge for this administration. She identified the spoon and other paraphernalia in evidence as that used by defendant, and testified that a similar administration of this drug to her by defendant occurred on the evening of April 5th and again on April 6th, as charged, and that Janet Jones lived there about two weeks prior to this occasion.

Defendant produced several witnesses in an endeavor to impeach the testimony of Dolores. She had just been committed to the Youth Authority as a user of heroin growing out of these charges. These several witnesses were friends of defendant and some were users of heroin or had prior convictions. Defendant denied possession of the heroin and denied any sale or injections or administration of heroin to Dolores.

[1] The evidence, if admissible against defendant, was sufficient to support all the charges, and the testimony of the complaining witness Dolores Villarreal, although contradicted in some respects, was not inherently improbable. People v. De Paula, 43 Cal.2d 643, 649, 276 P.2d 600. The principal question is whether it was illegally obtained under the authorities relied upon by defendant, such as People v. Cahan, 44 Cal.2d 434, 282 P.2d 905; People v. Wilson, 145 Cal.App.2d 1, 301 P.2d 974; People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17; People v. Thymiakas, 140 Cal.App.2d 940, 296 P.2d 4; People v. Schraier, 141 Cal.App.2d 600, 297 P.2d 81; People v. Gale, 46 Cal.2d 253, 294 P.2d 13; and People v. Molarius, 146 Cal.App.2d 129, 303 P.2d 350.

[2] There can be no question that there was reasonable cause for the arrest of Dolores Villarreal and Lydia Ruiz for violation of section 503 of the Vehicle Code. The officers had previous reliable information that the car they were driving was stolen, and they were found driving it. It appears that defendant was also previously seen driving it at a time when it had been reported as being stolen; that several officers, walking the beat in Chinatown, had suspicioned defendant of using it for the purpose of effecting the sale of narcotics, and these facts were known to the officers making the entry into the house at the time of the arrest. They had knowledge that a felony had been committed and it was reasonable to believe that the two women, seen driving the stolen car, were guilty of the felony. Vehicle Code sec. 503; People v. Ragone, 84 Cal.App.2d 476, 191 P.2d 126; People v. West, 144 Cal.App.2d 214, 300 P.2d 729; Sec. 836, subd. 5, Penal Code. They were informed of their arrest and the screen-door was opened for the purpose of making this arrest. There was a sufficient compliance with section 844 of the Penal Code. People v. Borbon, 146 Cal.App.2d 315, 303 P.2d 560; People v. Maddox, 46 Cal.2d 301, 305, 294 P.2d 6. In the latter case it was held that the primary purpose of the constitutional guarantees relating to searches and seizures is to prevent unreasonable invasions of the security of the people in their persons, houses, papers and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. Accordingly, since Dolores and Lydia were

tenants of the house in which they were residing, it would also appear proper for the officers to have examined the premises first, to ascertain whether Janet Jones was present, and second, to see whether any evidence was present relating to the charge for which the women were arrested and to determine defendant's connection with the charge. People v. West, 144 Cal.App.2d 214, 300 P.2d 729.

[3] It was recently held that under such circumstances as here related, the officers could only make that kind of a search reasonably necessary in connection with their right of entry, but in the course of conducting a reasonable search they did not have to blind themselves to what was in plain sight simply because it was disconnected with the purpose for which they entered. People v. Roberts, 47 Cal.2d 374, 303 P.2d 721. In that case the officers, while rightfully in the room on another mission, saw a stolen radio which was in plain sight and they took the number of it. Several cases are cited as authority for this holding. In one of these cases the officers entered the defendant's house lawfully for the purpose of searching for another man, and in the course of the search they discovered a distillery in operation. In another, the officers entered lawfully for the purpose of finding and arresting the defendant on one charge and in searching for the defendant they discovered an illegal supply of liquor in the basement, another and different offense. In another case there cited, it was said that where the entry and search are rightful and there is present no element of trespass or fraudulent invasion of the rights of the citizens, there is no reason for excluding evidence of crime discovered in the course of the search; that if the officers discovered in the cellar a counterfeiting plant in operation would it have been their duty to ignore it? If they had come upon the body of a murdered man would their testimony as to finding the body be excluded?

[4] In formulating the rule governing lawful searches and seizures, it quoted from authorities of the United States Supreme Court recognizing the distinction between the seizure of evidence which was readily visible and accessible to the officers and that which was uncovered only after a general, unreasonable ransacking of the premises, and stated that the decisions also make a sharp distinction between the seizure of property which is stolen or contraband and property which is unoffending of itself and merely evidentiary. As applied to the heroin in the front bedroom, it was apparently in the plain sight of the officer while rightfully searching that room for the purpose indicated. The possessor of that drug was committing a felony in the officers' presence. They were all placed under arrest on the charge. The further search of the premises for the paraphernalia connected therewith was justified as being incidental to a lawful arrest. People v. Allen, 142 Cal.App.2d 267, 298 P.2d 714; United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663.

[5, 6] Where the entry and search are rightful and there is present no element of trespass or fraudulent invasion of the rights of citizens, there is no reason for excluding evidence of crime discovered in the course of the search. Paper v. United States, 4 Cir., 53 F.2d 184, cited with approval in People v. Roberts, supra. The authorities relied upon by defendant are factually dissimilar. The question as to whether the testimony of the complaining witness was inherently improbable was considered by the trial court on a motion for new trial and the motion was denied. The reviewing court may not reappraise the credibility of witnesses and reweigh the evidence. People v. Jones, 36 Cal.2d 373, 224 P.2d 353. No prejudicial error appears from the ruling.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

H. S. CROCKER CO., Inc., a California corporation, Plaintiff and Appellant,

v.

Mrs. Claude L. McFADDIN, Defendant and Respondent.

Civ. 21754.

District Court of Appeal, Second District, Division 3, California.

Feb. 25, 1957.

Rehearing Denied March 27, 1957.

Hearing Denied April 25, 1957.

Action of claim and delivery. The Superior Court, Los Angeles County, George Francis, J., entered judgment awarding to defendant the property or judgment for the value thereof, and thereafter granted defendant's motion for a partial new trial and entered a second judgment for delivery of the property to defendant and for damages in specified sum, if property was not returned, and from such judgments and order, plaintiff appealed. The District Court of Appeal, Vallée, J., held that delivery of unsold greeting cards to dump and payment of fee for dumping subject to salvage without request that cards be destroyed constituted a sale and not a bailment and that title to cards passed to operator of dump and salvage operation.

Appeal from order granting partial new trial dismissed and judgments affirmed.

1. Sales ⇐234(7)

Innocent purchaser of property from a mere bailee acquires no title thereto as against bailor.

2. Contracts ⇐147(1, 2)

Mutual intention of the parties as exhibited by their language, acts and conduct governs in construing a contract.

3. Contracts ⇐147(2)

The objective manifestation of mutual consent is essential in construing a contract.

4. Contracts ⇐147(1, 2)

The law imputes to a person the intention corresponding to the reasonable meaning of his language, acts and conduct.

5. Bailment ⇐1

A "bailment" is the delivery of a thing to another for some specific object or purpose, on a contract, express or implied, to conform to objects or purposes of the delivery.

See publication Words and Phrases, for other judicial constructions and definitions of "Bailment".

6. Bailment ⇐23

Ordinarily, the identical thing bailed or the product of, or substitute for, such thing, together with all increments and gains, is to be returned or accounted for by bailee when the use to which such thing is to be devoted is completed or performed or bailment has otherwise expired.

7. Sales ⇐4(1)

A transaction involving transfer of ownership is a "sale" and not a "bailment".

See publication Words and Phrases, for other judicial constructions and definitions of "Sale".

8. Bailment ⇐3

General rule that assent of both parties is necessary to the existence of a contract, either express or implied, is applicable to the ordinary case of a contract of bailment.

9. Bailment ⇐3

Ordinarily, the duties and obligations of a bailee can not be thrust on one against his consent, but must be voluntarily assumed as in every obligation founded on contract.

10. Bailment ⇐1

A bailment cannot be implied, where mutual relationship of the parties and the circumstances of the case indicate intention of the parties that property was to be held by the party in possession in some capacity other than as bailee.

11. Sales ⇐4(1)

Transaction is a "sale," and not a "bailment", and title to the property is changed, where receiving party is under no obligation to return the property or account for it. West's Ann.Civ.Code, § 1721.

12. Sales ⇐1(1)

A "sale" is the transfer of the property in a thing for a consideration, called the price, the essence of such transaction being the transfer of the absolute interest in the property. West's Ann.Civ.Code, §§ 1605, 1721.

13. Sales ⇐1(3)

The "price" is the consideration passing from buyer to seller for seller's interest in the thing sold. West's Ann.Civ. Code, §§ 1605, 1721.

See publication Words and Phrases, for other judicial constructions and definitions of "Price".

14. Sales ⇐19

The consideration for which property is transferred to another may be money or its equivalent or any valuable consideration. West's Ann.Civ.Code, §§ 1605, 1721.

15. Contracts ⇐54(1)

A single consideration may support several counterpromises made by the other party to transaction. West's Ann.Civ.Code, §§ 1605, 1721.

16. Contracts ⇐16

An offer may contain a choice of terms from which the offeree may make selection in accepting offer.

17. Contracts ⇐22(1)

Acceptance of one of several alternate propositions constitutes a binding contract.

18. Contracts ⇐1

Any conduct of one party from which the other may reasonably draw the inference of a promise is effective in law as such.

19. Sales ⇐4(1)

Delivery of unsold greeting cards packed in cartons to dump and payment of fee for dumping subject to salvage without request that cards be destroyed constituted "sale" and not "bailment" of cards and title thereto passed to dump operator. West's Ann.Civ.Code, §§ 1605, 1721.

20. Sales ⇐1(1)

Relinquishment of property for a consideration is a sale or barter.

21. Sales ⇐19

Privilege of dumping unsold greeting cards on property of operator of dump and salvage operation and thereby relinquishing all right in cards was the "consideration" for sale of cards to dump operator, and fact that both fee for dumping and cards were delivered to dump operator did not negative fact that transaction was a sale. West's Ann.Civ.Code, §§ 1605, 1721.

See publication Words and Phrases, for other judicial constructions and definitions of "Consideration".

22. Bailment ⇐31(1)

Where right of property rests on existence of bailment and the fact of bailment is in issue, party relying on bailment has the burden of establishing the bailment, including burden of proving the making of a valid contract of bailment, delivery to bailee under contract, and acceptance by bailee.

23. Bailment ⇐31(1)

In action of claim and delivery, involving title and right to possession of greeting cards delivered by plaintiff to operator of dump and salvage operation and salvaged by dump operator and sold to defendant's vendor, plaintiff had the burden of proving that dump operator entered into contract to destroy the cards dumped.

24. Contracts ⇐14

Intent may be inferred from a party's acts and conduct even in the face of his expressed declarations to the contrary.

25. Contracts ⇐4

Uncommunicated intent of owner that greeting cards delivered to operator of dump and salvage operation should be destroyed did not give rise to a "contract implied in fact" that dump operator would destroy the cards.

See publication Words and Phrases, for other judicial constructions and definitions of "Contract Implied in Fact".

26. Contracts ⇐22(1)

A secret intent does not constitute acceptance of an offer.

27. Contracts ⇐4

A "contract implied in fact" is one not expressed by the parties, but implied from facts and circumstances showing a mutual intention to contract.

28. Appeal and Error ⇐110

Order granting a partial new trial in action of claim and delivery to determine defendant's damages if the property was not returned to defendant was not appealable.

Loeb & Loeb, Allen E. Susman, Myron L. Slobodien, and Herman F. Selvin, Los Angeles, for appellant.

Pray & Price, Long Beach, and Jerry Giesler, Beverly Hills, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from two judgments for defendant in an action of claim and delivery.[1] The controversy centers around the title and the consequent right to possession of some two hundred thousand Christmas greeting cards.

Plaintiff maintains a division known as California Artists which publishes and distributes Christmas greeting cards. Each year it publishes a series of new cards in albums. The albums are distributed to its retail outlets. Cards carried over from one season are boxed for the next season and sold at a lower price. After two seasons the remaining cards are reviewed and some are selected for destruction. In early 1952 one of plaintiff's traffic managers was told by his superior that "if he could make sure that the cards taken to the City Dump would be destroyed, that he could take them there."

City Dump & Salvage, Inc., a private concern, conducts a dump and salvage operation in Long Beach. People desiring to dispose of material take it to the dump. The person bringing the material stops at a small building near a gate; a person at the gate checks the load as to size, quantity, and materials, estimates the charge, bills the person, and on being paid gives him a receipt and directs him to the dump site where the customer dumps the material. Shortly thereafter salvage men begin salvaging. That which is left after salvaging is covered.

If a person expresses a desire that the material be destroyed and not salvaged, City Dump & Salvage has a form on which it is specified that the material is to be covered; it charges "considerably extra because it is a very expensive way of doing it"; a hole is dug; the material is dumped in the hole and covered. City Dump & Salvage then certifies in writing that the material has been covered. If that arrangement is not made, the dump operators, either themselves or through concessionaires, salvage such of the dumped material as desired.

In January 1955 employees of plaintiff took about 877,000 cards packed in cartons to the dump with instructions to "Take the cards to the dump and dispose of them." They paid City Dump & Salvage $2.50 for each load—which was not the fee for which the company would destroy the cards—received a receipt headed "City Dump & Salvage, Inc.," and dumped the cards into the dump. The truck in which the cards were taken to the dump was a rented truck with "O.K. U-Drive" on the side. Plaintiff's employees did not inform City Dump

1. Upon the conclusion of the trial a judgment awarding defendant the property in question or, if the property was not returned to her, permitting her to establish and have judgment for its value, was entered. Thereafter defendant's motion for "a partial new trial" for the purpose of determining the defendant's damages if the property was not returned, was granted. Plaintiff appealed from the judgment and from the order granting a partial new trial. Thereafter a trial on the issue of damages was had. A second judgment for delivery of the property to defendant and for $8,830 damages if not returned was entered. That judgment was also timely appealed. The findings of fact were substantially identical in each instance, except for the addition to the second set of findings, re damages.

& Salvage that plaintiff intended or wanted to have the cards handled so as not to be subject to salvage or that they wanted them destroyed. There was no discussion at any time between anyone associated with plaintiff and anyone associated with City Dump & Salvage with respect to destruction of the cards taken to the dump in January 1955. Employees of plaintiff testified that on occassions when they delivered cards to the dump in 1952, 1953, and 1954 they observed tractors and bulldozers covering up cards brought from "California Artists." The evidence is not clear as to whether these observations were made before or after salvaging operations.

City Dump & Salvage sold some of the cards dumped by plaintiff's employees in January 1955 to a third person who, in turn sold and delivered 220,970 of them to defendant for $25. The cards purchased by defendant were in cartons. Most of the cartons had a label reading "California Artists" on them. It was stipulated defendant acquired whatever title City Dump & Salvage had obtained.

The cards were in the possession of the sheriff pursuant to a writ at the time of trial. The court found defendant has been and still is the owner and entitled to possession of the cards, and she had not wrongfully obtained possession without plaintiff's knowledge or consent. The first judgment adjudged that defendant recover the cards from plaintiff or, if not recovered, she be permitted to establish the value and recover that amount. The second judgment adjudged that defendant recover the cards from plaintiff or $8,830 if the cards were not returned. Plaintiff appeals from both judgments.

[1] Plaintiff says the finding that defendant is the owner of the cards is contrary to the evidence. It argues the evidence is insufficient as a matter of law to establish a divestiture of plaintiff's title. Plaintiff characterizes the transaction as a bailment for destruction. Defendant asserts the finding as supported by the evidence; there was a sale of the cards to City Dump & Salvage; alternately, plaintiff divested itself of all rights in the property by abandonment; alternately, if not an abandonment to all the world, there was a gift of the cards to City Dump & Salvage. It appears to be agreed that if one delivers property to another as a mere bailee, a purchaser from the bailee, however innocent he may be, acquires no title as against the bailor. 7 Cal.Jur.2d 625, § 6; 8 C.J.S., Bailments, §§ 39, 313.

[2–4] The cardinal rule in the construction of contracts is that the mutual intention of the parties as exhibited by their language, acts, and conduct, shall govern. It is the objective thing, manifestation of mutual consent, which is essential. Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13; 1 Williston on Contracts 41, § 22. The law imputes to a person the intention corresponding to the reasonable meaning of his language, acts, and conduct. Platt v. Union Packing Co., 32 Cal.App.2d 329, 336, 89 P.2d 662.

[5–9] In a broad sense a bailment is the delivery of a thing to another for some special object or purpose, on a contract, express or implied, to conform to the objects or purposes of the delivery which may be as various as the transactions of men. People v. Cohen, 8 Cal. 42, 43. Ordinarily the identical thing bailed or the product of, or substitute for, that thing, together with all increments and gains, is to be returned or accounted for by the bailee when the use to which it is to be devoted is completed or performed or the bailment has otherwise expired. If there is a transfer of ownership the transaction is a sale. 7 Cal.Jur.2d 616, § 2; 8 C.J.S. Bailments, §§ 2, 20, 37, pp. 225, 251, 303; 6 Am.Jur. 242, § 92, 318, § 208. The general rule that the assent of both parties is necessary before a contract, either express or implied in fact, can come into existence, is applicable to the ordinary case of a contract of bailment. 7 Cal.Jur. 2d 618, § 3; 8 C.J.S., Bailments, § 1, p. 222; 6 Am.Jur. 177, § 4. The duties and obliga-

tions of a bailee ordinarily cannot be thrust on one against his consent—they must be voluntarily assumed as in every obligation founded on contract. Copelin v. Berlin Dye Works & Laundry Co., 168 Cal. 715, 718–721, 144 P. 961, L.R.A.1915C, 712; 8 C.J.S., Bailments, § 15b, p. 249.

[10, 11] No bailment can be implied where it appears it was the intention of the parties, as derived from their relationship to each other and from the circumstances of the case, that the property was to be held by the party in possession in some capacity other than as bailee. 8 C.J.S., Bailments, § 14, p. 247. A transaction is a sale, not a bailment, and title to the property is changed when the receiving party is under no obligation to return the property or to account for it. 6 Am.Jur. 190, § 128.

[12, 13] A sale is the transfer of the property in a thing for a consideration called the price. Civ.Code, § 1721. The essence of the transaction is the transfer of the property. The transfer is that of the absolute interest in the property Milana v. Credit Discount Co., 27 Cal.2d 335, 339, 163 P.2d 869, 165 A.L.R. 621. The "price" is the consideration passing from the buyer to the seller for the latter's interest in the thing sold. Zelkowitz v. Tobin, 108 Cal.App.2d 69, 71, 238 P.2d 19. Consideration is defined as "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." Civ.Code, § 1605.

[14, 15] While the word "sale" is commonly understood to mean a transaction by which the property of one of the parties thereto is exchanged for the money of the other, the legal meaning of the word is not so limited. The consideration need not be money; it may be money or its equivalent; it may be any valuable consideration. Mansfield v. District Agr. Ass'n, 154 Cal. 145, 147, 97 P. 150; Borland v. Nevada Bank, 99 Cal. 89, 93, 33 P. 737; Merchants' Holding Corp., Ltd. v. Grey, 6 Cal.App.2d 682, 689, 45 P.2d 253. W. F. Boardman Co. v. Petch, 186 Cal. 476, at page 482, 199 P. 1047, at page 1050, says:

> "The Code defines a sale as 'a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property.' Civ.Code, § 1721. It is also defined as 'a transmutation of property from one man to another in consideration of some price or recompense in value.' Anderson's Law Dic., 914; Mechem on Sales, § 1. The agreement whereby one person transfers a right of way for a ditch over his land in consideration that the other party should excavate the ditch and keep it in repair for the common use of both was held to be a sale of the right of way. Flickinger v. Shaw, 87 Cal. [126] 130, 25 P. 268, 11 L.R.A. 134, 22 Am.St.Rep. 234. It is clear, therefore, that the word 'sale,' when used in a contract, does not necessarily mean a transfer for money only. It is not a word of fixed and invariable meaning. Eaton v. Richeri, 83 Cal. [185] 186, 23 P. 286. It may be given a narrow or broad meaning, as may be indicated by the context or the surrounding circumstances and the conduct of the parties."

A single consideration may support several counterpromises made by the other party to a transaction. Vogel v. Bankers Bldg. Corp., 112 Cal.App.2d 160, 169, 245 P.2d 1069; First Nat. Bank of Stockton v. Pomona Tile Mfg. Co., 82 Cal.App.2d 592, 603, 186 P.2d 693.

[16–18] An offer may contain a choice of terms from which the offeree is given the right to make a selection in his acceptance. 17 C.J.S., Contracts, § 42, p. 379; Rest., Contracts, §§ 29, 32. The acceptance of one alternate proposition constitutes a binding contract. Lee v. Ellis,

169 Ark. 556, 275 S.W. 889, 890. See Mathieu v. Wubbe, 330 Mich. 408, 47 N.W. 2d 670, 673; 1 Williston on Contracts 128, § 44. Any conduct of one party from which the other may reasonably draw the inference of a promise is effective in law as such. (1 Williston on Contracts 41, § 22.)

[19, 20] Applying these principles to the facts, we have concluded the transaction between City Dump & Salvage and plaintiff was not a bailment: it was a sale. City Dump & Salvage conducted both a dump and a salvage operation. It offered an opportunity for choice between two things to those who brought material to its dump. For a small charge such persons were accorded the privilege of dumping their material into a pit on the property of City Dump & Salvage, and a salvage operation followed. This was the normal course unless a special contract of a different character was made. If the person bringing the material requested that it be destroyed he was charged a greater sum; he was directed to dump the material in a hole dug by City Dump & Salvage—a different place from that in which he would have dumped it if the request had not been made—and the latter destroyed it without salvaging. Plaintiff concedes there was "a delivery, for a consideration, to a particular person." The early case of Stephens v. Mansfield, 11 Cal. 363, held that the relinquishment of property for a consideration is a sale or barter.

[21] Plaintiff took the cards to City Dump & Salvage. It paid the fee for the privilege of dumping the cards only. It received a receipt with the name "City Dump & Salvage, Inc." on it, which in effect told it that if the cards were merely dumped into a pit they might be salvaged. It did not manifest in any way any intention or desire that the cards be handled so as not to be subject to salvage or that it wanted them destroyed. Plaintiff had no further use for the cards. In consideration for the privilege of dumping the cards on the property of City Dump & Salvage and thereby relinquishing them, plaintiff paid the latter $2.50 a load and dumped them. Plaintiff thereby sold the cards to City Dump & Salvage, and title to them passed to it. The privilege of dumping the cards into the dump and thereby relinquishing all right in them was the consideration which passed from the buyer, City Dump & Salvage, to the seller, plaintiff. The fact that money was paid as well as the cards delivered to City Dump & Salvage does not negative the fact that the transaction was a sale. Cf. Goetten v. Owl Drug Co., 6 Cal.2d 683, 686, 59 P.2d 142.

Plaintiff analogizes the transaction to the parking of an automobile in a parking lot and to checking a hat at a hat-check stand. There is no analogy. The distinction is obvious. One who parks an automobile in a parking lot or checks a hat at a hat-check stand does so with the understanding on the part of the operator and on the part of the person parking or checking that the automobile or hat will be returned. In the transaction in suit the understanding manifested by both parties, as impliedly found by the trial court, was that the cards would not be returned.

[22, 23] Where the right of recovery rests on the existence of the bailment relationship and the fact of bailment is in issue as it was in the case at bar, the burden of establishing a bailment rests on the plaintiff and includes the burden of proving the making of a valid contract of bailment between the parties, the delivery to the bailee under the contract, and acceptance by the bailee. (6 Am.Jur. 455, § 366.) Plaintiff's cause of action is on the theory of a special contract with City Dump & Salvage—that the latter would destroy the cards. The burden of proving City Dump & Salvage entered into a contract to destroy the cards was on plaintiff. Morgan v. Citizens' Bank, 190 N.C. 209, 129 S.E. 585, 587, 42 A.L.R. 1299.

[24–27] The state of the evidence was not such as to compel a finding that City Dump & Salvage received the cards for

the purpose of destruction, or that a bailment was created. The trial judge was justified in determining plaintiff's intention by its outward manifestations and not by its secret intention. So far as it manifested its intention, it was that it desired to transfer the title to the cards to City Dump & Salvage. Intent may be inferred from a party's acts and conduct even in the face of his express declarations to the contrary. Trevaskis v. Peard, 111 Cal. 599, 605, 44 P. 246. The fact plaintiff intended that the cards be destroyed was not communicated to City Dump & Salvage. The fact it so intended and that it thought they would be did not give rise to a contract implied in fact. A secret intent is not an acceptance. 17 C.J.S., Contracts, § 32, p. 361; 12 Am.Jur. 515, § 19; 1 Williston on Contracts 49, § 24. Travelers Fire Ins. Co. v. Brock & Co., 47 Cal.App.2d 387, 118 P.2d 25, was an action by the assignee of a bailor against the bailee. The plaintiff's assignor, Mrs. Brandt, took a brooch to Brock & Company to have a lost diamond replaced. Brock sent it to a diamond dealer who furnished a diamond and, in turn, delivered it to a diamond cutter for cutting. While in the diamond cutter's possession it was stolen. The court said, 47 Cal.App. at page 391, 118 P.2d at page 27:

> Plaintiff contends that there was at least a contract implied in fact to that effect, relying on testimony tending to show that the brooch was worth $2,500, and defendant was so informed at the time the contract was made; that Mrs. Brandt had inquired from friends as to the best and most reliable jeweler to do the work and had been advised to go the defendant; that defendant had a large jewelry business and a repair department and usually did not send repair work out to others; that Mrs. Brandt assumed the work would be done on defendant's premises and would not have left it there for repair had she known it would be sent out; and that defendant's manager, who took it in, did not see anything unusual about it and expected the work would be done in defendant's shop. None of these matters, except the value of the brooch, appear to have been mentioned between the parties to the contract.
>
> "'An implied contract is one, the existence and terms of which are manifested by conduct.' Civ.Code, § 1621. 'A contract implied in fact is one not expressed by the parties, but implied from facts and circumstances showing a mutual intention to contract.' 17 C.J.S., Contracts, § 4, p. 318. Without such mutual intention there can be no contract in fact; hence the assumption, intention or expectation of either party alone, not made known to the other, can give rise to no inference of an implied contract in accordance therewith. Excluding such matters from consideration, we have no evidence requiring a finding here of an implied contract such as plaintiff relies upon. At most, it might be said that from the evidence conflicting inferences in that respect are possible, in which case the trial court's finding that there was no such contract is binding on us."

The evidence was such as to justify the trial court in concluding there was a divestiture of plaintiff's title.

[28] The appeal from the nonappealable order granting a partial new trial is dismissed. The judgments appealed from are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Rehearing denied; SHINN, P. J., dissenting.

148 Cal.App.2d 708

Beatriz T. RODELA, Plaintiff and Appellant,

v.

SOUTHERN CALIFORNIA EDISON COMPANY, Defendant and Respondent.

Civ. 21994.

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1957.

Rehearing Denied March 21, 1957.

Hearing Denied April 25, 1957.

Action, against electric power distributor, for injuries sustained by plaintiff when pole crashed through top of building where she was at work. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Ashburn, J., found nothing in the record to support an inference that defendant was or should have been alerted to possibility that placing of new roof on plaintiff's employer's building would result in leaving vent stack thereon without support of proper guy wires, or that defendant was, or should have been, alerted to any other facts which would forecast an accident similar to one which evidence showed to have been caused by venting of heat onto pole.

Affirmed.

1. Negligence ⇐121(2)

As a general rule, res ipsa loquitur applies where accident is of such nature that it can be said, in light of past experience, that it probably was result of negligence by someone and that defendant is probably person who was responsible.

2. Negligence ⇐121(2)

Res ipsa loquitur doctrine is not intended to open door for mere speculation as to cause of an injury, but rather it furnishes formula which, in proper case, may justifiably lead to natural inference of negligence on part of one who was in actual control of particular situation.

3. Negligence ⇐121(2)

In res ipsa loquitur case, defendant's explanation must be as broad as inference of negligence, but it need be no broader, and need not reach out to field of negation of possibilities of negligence on defendant's part, as distinguished from probabilities.

4. Electricity ⇐19(3)

Mere possibility that transformer short-circuited, or that other electrical troubles occurred, was not enough to raise inference of negligence on part of electric power distributor whose pole crashed through top of building where plaintiff was at work and seriously injured her.

5. Evidence ⇐597

A bare possibility is not evidence.

6. Evidence ⇐597

A bare possibility cannot be accepted as evidence to contrary of a presumption.

7. Evidence ⇐54

An inference cannot be based on mere possibilities, but must be based on probabilities.

8. Evidence ⇐506

An expert may express an opinion upon ultimate issue of case.

9. Electricity ⇐19(6)

Where there was evidence, in plaintiff's action against electric power distributor for injuries sustained when pole crashed through top of building where she was working, that vent pipe on side of plaintiff's employer's building had emitted heat onto pole and caused pole to burn, res ipsa loquitur inference would not prevail as a matter of law.

10. Electricity ⇐19(5)

In action against electric power distributor for injuries sustained by plaintiff when pole crashed through top of building where she was at work, evidence sustained finding that there had been no negligence on part of defendant.

11. Negligence ⇐121(2)

Circumstantial evidence is as potent by way of overthrowing res ipsa loquitur

inference as is any other type of credible evidence.

12. Evidence ⇐587

One who relies on circumstantial evidence is not required to exclude all other possibilities.

13. Electricity ⇐14(1)

Electric power distributor was entitled to assume that others would exercise reasonable care in management of their own property, and could properly continue to do so until apprised in some manner that such reliance was no longer reasonably safe.

Joseph W. Fairfield, H. Gregory Brilliant, Ethelyn F. Black, Los Angeles, for appellant.

Chase, Rotchford, Downen & Drukker and Richard T. Drukker, Los Angeles, for respondent.

ASHBURN, Justice.

Personal injury action. Jury waived. Judgment for defendant. Plaintiff appeals, claiming primarily that she is entitled to the benefit of res ipsa loquitur and as a matter of law the evidence is insufficient to offset it.

Plaintiff was working for Academy Candle Company, which uses as a part of its equipment in making candles a boiler fired by 48 gas burners and producing heat of 400 to 600 degrees at the exit of the vent pipe. Normally this pipe extended in a vertical position on the west side of the building. It was only 18 inches from a power line pole of defendant Edison Company. On May 27, 1954, at about 5:00 p. m. this pole burned about two-thirds of the way through, at an elevation at which the end of the vent pipe would strike the pole if it fell over onto it; the pole with its cross arms, transformers and power lines, came crashing through the top of the building where plaintiff was at work and seriously injured her.

Although respondent denies the applicability of res ipsa loquitur, its counsel join appellant in arguing the case as one in which a res ipsa inference arises. It will appear as the discussion proceeds that plaintiff's appeal is built upon a faulty conception of that doctrine.

In stating the facts we accept, in conformity with the familiar rule of review, all evidence and all inferences favorable to respondent which the record warrants. The Candle Company's building faced north on 48th Street in the city of Vernon. On the west side was an alley some four feet three inches wide. A stack or vent pipe passed through the west wall of the building upon a horizontal plane and through an elbow turned to a vertical position. When so standing it was about 22 inches from the west wall and extended some two to three feet above the eaves. The pipe had a hood or cap on it which had two exits for the fumes and when in normal position discharged them to the north and the south. In that alley was a power line pole of defendant Southern California Edison Company, 12 inches in diameter, which was 18 inches south of the center of the vent pipe and 21 to 23 inches west of the wall of the Candle Company's building. The pole was 50 feet high and carried three heavy transformers and nine high tension wires. The cross arms and all electrical equipment were 27 feet above the burned portion of the pole and the break therein which occurred when it fell on the building. Witnesses who arrived within 10 to 15 minutes after the crash saw the broken ends of the pole burning or smoldering. The pole, which was heavily treated with creosote, had burned about two-thirds of the way through and the remaining portion had broken off. The broken ends were charred and black. The transformers, cross arms and wires had fallen into or upon the building.

Attention of persons in and near the building was first attracted by a noise variously described as a loud explosion like a bomb or a cannon boom or a mortar shell. This so-called explosion coupled with the fall of the pole is the heart of

plaintiff's case. From this springboard counsel jumps to the conclusion that as this gives rise to the inference of res ipsa loquitur it became the duty of defendant to disprove the possibility that an explosion or a short circuit or a blown fuse occurred within a transformer and thus caused the fire and resultant accident. In the reply brief it is said: "A defective fuse might cause a short circuit which in turn might cause the explosion." Also: "All that the appellant did was demonstrate through evidence produced by the defendant's own witnesses that a cause of the explosion could have been a defective fuse causing a short circuit. * * The point that appellant is making, is that the respondent did not eliminate or explain a defective fuse as a cause for the explosion; that the respondent did not demonstrate due care on its part in keeping proper fuses in the fuse box. * * * You must eliminate all possible causes for the accident."

[1] In support of this position language such as that quoted in Dierman v. Providence Hospital, 31 Cal.2d 290, 295, 188 P.2d 12, 15, is invoked, namely, " 'that, where the accident is of such a character that it speaks for itself, as it did in this case, * * * the defendant will not be held blameless, except upon a showing either (1) of the satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented.' " Appellant emphasizes the last sentence and argues that every possibility of negligence on defendant's part must be negated by its proof. This overlooks several things. Firstly, the court was discussing the sufficiency of the evidence to overcome the inference as a matter of law, while the question at bar is the sufficiency of the evidence to support a finding of fact contrary to the res ipsa inference. Immediately preceding the language quoted from Dierman occurs this: "It is not to say that a defendant must in every such case produce evidence of the actual cause of the accident. It is not to say that the question of the sufficiency of a defendant's explanation—or, if he cannot explain, the sufficiency of his evidence of due care and of impossibility of explanation—is not ordinarily for the jury." 31 Cal.2d at page 295, 188 P.2d at page 14. Moreover, the matter emphasized by counsel is concerned with a situation in which there is no satisfactory explanation of the accident and that is not the case at bar, as will be seen. Again, the rules stated in the quotations from Dierman are applicable only to respects in which the evidence shows a probability of negligence on the part of defendant. This later clarification of the doctrine appears in Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 446, 247 P.2d 344, 349. It is there said: "In summary, it appears from the foregoing that, as a general rule, res ipsa loquitur applies where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible. In determining whether such probabilities exist with regard to a particular occurrence, the courts have relied both upon common knowledge and the testimony of expert witnesses * * *. All of these matters have been treated as aids to help the courts in determining whether the accident was of such a nature that the injury was more probably than not the result of the defendant's negligence."

[2, 3] As pointed out in Nelson v. Douglas Pedlow, Inc., 130 Cal.App.2d 780,

784, 279 P.2d 823, 825: "The res ipsa loquitur doctrine is not intended to open the door for mere speculation as to the cause of an injury. Rather, it furnishes a formula which in a proper case, may justifiably lead to a natural inference of negligence on the part of one who is in actual control of the particular situation." Defendant's explanation, while it must be as broad as the inference of negligence, Talbert v. Ostergaard, 129 Cal.App.2d 222, 228, 276 P.2d 880, need be no broader. Hinds v. Wheadon, 67 Cal.App.2d 456, 464–466, 154 P.2d 720. It need not reach out to the field of negation of possibilities of negligence on defendant's part as distinguished from probabilities.

The fire and resulting break in the pole were 27 feet below the nearest electrical apparatus or wires; there were no grounded wires, which would be essential to starting an electrical fire at that place on the pole; no markings or other evidence of fire at the top of the pole; and there was affirmative evidence that no transformer exploded or blew out or short circuited, and that no cross arm was burned. Counsel's emphasis upon the initial "explosion" as evidence of electrical trouble is adequately offset by testimony that the wires as they came down would fall together creating a short circuit, which means a flash or arc and a loud noise like an explosion. Some of plaintiff's witnesses saw such a flash of light followed by the noise.

[4–7] The mere possibility that any of the suggested electrical troubles occurred is not enough to raise an inference of negligence on defendant's part, for "[a] bare possibility is not evidence [citations]; it cannot be accepted as 'evidence to the contrary' of the presumption. 'An inference cannot be based on mere possibilities; it has been held that it must be based on probabilities.'" Robinson v. Board of Retirement, 140 Cal.App.2d 115, 118, 294 P.2d 724, 726. "The most recent decisions of the Supreme Court prescribe as the ultimate test of applicability of res ipsa loquitur an answer to the question of 'whether it can be said, in the light of common experience, that the accident was more likely than not the result of their (defendants') negligence. (Citing cases.) "Where no such balance of probabilities in favor of negligence can be found, res ipsa loquitur does not apply."'" Redfoot v. J. T. Jenkins Co., 138 Cal.App.2d 108, 116, 291 P.2d 134, 138. To the same effect see, LaPorte v. Houston, 33 Cal.2d 167, 169, 199 P.2d 665; Zentz v. Coca Cola Bottling Co., supra, 39 Cal.2d 436, 446, 247 P.2d 344; Simmons v. Rhodes and Jamieson, Ltd., 46 Cal.2d 190, 195, 293 P.2d 26.

[8] Opposed to the possibilities upon which appellant relies is the opinion of Capt. Halter (formerly of the Los Angeles Police Department), a qualified expert, that this was not an electrical fire but "that the pole was set afire by continuing application of heat." It is now settled in this jurisdiction that an expert may express an opinion upon the ultimate issue of the case. People v. Martinez, 38 Cal.2d 556, 564, 241 P.2d 224; George v. Bekins Van & Storage Co., 33 Cal.2d 834, 843–844, 205 P.2d 1037; People v. Cole, 47 Cal.2d 99, 301 P.2d 854; People v. Maas, 145 Cal.App.2d 69, 301 P.2d 894. In the George case this holding was made with respect to the cause of a fire, the cause being reached by the expert through a process of elimination, as in the instant case.

[9] From the foregoing it is apparent that this was not in truth a res ipsa case, but one in which the best that can be said for appellant is that the trier of facts had the function of determining whether an inference of res ipsa loquitur did arise. Seneris v. Haas, 45 Cal.2d 811, at page 827, 291 P.2d 915, 924, a jury case, says: "The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence even though the court itself would not draw that inference; the court must still leave the question to the jury where rea-

sonable men may differ as to the balance of probabilities (Res Ipsa Loquitur in California, Prosser, 37 Cal.L.Rev. 183, 194–195). * * * The existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the right of the jury to find those facts must be carefully preserved."

[10–12] Reverting to the assumption that this is a res ipsa case as a matter of law, the evidence fully sustains the trial judge's holding that there was no negligence on the part of defendant. The fire occurred at the place on the pole where the hood of the vent pipe would have discharged its heat had it fallen over against the pole. While no one saw it in that position the fact was established by circumstantial evidence. Of course that is equally as potent by way of overthrowing the res ipsa inference as is any other type of credible evidence. See Polioudakis v. City and County of San Francisco, 129 Cal. App.2d 137, 142, 276 P.2d 126. One who relies on circumstantial evidence is not required to exclude all other possibilities. "It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the *only* conclusion that can fairly or reasonably be drawn therefrom, because it is now settled law that 'circumstantial evidence in civil cases, in order to be sufficient to sustain the verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that arrived at by the jury.'" Katenkamp v. Union Realty Co., 36 Cal.App.2d 602, 617, 98 P.2d 239, 246. To the same effect are Hilyar v. Union Ice Co., 45 Cal.2d 30, 38, 286 P.2d 21; Singer v. Marx, 144 Cal.App.2d 637, 301 P.2d 440; Spolter v. Four-Wheel Brake Serv. Co., 99 Cal.App.2d 690, 694, 222 P.2d 307.

The evidence shows that there were no guy wires from the roof holding the top of the stack in place; that the vent emitted heat ranging in temperature from 400 to 600 degrees Fahrenheit; that later borings in the pole disclosed no evidence of decay, annual ring separations or other type of deterioration; that application of heat of 450 to 500 degrees Fahrenheit for several hours would be sufficient to char and burn the creosoted pole; that not only the pole but also the inside of the vent hood bore evidence that this had happened; that the burn was in that portion of the pole nearest the vent stack and at the height at which the hood would strike when falling on it; that the pole fell toward the building; that there was no evidence on the roof, in the building or on the ground that any other type of fire had occurred.

Sgt. Hatcher of the Sheriff's Arson Squad was called as an expert witness by defendant; he qualified (as was asserted later by plaintiff's attorney) and testified:

"Q. If you tilted the stack over against the pole, where would it strike? A. It would be about the top of the burn, on the top portion of the pole in the pole yard.

"Q. Did you find anything else to have caused this fire other than this stack? * * * A. I did not."

The witness was turned over to opposing counsel for cross-examination at this point, and facts and opinions were brought out on that examination which of themselves are enough to support the judge's findings. Parenthetically, it should be noted that this leaves appellant in no position to urge lack of expert qualifications or that the testimony is hearsay or opinion based upon insufficient facts or given in response to improper questions. Sgt. Hatcher testified on cross:

"Q. Did you find the stack was the cause of the fire? A. I did find the stack as the cause of the fire.

"Q. How did you find the stack as the cause of the fire? A. Because it was the continued application of heat from out of the stack as it rested against the pole that caused the pole to burn.

"Q. Now, how did you come to that conclusion? A. As a result of the examination of the area at the time, the distances, the amounts, the examination of the end of the piece which ran from the top of the elbow to the top which has the curved vent on it, and the fact that the curved vent has a slight discoloration on the inside similar to the discoloration from the burning of wood, that the distances were the same, and the fact that the two guy wires which were attached to the portions of the pipe at the time of the examination were not at any place put into the wood."

He also gave considerable other evidence to the same effect. Substantially the same opinion was voiced by Capt. Halter and Percy E. Parker, District Superintendent of defendant, who also qualified as an expert. Their evidence is not mere speculation, as urged by appellant. The only element of speculation involved therein is the normal amount which occurs as a part of the reasoning process applied to circumstantial evidence. See Edler v. Sepulveda Park Apts., 141 Cal.App.2d 675, 679, 297 P.2d 508; Miller v. Southern Pacific Co., 117 Cal.App.2d 492, 507, 256 P.2d 603; Schulz v. Pennsylvania R. Co., 350 U.S. 523, 526, 76 S.Ct. 608, 100 L.Ed. 668.

Appellant says in her opening brief: "The sole question for the Appellate Court is the legal sufficiency of the evidence introduced by the defendant to meet or balance the inference of negligence established by the *res ipsa loquiter* [sic] doctrine." However, counsel does argue, by way of support for the res ipsa inference, that defendant was negligent in failing to perform the duty of foreseeing such an accident, a doctrine which is thus stated in Tucker v. Lombardo, 47 Cal.2d 457, 303 P.2d 1041, 1046; "It is an elementary principle that negligence is gauged by the ability to anticipate danger. '[R]easonable foresight of harm is essential to the concept of negligence, and supplies the criterion for determining whether it exists in a particular case, and reasonable foreseeability of harm is the fundamental basis of the law of negligence. * * * On the other hand, one is not bound to foresee every possible injury which might occur, or every possible eventuality, but only those which were reasonably foreseeable; and one is not required to anticipate against dangers which it is not his duty to avoid.' 65 C.J.S., Negligence, § 5 c (2) (a), pp. 354–359." Again the record fails to support the argument.

[13] It appears that defendant caused the pole to be inspected periodically, but the nature or frequency thereof is not shown. However, it is clear that the pole did not fall as a result of any inherent weakness, and the inference is plain that it would not have done so except for the intervention of outside agencies. The matter of inspections therefore becomes legally inconsequential. Defendant was entitled to assume that others would exercise reasonable care in the management of their own property and could properly continue to do so until apprised in some manner that such reliance was no longer reasonably safe. Bogner v. Eubanks, 137 Cal.App.2d 181, 184, 289 P.2d 875; Harris v. Johnson, 174 Cal. 55, 58, 161 P. 1155, L.R.A.1917C, 477; Shivers v. Van Loben Sels, 109 Cal.App.2d 286, 289, 240 P. 2d 635. There is nothing in this record to support an inference that defendant was or should have been alerted to the possibility that the placing of a new roof on the Candle Company building would result in leaving the vent stack without support of proper guy wires, or alerted to any other facts which would forecast an accident similar to the one which occurred, or any other accident involving its power pole. Cf. Werkman v. Howard Zink Corp., 97 Cal. App.2d 418, 425, 218 P.2d 43.

Certain procedural matters advanced by appellant require no discussion. None of the alleged errors resulted in any prejudice.

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, J., dissenting.

148 Cal.App.2d 701

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edward Franklin WHITEHEAD, Defendant and Appellant.

Cr. 3276.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1957.

Hearing Denied April 25, 1957.

Defendant was convicted on two counts of an information charging him with having violated section of the Penal Code dealing with lewd or lascivious acts on the body of a child under fourteen. The Superior Court, County of Contra Costa, Hugh H. Donovan, J., entered judgment on the verdict and an order denying defendant's motion for new trial, and the defendant appealed. The District Court of Appeal, Dooling, Acting P. J., held that improper statement of trial judge to seven year old girl, who was attempting to indicate part of her body allegedly touched by defendant, "Well, farther down, will you" after which she placed her hand on the lower portion of her body, and improper arguments of prosecuting attorney to jury, without evidence to such effect, that at a certain age period men go through something that causes them to want to find something in the way of sexual gratification other than what normal people go through, though there was no evidence to that effect, and that unless defendant was convicted, prosecuting attorney was sure that defendant was going to do it again, because that was the experience of the prosecuting attorney's office, and that defendant had been held to answer to the charge after a preliminary hearing in justices court, and that if jury should vote to send defendant, who was allegedly addicted to drink, back to his family, prosecuting attorney did not think that defendant's family would welcome defendant back, constituted prejudicial error, though defendant's counsel made no objection at the trial to such errors.

Judgment and order reversed.

1. Witnesses ⇐243

Use of leading questions with immature witness may be necessary and lies in sound discretion of trial judge, but danger of suggesting answers by such form of interrogation is obvious, and trial judge and counsel should be meticulous to obviate such danger so far as possible. West's Ann.Code Civ.Proc., § 2046.

2. Criminal Law ⇐656(2)

In prosecution under section of the Penal Code dealing with lewd or lascivious acts on the body of a child under fourteen, trial judge abused discretion in stating to seven year old girl, who was attempting to indicate the part of her body on which defendant had allegedly placed his hand, "Well, farther down, will you" which direction the girl immediately obeyed. West's Ann.Pen.Code, § 288; West's Ann. Code Civ.Proc., § 2046.

3. Criminal Law ⇐719(1)

In prosecution under section of the Penal Code dealing with lewd or lascivious acts on the body of a child under fourteen, prosecuting attorney stepped beyond bounds of proper argument to jury when he stated that at a certain age period men go through something that causes them to want to find sexual gratification other than what normal people go through, and that unless defendant was convicted, the prosecuting attorney was sure that defendant would do it again, because that was the experience of the prosecuting attorney's office, where there was no evidence to that effect. West's Ann.Pen.Code, § 288.

4. Criminal Law ⇐719(3)

It is always misconduct for prosecuting attorney to bring before jury from his own experience facts which are not to be found in the evidence before the jury.

5. Criminal Law ⇐719(1)

Statements by prosecuting attorney in his argument to jury concerning facts not in evidence constitute misconduct.

6. Criminal Law ⇐713

In prosecution under section of the Penal Code dealing with lewd or lascivious acts on the body of a child under fourteen, prosecuting attorney was guilty of misconduct in arguing to jury the fact that defendant had been held to answer to the charge after a preliminary hearing in justices court. West's Ann.Pen.Code, § 288.

7. Criminal Law ⇐719(3)

In prosecution under section of the Penal Code dealing with lewd or lascivious acts on the body of a child under fourteen, it was highly improper for prosecuting attorney to argue to jury that if jury should vote to send defendant, who was allegedly addicted to drink, back to his family, prosecuting attorney did not think that defendant's family would welcome defendant back. West's Ann.Pen.Code, § 288.

8. Criminal Law ⇐1035(3), 1037(1)

Where no objection was voiced by counsel of defendant at the trial to improper examination of one of the prosecuting witnesses by the trial judge and to improper arguments of prosecuting attorney to jury, task of District Court of Appeal on appeal by defendant was to determine whether the errors were of such a nature, in view of the character of the charge, that an instruction or admonition of the trial court could not have purged the harmful effect of the errors.

9. Criminal Law ⇐1166½(12), 1171(1)

In prosecution under section of the Penal Code dealing with lewd or lascivious acts on the body of a child under fourteen, improper statement of trial judge to seven year old girl, who was attempting to indicate part of her body allegedly touched by defendant, "Well, farther down, will you" after which she placed her hand on the lower portion of her body, and improper arguments of prosecuting attorney to jury constituted prejudicial error, though defendant's counsel made no objection at the trial to such errors. West's Ann.Pen.Code, § 288; West's Ann.Code Civ.Proc., § 2046.

Thomas F. Curtin, San Pablo, for appellant.

Edmund G. Brown, Atty. Gen., William M. Bennett, Deputy Atty. Gen., San Francisco, for respondent.

DOOLING, Acting Presiding Justice.

Defendant was convicted by a jury upon two counts of an information which charged him with having violated section 288 of the Penal Code. His motion for a new trial was denied, the court found that he was not a sexual psychopath, and he was denied probation. He appeals from the judgment of conviction and from the order denying a new trial.

At the time of the alleged offenses the prosecuting witnesses, two sisters, were living across the street from appellant. Roxanna was 7 years of age and Deborah 6. They were friendly with appellant's daughter, Caroline Lee, aged 6, and frequently came to appellant's house to play with her.

Roxanna testified that on the day in question, a Saturday, she and Deborah went over to appellant's house to play with Caroline Lee. She knocked on the door and they were admitted by appellant. Neither Caroline Lee nor her mother were home and appellant was alone at the time. Appellant told them that they could play with Caroline Lee's toys. Then Roxanna went into appellant's bedroom. She was asked if anything happened in there and she answered "Yes." Then she was asked:

"Q. What happened?

"A. He put his hands on me.

"The Court: He put his hands on you?

"The Witness: Yes.

"Q. (By Mr. Hemmings) Will you kind of show us, Roxanna, where he put his hands on you?

"A. (Indicating)

"The Court: Just point again, won't you, Roxanna?

"The Witness: (Indicating)

"The Court: Well, farther down, will you—

"The Witness: (Indicating)

"The Court: Right between—Are you indicating between the legs?

"The Witness: Yes.

"The Court: All right. Then let the record show that she's indicated between her legs."

She told her parents what appellant had done although appellant had told her not to tell her father or anyone.

Deborah's testimony regarding the circumstances under which she and Roxanna entered appellant's house was similar to that of her sister. She stated that they went across the street to visit Caroline Lee in the morning of the day in question. She testified that she went into the living room and the bedroom of the house and that Roxanna went into the living room, Caroline Lee's room, and appellant's room. To the question "Did something strange happen while you were in Ed's [appellant's] house?" she replied "Yes." She was asked to tell what happened and she replied: "A. He done this to us. (Demonstrating)." The court then said: "In other words, you're putting your hand in between your legs, is that right?" Deborah nodded in response to this question. She said that appellant touched her *outside her skirt* and that he did so more than one time. She was in the living room when appellant touched her. Appellant told her not to tell anybody what he did but she told her parents what happened at appellant's house.

On cross-examination Deborah became rather confused about just where in the house the alleged offenses occurred. She stated that she was playing with Roxanna in Caroline Lee's bedroom all the time but that she did not see appellant touch Roxanna because they went into the bedroom alone.

The father of the complaining witnesses testified that on the day of the alleged offenses at about 1:30 or 2:00 p. m. his daughters left the house together. They went across the street to appellant's house. About 25 minutes later they returned home and complained to him about what had happened. The father had previously spoken to his daughters about strangers touching them and had warned them about this sort of thing. The mother of the children called the Sheriff's Office.

Appellant testified in his own behalf. He stated that he was home alone on the Saturday afternoon in question. He was watching television and fell asleep on the davenette. He was awakened by the noise of the complaining witnesses playing in his daughter's bedroom with her toys. He told the children to put the toys away and to go home. He was angry with the children both because they had awakened him out of a sleep and because he felt that they had no business entering his house and going through things as they did. When he told the sisters to put the toys away they said they didn't want to, that they wanted to play house. He said that he then went back and sat on the davenette and the children started to put the toys back in a closet. He further testified that as one of the little girls came through the house on the way out she said to him: "I'm going to tell my mama on you." One of them was very angry with him. He swore that he never laid his hands on either one of the little girls.

On cross-examination appellant stated that he had had a couple of drinks of whiskey during the morning of the day of the alleged offenses. He further stated that at the time of his arrest he did not know that he was being charged with a violation

of Penal Code section 288 but thought that he was being arrested for drunk and disorderly conduct.

The jurors retired to consider their verdict at 4:20 p. m. At 5:30 p. m. the jury returned and asked to have reread to them the part of the court's charge concerning evidence which is susceptible of two equally reasonable constructions, one pointing to the guilt of a defendant and the other to his innocence. After having dinner the jury returned its verdicts at 7:50 p. m.

[1, 2] Much of the testimony of the two little girls was elicited by leading questions. The use of leading questions with an immature witness may be necessary and lies in the sound discretion of the trial judge. People v. Goff, 100 Cal.App.2d 166, 169–170, 223 P.2d 27; People v. Doxie, 34 Cal.App.2d 511, 513–514, 93 P.2d 1068; People v. Hinrich, 53 Cal.App. 186, 199 P. 1058; People v. Gregory, 8 Cal.App. 738, 744–745, 97 P. 912; Code Civ.Proc. 2046. The danger of suggesting the answers by this form of interrogation, however, especially to immature and therefore presumably more suggestible witnesses, is obvious, and court and counsel should be meticulous to obviate this danger so far as possible. It is clear that the trial judge, no doubt with the best of intentions, grievously overstepped the bounds of all reasonable discretion in the portion of the examination of Roxanna in which she was attempting to indicate the part of her body upon which she was testifying the appellant had placed his hand. His statement: "Well, farther down, will you—" was more than a leading question. It was a direction to the child to place her hand on a lower portion of her body than she was then indicating, a direction which the transcript demonstrates that she immediately obeyed. Courts have frequently commented on the extreme care that trial judges should use not to give the impression that the judge is taking sides in the trial of the case before the jury. People v. Byrd, 88 Cal.App.2d 188 at page 191, 198 P.2d 561, and cases cited. It would have been grievous error for the prosecuting attorney to direct the child where to place her hand and the error was much more damaging when the direction came from the trial judge whose every action is apt to be clothed in the minds of the jury with the greatest importance. What conclusion could the jury reasonably draw from the trial judge's conduct than that he believed that appellant had placed his hand upon the portion of the child's body upon which he directed her to place her own?

[3] In his argument to the jury the prosecuting attorney in several instances stepped beyond the bounds of proper argument. He stated in one instance:

"I know just enough about the subject to say this: that at a certain age period men go through something that causes them to want to find something in the way of sexual gratification other than what normal people go through. And I hate to say it. As a matter of fact, I hate to have anything to do with a case like this, because it doesn't give me any pleasure to wash dirty linen, and that's just what we're doing here on Rita Drive.

"But anyway, men of the caliber of Whitehead do it, and unless Whitehead is convicted I'm sure he's going to do it again, because that is just the history of what we in the District Attorney's Office have learned to call 288'ers."

There was no evidence before the jury, and there could not properly have been, that at a certain age period (presumably at appellant's age) "men go through something that causes them to want to find * * * sexual gratification other than what normal people go through," and there was no justification in the evidence, and there could not properly have been, that it is the history of such men which led the District Attorney's staff to know from experience with "288'ers" that "unless Whitehead is convicted * * * he's going to do it again."

[4, 5] By this portion of his argument the prosecutor brought before the jury his own unsworn testimony as to the predilec-

tion of men of Whitehead's age to commit offenses of this character and of the experience of his office that such men if acquitted will repeat the same character of offense. That this argument was highly inflammatory goes without saying. The jury could not help being impressed by the recital of the past experience of the District Attorney's office and may well have given weight to it in weighing the evidence of the two little girls against the flatly contradictory testimony of the appellant. It is always misconduct for a prosecutor to bring before a jury facts from his own experience which are not to be found in the evidence before them. "Equally well-settled is the rule that statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct." People v. Kirkes, 39 Cal.2d 719, 724, 249 P.2d 1, 4; People v. Evans, 39 Cal.2d 242, 251, 246 P.2d 636; People v. Cook, 148 Cal. 334, 349, 83 P. 43; People v. Delgado, 28 Cal.App.2d 665, 668, 83 P.2d 512.

[6] The prosecuting attorney was likewise guilty of misconduct in arguing to the jury the fact that appellant had been held to answer to the charge after a preliminary hearing in the justices court. People v. Wayne, 41 Cal.2d 814, 829, 264 P.2d 547; People v. Brown, 81 Cal.App. 226, 241, 253 P. 735.

[7] Further the prosecutor argued that because appellant was addicted to drink and his wife had recently "had quite a discussion about it" with him * * * "If you should vote to send Mr. Whitehead back to his family today, I don't think they would welcome him." The jury were concerned only with the guilt or innocence of the accused on the information before them. It was no concern of theirs whether he would be welcomed by his family if acquitted and it was highly improper for the prosecutor to argue that the jury should take that question into account in determining his guilt or innocence.

The verdicts, as is generally true in prosecutions for crimes of this character, depended entirely on weighing the testimony of the two little girls brought out largely through leading questions against the uncorroborated testimony of the appellant. The jury at the outset certainly entertained a serious question about the sufficiency of the evidence as shown by their request, after deliberating for more than an hour, for a rereading of certain instructions on the subject. The trial took less than one day and the evidence was not complex so that an hour's deliberation should have enabled the jury to fully review the evidence. The probability that the jury in ultimately arriving at their verdicts of guilt were influenced by some or all of the matters discussed seems strong.

[8] We are mindful of the fact that no objection was voiced by appellant's counsel at the trial to any of these matters. Our task then is to determine whether the misconduct of court and counsel was of such a nature in view of the character of the charge that an instruction or admonition of the court could not have purged its harmful effect. People v. Kirkes, supra, 39 Cal.2d 719, 726, 249 P.2d 1.

Certainly once the youthful witness had placed her hand "lower down" on her body following the direction of the court nothing could undo the effect of that action on the jury. The effect of the misconduct of the prosecutor was cumulative of this primary irreparable misconduct. In measuring its effects we are entitled to consider the statement of the Supreme Court in People v. Adams, 14 Cal.2d 154, 168, 93 P.2d 146, 153, in discussing the effect of error in a prosecution for violating Penal Code section 288: "It is because of the recognized existence of the ease with which convictions of men, even those of unblemished reputation, may be secured in cases of the instant kind that courts are at pains to insist upon fair trials in all respects being accorded to the accused. Errors committed either by the prosecution or by the court in the course of the trial, which ordinarily might be considered trivial and as of no material consequence from a standpoint of adverse ef-

fect upon the rights of a defendant, may become of great importance when committed in a case of the character of that here involved."

The court in People v. Evans, supra, 39 Cal.2d 242, 252, 246 P.2d 636, quoted with approval the language of People v. Adams, supra, and commented at pages 251 and 642 respectively: "In a case such as this where the crime charged is of itself sufficient to inflame the mind of the average person, it is required that there be rigorous insistence upon observance of the rules of the admission of evidence and conduct of the trial."

[9] Upon the reading of the entire record in this case we are convinced that appellant suffered prejudicial error.

Judgment and order denying new trial reversed.

KAUFMAN, J., and DRAPER, J. pro tem., concur.



148 Cal.App.2d 679

OREGON CEDAR PRODUCTS CO., a California corporation, d/b/a Cedar Products Co., Plaintiff and Respondent,

v.

RAMOS & KOHLER, a partnership, Joseph M. Kohler, Individually and as a partner of Ramos & Kohler, First Doe and Second Doe, Defendants and Appellants.

Civ. 17024.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1957.

Action against former member of partnership for goods allegedly sold and delivered to partnership, wherein defendant contended that they had been sold to corporation formed upon dissolution of partnership and bearing former partnership's name with the addition of "Inc.". From judgment rendered for plaintiffs by the Superior Court, County of San Mateo, Aylett R. Cotton, J., defendant appealed. The District Court of Appeal, Kaufman, J., held that there was sufficient evidence to support finding that debt was incurred on account of partnership.

Judgment affirmed.

1. Payment ⇐43

Where there are various items of debit on running account, payment made must be applied to earliest obligations if there is no specification by debtor or creditor as to its application. West's Ann.Civ.Code, § 1479.

2. Corporations ⇐30(6)

In action against former member of partnership for goods allegedly sold and delivered to partnership, wherein defendant contended that they had been sold to corporation formed upon dissolution of partnership and bearing former partnership's name with the addition of "Inc.", in view of evidence that seller had considerable course of dealings with partnership, that during time credits were extended, business was carried on under license issued to partnership, that there was no proof of formal notice of change and conflict as to whether seller had knowledge of incorporation, there was sufficient evidence to support finding that debt was incurred on account of partnership. West's Ann.Corp.Code, § 15035.5.

3. Corporations ⇐1

Before acts and obligations of a corporation may be legally recognized as those of an individual, complaint must allege facts necessary to establish liability of such individual.

4. Corporations ⇐1

In action against former member of partnership for goods allegedly sold and delivered to partnership, wherein former partner contended that they had been sold to corporation formed upon dissolution of partnership, in view of fact that action was not brought on theory of piercing corpo-

rate veil, there was no requirement that facts be alleged showing justification for disregarding of the corporate entity.

Millington & Dell'Ergo, Redwood City, Donnell B. McCarthy, Belmont, James M. Paxton, Redwood City, for appellants.

Aaronson & Cohn, Michael Aaronson, Melvin E. Cohn, San Carlos, for respondent.

KAUFMAN, Justice.

This is an appeal by defendants from a judgment in favor of plaintiff in the sum of $24,612.55 in an action based on a complaint for money brought against Ramos & Kohler, a partnership, and Joseph M. Kohler, individually and as a partner in said firm. The complaint alleged three causes of action, each in the form of a common count, for goods sold and delivered, in the sum for which judgment was rendered.

Respondent contended at trial that the debt was incurred by the partnership, and that appellant Kohler was individually liable. Appellants maintained that the debt was incurred by Ramos & Kohler, Inc., a California Corporation, hence no liability for the debt was incurred by appellant Kohler individually.

The trial court found that the debt for all of the items of plaintiff's account was incurred by Joseph M. Kohler individually and as a partner of Ramos & Kohler and that all credit extended by plaintiff for said account was extended to Joseph M. Kohler, individually and as member of the partnership. It was further found that plaintiff had not extended credit to the corporation of Ramos & Kohler, Inc., and that no part of the debt had been incurred by the corporation.

The account sued upon commenced in 1952. All billings thereon were to Ramos & Kohler, the partnership, which was composed of Jack Ramos and Joseph Kohler. The partnership came into existence in 1945, and held a roofing contractor's license. Mr. Ramos died in June, 1954, and there was no probate of his estate. On May 20, 1953, the corporation of Ramos & Kohler, Inc. was organized and corporation papers were filed in the office of the County Clerk of San Mateo County on May 22, 1953. On May 21, 1953, the partnership owed respondent the sum of $21,123.99 and at no time subsequent to this date did Ramos & Kohler owe less than this sum to respondent, and much of the time thereafter it owed a greater sum.

Although appellant Kohler contended that the contractor's license was changed immediately upon incorporation to the corporation, a photostatic copy of the corporation's application for such contractor's license is dated February 15, 1954, and such license was not issued until July 22 of that year. In the application in answer to the question of whether any person listed under "Personnel of applicant" was presently licensed as a contractor either as an individual, member of a copartnership or corporation, the answer "Yes" was given, and the name "Ramos & Kohler" with the license number. In answer to question 12, "Does applicant intend to do business as a corporation", the answer "Yes" was given.

Also in the record is a certified statement of the Secretary of the State Board of Equalization stating that a seller's permit under the Sales and Use Tax Law was issued to Ramos & Kohler, Inc., on January 1, 1954. The Board's records showed, the letter stated, that the seller's permit to the copartnership had been surrendered as of December 21, 1953, with the indication that the business had been transferred to the corporation. These documents, the application for contractor's license and the letter, were added to the record upon the granting by this court of respondent's motion for leave to produce additional evidence.

Joseph Kohler testified that he notified Mr. Stone, general manager of respondent of the incorporation in the middle of May, 1953, but Stone stated that he did not re-

call having been told of the incorporation until the first part of 1954. Stone believed that he had noticed the letterhead Ramos & Kohler, Inc., on appellant's stationery during the first part of 1954. Edison, respondent's credit manager, testified that he bagan working for respondent on March 1, 1954, and that the first time he received notice that appellants were incorporated was in June or July 1954. He had previously dealt with appellants when he had been credit manager for Redwood Materials Company, prior to his employment with respondent, and had never been informed during that time that they were incorporated. Stone and Edison both testified that Ramos and Kohler never asked for credit as a corporation, nor did they ever notify them that they wished to be billed as such.

No stock was ever issued for the corporation. Checks payable to respondent which bore the heading "Ramos & Kohler, Inc. Shingling Contractors" were used to make payments on the account on five occasions between November 9, 1953 and January 21, 1954. Although numerous other payments in large sums were made thereafter on the account, there appears to have been no evidence offered as to how they were paid. The checks referred to above bore the name "J. M. Kohler" printed above the signature line, and the checks were signed "By J. M. Kohler."

[1] Appellant contends that the evidence is not sufficient to support the findings that the entire debt was incurred by the partnership and appellant Kohler individually, and that no credit was extended to the corporation. Where there are various items of debit and credit on a running account, as here, the payments made must be applied to the earliest obligations where no specification is made by the debtor or creditor as to its application. Civ.Code, sec. 1479; Hollywood Wholesale Electric Co. v. John Baskin, Inc., 121 Cal.App.2d 415, 429, 263 P.2d 665. Plaintiff's Exhibit One, the cards composing the account of Ramos & Kohler, show that there was a balance of $27,571.72 due on January 17, 1954, and after that date credits totalling $27,825.19 are shown, which is more than the final balance of $24,612.55. This final balance accrued, therefore, appellants maintain, after January 17, 1954, and is clearly the debt of the corporation which dates from May, 1953.

It is urged that the five checks referred to above, which bore the heading "Ramos & Kohler, Inc." were seen by some one in respondent's office, and that this therefore was notice to respondent corporation. Sanders v. Magill, 9 Cal.2d 145, 153, 70 P.2d 159; Edson & Foulke Co. v. Winsell, 160 Cal. 783, 787, 118 P. 243. It has been said that any reasonable business man should know that the abbreviation "Inc." means "incorporated", and puts one dealing with such company on notice that it is a corporation. Carlesimo v. Schwebel, 87 Cal. App.2d 482, 486, 197 P.2d 167. The Carlesimo case, an action for breach of contract, is distinguishable from the present case in that there the parties had entered into a contract after plaintiff had been advised by defendant that he was no longer connected with the company he had represented when he had first known plaintiff. Plaintiff there executed a contract signed with both the name of the corporation and defendant's name. If respondent did not have actual knowledge, appellant argues, notice will be imputed if respondent had the means of knowledge by inquiry. Vertex Investment Co. v. Schwabacher, 57 Cal.App.2d 406, 417, 134 P.2d 891; 13 Cal.Jur.2d, pg. 112, sec. 340.

[2] Had respondent pursued such an inquiry in this case it would have found that up until July 22, 1954, Ramos & Kohler were not licensed to do a contracting business as a corporation. Since the application showed that their partnership license as shingling contractors was still in effect, such inquiry could lead respondent to believe that the partnership had not yet been dissolved.

Sec. 15035.5, Corporations Code, provides that whenever a partnership is dissolved,

notice of dissolution "shall be published at least once in a newspaper of general circulation in the place, * * * at which the partnership business was regularly carried on, and an affidavit showing the publication of such notice shall be filed with the county clerk within thirty days after such publication." Appellants did not offer proof that this had been done. And as before noted, the firm was until July 22, 1954, doing business under the partnership contractor's license.

In Charles M. Woods Co. v. Armstrong, 101 Cal.App. 664, 282 P. 19, the contention was made that since a business that was being carried on as a partnership had been incorporated on a certain date, the partnership could not be held for goods allegedly sold and delivered to the partnership after the date of the incorporation. The court stated that without proof of the transfer of the assets and without proof of dissolution of partnership, the court could not assume that the copartnership ceased to exist on the date of the incorporation. The court there remarked: "Let us assume, for example, that the corporation commissioner had not been satisfied to approve the issuance of the stock in the amount and proportion contemplated by the parties and the defendants had continued to pursue the business of the association in full accord with the agreement, is it not clear that the partnership relation would have continued?" In the instant case, appellant Kohler testified that no stock had ever been issued.

In view of the evidence that the respondent had a considerable course of dealing with the partnership, that during the time the credits were extended a contracting business was still being carried on under a license issued to the partnership, that there was no proof that formal notice of the change was given to respondent and that there was a conflict as to whether respondent had knowledge of the incorporation, there is sufficient evidence to support the finding that the debt was incurred on account of the partnership and that appellant Kohler is therefore individually liable.

[3, 4] Appellant has also argued that the complaint does not state facts sufficient to allow the corporate entity of Ramos & Kohler, Inc. to be disregarded and appellant Kohler to be held liable as an officer and incorporator of the corporation. Before the acts or obligations of a corporation may be legally recognized as those of an individual, the complaint, it is true, must allege facts necessary to establish the liability of such person. Judelson v. American Metal Bearing Co., 89 Cal.App.2d 256, 263, 200 P.2d 836. The complaint herein, however, alleged that Ramos & Kohler were at all times therein mentioned, partners in a roofing contracting business known as "Ramos & Kohler." The action was not brought on the theory that the corporate veil was being pierced to hold appellant individually liable. Nor are the findings in accordance with such theory. Since the findings support the judgment and are supported by substantial evidence, it is unnecessary to discuss the authorities cited by appellants in support of their argument concerned with a disregard of the corporate entity. We may state that we agree with them that no such issue was raised by the pleadings.

In view of the foregoing, the judgment must be affirmed.

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, J. pro tem., concur.

148 Cal.App.2d 667

Zalph B. JACKSON, Jean Jackson and Parrott Park Improvement Association, Inc., a corporation, Plaintiffs and Appellants,

v.

CITY OF SAN MATEO, City Council of the City of San Mateo, F. Herschel Campbell, Carrol M. Speers, Edward J. Reilly, Wesley F. Johnson and Victor G. Binsacca, Members of said City Council, Arthur B. Sullivan, City Manager of the City of San Mateo, Mervyn A. Brader, Building Inspector of the City of San Mateo, William J. O'Farrell, Clerk of the City of San Mateo, Economy Builders, Inc., a corporation, Fifth Avenue Corporation of California, a corporation, Marjorie L. Cunningham, Warren Casey, Alvin William Collier and Frank S. McGorty, Defendants and Respondents.

Civ. 16985.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1957.

Rehearing Denied March 28, 1957.

Hearing Denied April 25, 1957.

Proceeding on application to set aside action of San Mateo city council in granting variance to allow construction of office building on property zoned for multiple family residential units. The Superior Court, County of San Mateo, Louis B. Dematteis, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Agee, J. pro tem., held that evidence showing that property was undesirable for medium priced or more expensive units because of availability of more attractive locations, that it was adjacent to city shopping center and was only remaining property in immediate vicinity adequate for commercial purposes, and that it could not be developed under present zoning supported action of council in granting variance.

Judgment affirmed.

1. Municipal Corporations ⇐621.54

Decisions of city council in granting or denying variance are final if supported by substantial evidence.

2. Municipal Corporations ⇐621.55

In proceeding on application to set aside action of San Mateo city council in granting variance to allow construction of office building on property zoned for multiple family residential units, evidence showing that property was undesirable for medium priced or more expensive units because of availability of more attractive locations, that it was adjacent to city shopping center and was only remaining property in immediate vicinity adequate for commercial purposes, and that it could not be developed under present zoning supported action of council in granting variance.

3. Municipal Corporations ⇐621.43

Where San Mateo zoning ordinance required only a full investigation and public hearing on application for variance, there was no requirement that witnesses be sworn.

4. Municipal Corporations ⇐621.52

In proceeding on application to set aside variance to allow construction of office building on property in San Mateo zoned for multiple family residential units, evidence failed to show that persons opposing variance were prejudiced by fact that city council did not have witnesses sworn, where there was no requirement therefor in the ordinance.

A. J. Zirpoli, C. Harold Underwood, San Francisco, for appellants.

Frank T. O'Neill, San Francisco, for respondent, Economy Builders, Inc.

Frank S. McGorty, San Francisco, for respondents, Fifth Avenue Corp. of Cal., Warren Casey, Alvin William Collier and Frank S. McGorty.

AGEE, Justice pro tem.

Plaintiffs appeal from a judgment denying their application to set aside and have declared void a variance granted by a city council as to certain land zoned as residential. The sole issue is whether the City Council acted upon substantial evidence in granting the variance.

The real property involved is a seven-acre parcel located on the west side of El Camino Real (State Highway Route 101) at the intersection thereof with Fifth Avenue, in the City of San Mateo. The portion immediately adjacent to the highway, consisting of one acre, is zoned for multiple family residential units and the remaining portion is zoned for single family residential units.

The owner of the property, respondent Economy Builders, Inc., filed with the City Planning Commission of the City of San Mateo and with the City Council of the City of San Mateo an application for a variance to permit the construction of an office building thereon. The Planning Commission recommended a denial. The application was then heard before the City Council. There were two hearings held, at the second of which the variance was granted. The lower court upheld the City Council and this appeal followed.

The zoning ordinance of the City of San Mateo provides as follows: Variances may be granted, * * * provided that the Council, after a full investigation and public hearing, as herein specified shall have found all of the following to be true;

"a. That there are exceptional or extraordinary circumstances or conditions applicable to the property involved, or the intended use thereof which do not apply generally to the property or class of uses in the district, so that a denial of the application would result in undue property loss;

"b. That such variance would be necessary for the preservation and enjoyment of a property right of the owner of the property involved;

"c. That the granting of such variance would not be materially detrimental to the public health, safety, or welfare, or injurious to the property or improvements of other property owners, or the quiet enjoyment of such property or improvement."

It is apparent that (a) and (b) are directed to conditions directly applicable to the particular property involved, whereas (c) has to do with the effect of a variance upon the surrounding property and the public generally. Although (c) was highly controversial at the hearings before the City Planning Commission and the City Council, appellants concede that there is sufficient evidence in this respect to support the granting of the variance and they do not raise the point on this appeal.

The evidence as to (a) and (b) which supports the granting of a variance is as follows: the parcel is unimproved except for one house, it is adjacent to one of the main highways in this State, it is undesirable for medium priced or more expensive homes because of the availability of more attractive locations, it is adjacent to the retail shopping district of the City of San Mateo and is the only remaining property in the immediate vicinity of a size adequate for a commercial purpose such as that proposed, the property cannot be developed under its present zoning status for economic reasons, such as high real property taxes and financing difficulties, and it would be the highest form of economic futility to attempt to do so.

[1] Provisions substantially identical * to (a) and (b) in the instant case were involved in Bradbeer v. England, 104 Cal. App.2d 704, 232 P.2d 308 (hearing denied by Supreme Court). There the City Council of Inglewood granted a variance from R–1, one-family zone, to R–3, multiple-family zone, of a twenty-acre tract. Consideration was given therein to the nature

* These provisions are quoted in the opinion as follows, 104 Cal.App.2d at pages 705–706, 232 P.2d at page 309:

"'1. That there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property that do not apply generally to the property or class of uses in the same vicinity or zone.

"'2. That such variance is necessary for the preservation and enjoyment of a substantial property right of the applicant possessed by other property in the same vicinity and zone.'"

of the surrounding area, the suitability of the property for the proposed use, the economic unsoundness of the use permitted by R–1 zoning, and, in general, the same factors as are urged by respondents herein. The court cited the well-established rule that the decision of a city council in granting or denying a variance is final if supported by substantial evidence and upheld the variance.

[2] Under the authority of the Bradbeer case, supra, and the numerous authorities cited therein, it is apparent that the granting of the variance in the instant case is supported by substantial evidence and that the action of the city council should be affirmed.

[3, 4] Appellants complain that the witnesses appearing before the Planning Commission and the City Council were not sworn. There is no such requirement. The ordinance in question only requires "a full investigation and public hearing." Appellants cite Nishkian v. City of Long Beach, 103 Cal.App.2d 749, 752, 230 P.2d 156, 158, wherein the court stated: "In proceedings of this kind, quasi judicial in nature, witnesses should be sworn and examined, * * *" However, the court nevertheless accepted the record, despite the failure to swear the witnesses, and upheld the action of the city council based thereon. In Wolfskill v. City Council of City of Los Angeles, 178 Cal. 610, 614, 174 P. 45, the Supreme Court discusses the informality of this type of proceeding and concludes that the public interest is better advanced by such informality. We conclude that appellants did not sustain any prejudice by the failure to have the witnesses sworn. Moreover, the point was not raised until this appeal. In Re Estate of Wilson, 116 Cal.App.2d 523, 526, 253 P.2d 1011, 1013, it is stated: "An objection that evidence is incompetent because the witness has not been sworn is waived if not made when the evidence is offered or at least while the defect is capable of being remedied. [Citing authorities.]"

The judgment is affirmed.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.

48 Cal.2d 69

In re Arthur Elliott BOYD, Jr., on disbarment.

L. A. 24347.

Supreme Court of California,

In Bank.

March 1, 1957.

Rehearing Denied March 27, 1957.

Proceeding directing attorney to show cause why he should not be disciplined. The Supreme Court held that attorney's conduct involved moral turpitude and was sufficient to warrant his suspension from practice of law for three years.

Order in accordance with opinion.

Attorney and Client ⇐58

Attorney's conduct involved moral turpitude and was sufficient to warrant his suspension from practice of law for three years. West's Ann.Bus. & Prof.Code, § 6101; West's Ann.Pen.Code, § 647, subd. 5.

Arthur Elliott Boyd, Jr., in pro. per., Max Solomon and John W. Preston, Los Angeles, for petitioner.

Garrett H. Elmore, San Francisco, and John G. Thorpe, Los Angeles, for respondent.

PER CURIAM.

This is a proceeding predicated on an order of this court directing petitioner, an attorney at law, to show cause why he should not be disciplined pursuant to the provisions of section 6101 of the Business and Professions Code, and his return thereto.

Petitioner pleaded guilty to violating subdivision 5 of section 647 of the Penal Code (vagrancy). It is there provided, among other things, that every lewd or dissolute person is a vagrant and punishable as for a misdemeanor. The record discloses that on June 28, 1953, petitioner committed an act prohibited by this section of the Penal Code. Section 6101 of the Business and Professions Code provides that conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for discipline of an attorney at law.

This is the sole question for us to determine: *Did the acts constituting the offense to which petitioner pleaded guilty involve moral turpitude?*

Yes. Moral turpitude has been defined as: "An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man." 2 Bouv., Law Dict., Rawle's Third Revision, 8th ed. 1914, p. 2247; see also Ballentine, Law Dictionary (1948), p. 832; Black, Law Dictionary (4th Ed. 1951), p. 1160; Marsh v. State Bar of California, 210 Cal. 303, 307(2), 291 P. 583.

No citation of authority or argument is needed to support the conclusion that the conduct of petitioner fell within the purview of the above definition. His offense was one of depravity, contrary to the accepted and customary rule of right and duty between man and man, and was therefore an offense involving moral turpitude. The act was committed in a public place. Without further recitation of the facts, it is enough to say that such conduct is unworthy of a member of the legal profession.

This court in In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644, sustained the disbarment of an attorney pursuant to section 6102 of the Business and Professions Code where the record disclosed that he had been convicted of "indecent exposure," thus holding that indecent exposure involved moral turpitude.

Brun v. Lazzell, 172 Md. 314, 191 A. 240, 243, 109 A.L.R. 1453, and Kravis v. Hock, 135 N.J.L. 259, 51 A.2d 441, 442, also hold that indecent exposure and lewd acts in public involve moral turpitude.

It is ordered that petitioner be suspended from the practice of law in this state for a period of three years commencing 30 days after the date of filing of this order.

Rehearing denied; The time for commencement of the period of his suspension from the practice of law is hereby extended to begin June 1, 1957.

48 Cal.2d 71

CONTRACTOR'S SAFETY ASSOCIATION (a Corporation), Plaintiff and Appellant,

v.

CALIFORNIA COMPENSATION INSURANCE COMPANY (a Corporation), Defendant and Respondent.

L. A. 24366.

Supreme Court of California, In Bank.

March 1, 1957.

Rehearing Denied March 27, 1957.

Insured brought action against insurer on a dividend agreement, on a common count for money had and received, and for punitive damages. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment of dismissal following an order sustaining insurer's oral demurrer to the introduction of any evidence on behalf of the insured, and the insured appealed. The Supreme Court, Shenk, J., held that dividend agreement between insurer and insured that insurer would pay an additional 5% dividend to an insured whose loss-premium ratio was 60% or less, provided that a surplus was available to pay the dividend, was invalid under the Insurance Code.

Judgment affirmed.

Opinion, 301 P.2d 482, vacated.

1. Insurance ⇐59

Where a dividend agreement is not one to share profits, dividend cannot be said to be "participating" within meaning of section of the Insurance Code providing for return by an insurer issuing policies on a "participating" plan of any portion of the premium as a dividend after expiration of the term covered by the policy. West's Ann.Insurance Code, § 763.

See publication Words and Phrases, for other judicial constructions and definitions of "Participating".

2. Insurance ⇐11

Purpose of Minimum Rating Law is to require an insurance premium rate which will assure adequate reserves to meet claims as they mature. West's Ann.Insurance Code, §§ 11730–11742.

3. Evidence ⇐29, 47

Court could take judicial notice of the Insurance Code and administrative rules of the Insurance Commission, though they were not pleaded. West's Ann.Insurance Code, §§ 11730–11742; West's Ann.Code Civ.Proc., § 1875.

4. Pleading ⇐6

Matters judicially noticed by a court may be considered in construing the pleadings. West's Ann.Code Civ.Proc., § 1875.

5. Insurance ⇐59

Dividend agreement between insurer and insured that insurer would pay an additional 5% dividend to an insured whose loss-premium ratio was 60% or less, provided that a surplus was available to pay the dividend, was invalid under the Insurance Code. West's Ann.Insurance Code, §§ 751, 752, 763 and subd. (a), 11730–11742, 11736, 11738.

6. Contracts ⇐139

Insured, which entered into an invalid dividend agreement with insurer, was in pari delicto with insurer, and was barred from recovery from insurer on the agreement. West's Ann.Insurance Code, §§ 751, 752, 763 and subd. (a), 11730–11742, 11736, 11738.

7. Damages ⇐87(2)

Punitive damages are not recoverable where compensatory damages are not recoverable.

8. Damages ⇐89(2)

Punitive damages may not be awarded in an action based on a breach of contract even though breach was willful or fraudulent.

9. Damages ⇐89(2)
Fraud ⇐61

Where third count of complaint, though phrased in language of fraud, was clearly based on breach of contract, and no compensatory damages were sought because of alleged fraud, no recovery of punitive damages could be had.

Simon Miller, Harry E. Ehrlich, and Blau, Shaw & Miller, Beverly Hills, for appellant.

Betts, Ely & Loomis, Forrest A. Betts, Los Angeles, Frank J. Creede, San Francisco, and F. V. Lopardo, Los Angeles, for respondent.

Edmund G. Brown, Atty. Gen., and Harold B. Haas, Deputy Atty. Gen., as amici curiae on behalf of respondent.

SHENK, Justice.

This is an appeal from the judgment of dismissal following an order sustaining the defendant's oral demurrer to the introduction of any evidence on behalf of the plaintiff.

The plaintiff seeks to recover dividends to which it claims to be entitled upon an agreement made in conjunction with the purchase of a policy of workmen's compensation insurance.

As finally amended the complaint alleges that the defendant in 1950 circulated a form letter representing that it would pay dividends according to a stated schedule to group insureds carrying workmen's compensation insurance issued by the defendant where the insured's loss-premium ratio was 65% or less and a surplus was available for payment of such dividends. In August, 1950, the defendant insurance company wrote the plaintiff to the effect that its board of directors had authorized an additional 5% dividend to those insureds whose loss-premium ratio was 60% or less provided a surplus was available to pay the dividend. In reply the plaintiff informed the defendant that it accepted the offer to insure the plaintiff according to the terms of the information thus received. On October 11, 1950, the defendant issued to the plaintiff its standard workman's compensation policy. The plaintiff alleges that it relied upon those representations and that its loss experience was within a range which would entitle it to dividends in the sum of $77,400.74; that the defendant has sufficient surplus to meet the payment of the dividend, that it arbitrarily reduced plaintiff's dividend to $13,959 and that it has paid that amount. The complaint prays that the balance be paid to the plaintiff upon the determination of the existence of reserves sufficient to make the additional payment. The plaintiff contends that before the representations were made the defendant's board of directors by resolution unknown to the plaintiff provided that no dividend would be paid except by resolution of the board and that the board has arbitrarily reduced the amount of plaintiff's dividend because the plaintiff ceased to do business with the defendant in August, 1951. This, the plaintiff contends, was malicious and oppressive conduct on the part of the defendant through its board of directors. Accordingly, the plaintiff seeks an additional $50,000 as punitive damages.

The above facts are alleged in three counts. The first is an action upon the collateral agreement which the plaintiff contends is a part of the contract of insurance entered into on October 11, 1950. The second is on a common count for money had and received; the third is for punitive damages.

The Insurance Commissioner as amicus curiae contends that the enforcement of the dividend agreement would violate the minimum rating provisions of the Insurance Code and administrative rulings promulgated under the Code. The defendant joins in this contention and asserts that the enforcement of the agreement would violate the anti-rebate provisions of the Insurance Code.

Insurance Code section 751 provides: "An insurer * * * shall not offer or pay, directly or indirectly, as an inducement to enter into an insurance contract, any valuable consideration which is not clearly specified, promised or provided for in the policy, or application for the insurance, and any such consideration not appearing in the policy is an unlawful rebate."

[1] The receipt of a rebate is made a misdemeanor by Insurance Code section 752. The code does not, however proscribe all rebates. Insurance Code section 763 permits rebates under certain conditions. Subsection (a) of that section provides for "The return by an insurer issuing policies on a participating plan, of any portion of the premium as a dividend after the expiration of the term covered by such policy." While the return of a part of the premium would otherwise constitute an unlawful rebate, the return of part of the consideration is permitted under section 763. This provision is, however, limited to participating policies the premiums on which have been defined as follows: "* * * [P]articipating premiums are those in which the profits therefrom are shared by those who have paid the premiums." (Couch, Cycl. of Ins., § 579.) In State Comp. Ins. Fund v. McConnell, 46 Cal.2d 330, 341, 294 P.2d 440, 447, this court said (in reference to Insurance Code § 11738), "'Participating' refers to the right to share in earnings and does not refer to the price paid for insurance." Where a dividend agreement is not one to share profits the dividend cannot be said to be "participating" within the meaning of section 763.

[2] The minimum rating law (now Ins. Code §§ 11730–11742) was enacted in 1915 to eliminate irresponsible premium policies which developed in response to competitive conditions in the insurance field. The purpose of this law was to require a premium rate which would assure adequate reserves to meet claims as they matured. Obviously, the purpose of the law would be frustrated if collateral agreements could effect a reduction of the premium. For this reason agreements affecting the premium were brought within the scope of statutory and administrative regulation.

At the time of the transaction here involved Insurance Code section 11736 provided: "An insurer shall not issue, renew or carry beyond next anniversary date any workmen's compensation insurance under a law of this State at premium rates which are less than the rates approved or issued by the commissioner." [St.1935, p. 723] The minimum rating law, like the anti-rebate provisions, contains a provision under which refunds may be made. Section 11738 provides: "Nothing in this article shall affect the right of any insurer to issue compensation participating policies. A refund by reason of a participating provision in a compensation policy shall not be made to policyholders by any insurer except from surplus accumulated from premiums on workmen's compensation policies issued pursuant to laws of this State governing workmen's compensation insurance."

The Insurance Commissioner, on March 1, 1950, promulgated the "Manual of Rules, Classifications and Basic Rates for Workmen's Compensation Insurance." This Manual, which became effective April 1, 1950, contains the following: "III. Policy Forms and Coverage. * * * (2) Each policy issued must contain the following provision: 'This policy, including all endorsements or riders hereon, constitutes the entire contract of insurance. No condition, provision, agreement, or understanding not set forth in the policy or in such endorsement or rider shall affect such contract or any rights, duties, or privileges arising therefrom.'"

[3, 4] In ruling on the demurrer to the introduction of evidence, the trial court had before it the Insurance Code and administrative rules of the Insurance Commission. Although not pleaded, the trial court could take judicial notice of "Public and private official acts of the legislative, executive and judicial departments of this state. * * *" Code Civ.Proc., § 1875. That matters judicially noticed may be considered in construing the pleadings is well settled. Chavez v. Times-Mirror, 185 Cal. 20, 23, 195 P. 666; French v. Senate of California, 146 Cal. 604, 607, 80 P. 1031, 69 L.R.A. 556; Mendez v. Pacific Gas & Electric Co., 115 Cal.App.2d 192, 195, 251 P.2d 773; Clark v. City of Pasadena, 102

Cal.App.2d 198, 200, 227 P.2d 306; Livermore v. Beal, 18 Cal.App.2d 535, 539, 64 P.2d 987; Fey v. Rossi Improvement Co., 23 Cal.App. 766, 770, 139 P. 908.

Section 11738, like section 763(a) is limited to participating dividends. Moreover section 11738 expressly requires the participating provision to be "in a compensation policy."

[5] It is apparent from a consideration of sections 751, 752, 763, 11736, and 11738 of the Insurance Code and Rule III of the Manual of Rules that the alleged dividend agreement is contrary to law. If the insurance policy which was not pleaded included the agreement and the agreement otherwise conformed to the requirements of the Insurance Code, a different situation would have been presented. There was no request to amend the complaint to include the entire policy.

[6] The plaintiff contends that, assuming the agreement to be illegal, it is not barred from recovery because it is not in *pari delicto* with the defendant. McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800, is relied upon. The plaintiff in that case was of a class for whose sole benefit the statute was enacted. Recovery was predicated on the repudiation of an illegal transaction. Here the plaintiff seeks to recover under an illegal agreement. See Severance v. Knight-Counihan Co., 29 Cal.2d 561, 569, 177 P.2d 4.

Acceptance or receipt of an unlawful rebate is a misdemeanor. Ins.Code, § 752. Violation of the minimum rating law is also a misdemeanor. Ins.Code, § 11742. This court said in Severance v. Knight-Counihan Co., 29 Cal.2d 561, at page 568, 177 P.2d 4, at page 8, supra: "It is settled that a contract must have a lawful object (Civ.Code, §§ 1596, 1598, 1599) and that a contract for an object prohibited by a penal law is void. 'The general rule controlling in cases of this character is that where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum*. * * * The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void.' "

The relief sought in the second count is the same as that sought in the first count and is subject to the same defense of illegality.

[7–9] The third count alleges that the board of directors of the defendant insurance company passed a resolution, unknown to the plaintiff, providing that no dividends would be paid without further resolution by the board; that the defendant concealed the existence of the resolution from the plaintiff because the defendant knew that the plaintiff would not enter into a contract with the defendant if the resolution were known to it. This, the plaintiff alleges, was fraudulent. The third count further alleges that the defendant withheld dividends from the plaintiff because the plaintiff ceased doing business with the defendant; that the defendant was "* * * actuated by malice against the plaintiff and that as punishment for said malicious and oppressive conduct, plaintiff requests punitive damages in the sum of $50,000." The third count though phrased in the language of fraud is clearly based upon breach of contract. The injury thus complained of is the refusal of the defendant to perform the contract. No compensatory damages are sought because of the alleged fraud. Punitive damages are not recoverable where compensatory damages are not. Clark v. McClurg, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908. It is settled that punitive damages may not be awarded "* * * in an action based on a breach of contract even though the defendant's breach was wilful or fraudulent." Crogan v. Metz, 47 Cal.2d 398, 303 P.2d 1029, 1033.

Other contentions made by the plaintiff have been considered and are deemed with-

out merit. From what has been said it follows that the plaintiff suffered no compensable damages because of the action of the defendant. The oral demurrer was properly sustained.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



148 Cal.App.2d 845

William D. CARTER, Plaintiff and Appellant,

v.

Opal CARTER, Defendant and Respondent.

Civ. 22102.

District Court of Appeal, Second District, Division 2, California.

March 1, 1957.

Rehearing Denied March 22, 1957.

Hearing Denied April 25, 1957.

Divorce action wherein the Superior Court of Los Angeles County, James H. Pope, J., entered a "judgment and order" purporting to modify interlocutory decree of divorce and to award judgment in favor of wife and against husband based upon his failure to perform certain monetary requirements of interlocutory decree. On the husband's appeal, the District Court of Appeal, Ashburn, J., held that the most that court can do with respect to joint tenancy property, when granting divorce, is divide it equally, or perhaps declare lien upon husband's moiety as security for alimony award or child support award, and held decree purporting to award use of joint tenancy property to wife and to require husband to maintain property was beyond jurisdiction of court.

Reversed and remanded with directions.

1. Divorce ⇐249(3)

The most that court can do with respect to joint tenancy property, when granting divorce, is divide it equally, or perhaps declare lien upon husband's moiety as security for alimony award or child support award, and divorce court decree purporting to award use of joint tenancy property to wife and to require husband to maintain property was beyond jurisdiction of court. West's Ann.Civ.Code, §§ 140, 141, 143.

2. Appeal and Error ⇐112

Invalidity of order does not affect its appealability.

3. Parent and Child ⇐3(3)

Court has jurisdiction to modify child support award at any time. West's Ann. Civ.Code, § 138.

4. Judgment ⇐486(1)

Motions ⇐61

Void order or judgment is subject to collateral attack at any time and in any place by any interested party.

5. Divorce ⇐156, 254

Entire interlocutory decree of divorce was not invalidated by portion thereof purporting to affect joint tenancy property of parties, but that portion of interlocutory decree could not support money judgment for nonperformance thereof.

Block, Toler, Bulloch & Biggerstaff, Compton, for appellant.

Austin, Austin, Jones & Chaffee, Comptin, for respondent.

ASHBURN, Justice.

Plaintiff, William D. Carter, has appealed from a ruling entitled "Judgment and Order" which was filed on March 29, 1956, and entered on April 2, 1956. This was after an interlocutory decree of divorce had become final. The said order purported to modify that decree in certain respects and to award judgment in favor of defendant-wife against plaintiff-husband for $1,042.32, based upon his failure to perform

certain monetary requirements of the interlocutory decree.

The court granted each party a divorce. Interlocutory decree was entered on January 6, 1955, and no appeal was taken therefrom. It ordered plaintiff-husband to pay to defendant-wife $25 a week for support of the minor children, made no alimony award, adjudged that certain real property, the home, was owned as joint tenants, and then provided that the use thereof be "awarded to the defendant during such period of time as the said minor children of the parties are with defendant and living on the said premises, or until further order of court." The interlocutory also ordered that during said period the maintenance of the home should be at the expense of plaintiff, who was ordered to make all monthly payments of principal and interest and to pay all taxes on the property; it was further provided that the equity of either party should increase in proportion to principal payments made by him or her. Plaintiff in February, 1956, made a motion for modification of the provisions of the interlocutory concerning support of the children and payment of taxes and other items for maintenance of the home; defendant made a counter motion designed to enforce the existing provisions of the decree, including the collection of items upon which plaintiff was then in default. After a hearing the court made certain findings specifying past defaults of plaintiff and caused to be entered the said "Judgment and Order" wherein defendant was awarded personal judgment against plaintiff for said $1,042.32, and an order was made directing issuance of execution thereon. This "Judgment and Order" also directed that the portion of the interlocutory decree providing for use of the home by defendant be modified by rephrasing the obligation of the husband to provide for the physical maintenance of the premises, payments of principal and interest on the encumbrance, and taxes on the property. It also added a requirement that he pay to defendant the sum of $80 on the 15th of each month and directed her to use the same toward liquidation of monthly payments upon principal, interest and taxes. As set forth in the interlocutory the pertinent provisions are copied in footnote [1], and as modified by said "Judgment and Order" same are copied in footnote[2] hereof.

1. "It Is Further Ordered, Adjudged, and Decreed that the use of the said home premises of the parties at 4615 East Saunders Street, Compton, California, is awarded to the defendant during such period of time as the said minor children of the parties are with defendant and living on the said premises, or until further order of court.

"It Is Further Ordered, Adjudged, and Decreed that the maintenance of the said home premises, so long as the said minor children of the parties are with defendant and living on said premises, or until further order of court, is to be at the expense of plaintiff, with the interest cost on the home payments, as well as the taxes on the said real property, being borne by plaintiff; plaintiff is ordered to make the monthly payments due on the said home premises, and the equity of the plaintiff in the said joint tenancy property shall increase in proportion to the payments hereafter made by the plaintiff on account of the principal; should defendant hereafter make any of the said home payments, her equity in the said joint tenancy property shall likewise increase in proportion to the payments hereafter made by her on account of principal."

2. "It Is Further Ordered, Adjudged and Decreed that the defendant and children of the parties shall have the use and occupancy of the home premises so long as the minor children are with the defendant and living upon the premises, or until further order of the court, and the physical maintenance of the premises, together with the payments upon the encumbrance, the interest upon the encumbrance and the taxes on the property shall be at the expense of the plaintiff. The plaintiff is ordered to pay to the defendant forthwith the sum of $80.00 for the payment due March 15, 1956, and thereafter the sum of $80.00 upon the 15th day of each and every month, and the defendant is ordered to deliver the same to the holder of the encumbrance to be applied upon the monthly payments upon principal, interest and taxes. All payments applied upon the principal of the encumbrance from sums paid by the plaintiff shall increase pro rata his equity in the property. In the event the defend-

These provisions were additional to an award of $25 a week[3] payable to the wife for the support of the two children.

[1, 2] Plaintiff's contention on appeal is that the order concerning use and maintenance of the home is beyond the jurisdiction of the court, which is powerless to thus affect property owned in joint tenancy. The law is settled in this State that the most the court can do with respect to joint tenancy property when granting a divorce is to divide it equally, Rogers v. Rogers, 86 Cal.App.2d 817, 822, 195 P.2d 890; Siberell v. Siberell, 214 Cal. 767, 775, 7 P.2d 1003; Tomaier v. Tomaier, 23 Cal.2d 754, 759, 146 P.2d 905, or perhaps declare a lien upon the husband's moiety as security for an alimony award or one for the support of the children. Civ.Code, §§ 140–141, 143; 16 Cal. Jur.2d § 293, p. 590.

In Barba v. Barba, 103 Cal.App.2d 395, 229 P.2d 465, the lower court made an order that plaintiff have and retain exclusive possession of joint tenancy property during her lifetime and that defendant vacate same in favor of plaintiff. That in effect is the order made at bar, although it does not specifically state that the wife's occupancy shall be exclusive. The said provision was attacked upon appeal and this court struck that portion from the judgment and in doing so said, 103 Cal.App.2d at page 396, 229 P.2d at page 466: "By virtue of the nature of the title by which the property is held by the parties, each is the owner of an undivided one-half interest therein in his separate right. In a matrimonial controversy resulting in a decree of divorce in favor of one of the parties, the court is without power to assign the separate property of one spouse to the other. Fox v. Fox, 18 Cal.2d 645, 646, 117 P.2d 325."

Jenkins v. Jenkins, 110 Cal.App.2d 663, 243 P.2d 79, 81, involved a judgment in a separate maintenance action which awarded to the plaintiff-wife the sum of $100 a month for the support of the minor child; the real property used as a home was found to be owned by the spouses as joint tenants and the decree provided that in addition to the said payments to the wife she should have the exclusive use of the said home so long as it was used by her for the maintenance of a home for the child, and that she should also during said period of time receive and have the exclusive use of any rentals from any rooms in the house. Upon appeal defendant urged, among other things, that "no authority of law exists for assignment to plaintiff of the use of defendant's joint tenancy interest in the home and furniture and excluding defendant therefrom." The court, 110 Cal.App.2d at page 665, 243 P.2d at page 81, said: "Defendant's second contention is well founded. In granting a divorce the court may award support money to the prevailing party and an allowance for the support, maintenance and education of children during their minority. Civ.Code, § 139. This section does not give the court authority to award to either party any of the separate property of the other, nor to require the payment of any sum in lieu of an assignment or division of it. Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868; Fox v. Fox, 18 Cal.2d 645, 117 P.2d 325. The court may not award the wife, in a divorce action, exclusive possession of joint tenancy property. Barba v. Barba, 103 Cal.App.2d 395, 229 P.2d 465. * * * The legislature has not granted authority for an award of separate property, or an interest therein in lieu of support for the prevailing party or children, or as additional support, either in an action for divorce or for separate maintenance. No such authority can be inferred from section 143, Civil Code, which provides: 'The community property and the separate property may be subjected to the support and education of the children in such proportion as the court deems just.' The assignment of

ant shall make any payments upon the principal of the encumbrance her equity shall be increased pro rata, but no payments made by the defendant upon the principal of the encumbrance while she and the children are resident thereon shall be deemed to be in lieu of payments required by this order of the plaintiff."

3. Subsequently reduced to $15 per week.

the use of the joint tenancy property here was in addition to the monetary awards, and not as security for payment."

In Gilmore v. Gilmore, 45 Cal.2d 142, 151, 287 P.2d 769, 774, it is said: "Plaintiff contends that the court deprived her of any real interest in the property found to be held in joint tenancy by failing to require defendant to protect the property against foreclosure and sale for nonpayment of the encumbrances thereon. She contends that such protection could have been afforded had it been found that the property was community, and that in any event, some provision should have been made to protect her interest. The evidence, however, supports the trial court's finding that the property was held in joint tenancy, and in the absence of an award of alimony the trial court had no authority to assign defendant's separate property to plaintiff by requiring him to use it to protect plaintiff's property interests." It is to be noted that there is no alimony award at bar.

That the rule is one of jurisdiction, rather than discretion, seems to be implicit in the foregoing cases, and it is so held in Reid v. Reid, 112 Cal. 274, 277, 44 P. 564; Allen v. Allen, 159 Cal. 197, 201, 113 P. 160; Fox v. Fox, 18 Cal.2d 645, 646, 117 P.2d 325; Conard v. Conard, 5 Cal.App.2d 91, 93, 41 P.2d 968; Roy v. Roy, 29 Cal.App.2d 596, 603, 85 P.2d 223; Robinson v. Robinson, 65 Cal.App.2d 118, 119, 150 P.2d 7. It follows that the provisions of the order under consideration which affect the possession and use of the joint tenancy property and require payments for maintenance of same are erroneous and indeed in excess of jurisdiction. This fact does not render the order nonappealable, for a void order may be reversed on appeal as well as one made within the court's jurisdiction. 3 Cal.Jur. 2d § 20, p. 413.

[3, 4] Of course the trial court has jurisdiction to modify an award for child support at any time, Civ.Code § 138, and a rehearing upon that subject, as embraced in the respective motions, will become necessary as a practical matter. In view of that fact it should be pointed out that the provision in the interlocutory judgment, quoted in the footnote, supra, is also void. The final decree which incorporates the provisions of the interlocutory by reference falls into the same category. The absence of any appeal from either of those judgments does not add any strength to the portions just mentioned, for a void order or judgment is subject to collateral attack at any time and in any place by any interested party. "A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant." People v. Greene, 74 Cal. 400, 405, 16 P. 197, 199.

[5] This does not mean that the entire interlocutory judgment or the entire final decree is void,—merely that the portions which are in excess of jurisdiction are in that status, see 29 Cal.Jur.2d § 181, p. 137. This includes the money judgment for $1,042.32, for it rests upon nonperformance of the void portion of the interlocutory decree, which manifestly cannot support a valid money judgment.

These considerations render the entire "Judgment and Order" entered on April 2, 1956, reversible, and it thus becomes unnecessary to inquire whether it is erroneous or void upon the further ground that it is a third judgment between the same parties in an action wherein the statute authorizes only two. Cf. David v. Goodman, 89 Cal.App. 2d 162, 165, 200 P.2d 568; Doudell v. Shoo, 159 Cal. 448, 454, 114 P. 579; Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co., 98 Cal. 557, 577, 33 P. 633.

The said "Judgment and Order" entered on April 2, 1956, is reversed, and the cause is remanded to the lower court for further proceedings not inconsistent with the views expressed herein.

MOORE, P. J., and FOX, J., concur.

148 Cal.App.2d 855

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Isadore STEINBERG, Defendant and Appellant.

Cr. 5750.

District Court of Appeal, Second District, Division 2, California.

March 1, 1957.

Hearing Denied April 30, 1957.

Defendant was convicted in the Superior Court, Los Angeles County, Allen T. Lynch, J., of occupying a residence with books, papers and apparatus and paraphernalia for purpose of selling and registering bets on horse races, and he appealed, complaining of an allegedly illegal search and seizure. The District Court of Appeal, Moore, P. J., held that when a police officer has reasonable cause to believe that a suspected person has committed a felony, such officer is authorized to make an arrest of the suspect and also to make a search of the latter's premises and to seize such evidence of alleged crime as may be there found.

Affirmed.

1. Arrest ⇐63(4), 71

When a police officer has reasonable cause to believe that a suspected person has committed a felony, such officer is authorized to make an arrest of the suspect and also to make a search of the latter's premises and to seize such evidence of alleged crime as may there be found.

2. Arrest ⇐63(4), 71

Where officer, using field glasses, saw defendant talking into a telephone and, after approaching closer and crying out "police officers", looked through glass door and saw defendant rise from desk by which he was sitting with papers in his hand and move speedily away, officer's observations justified him in relying upon confidential information that defendant was engaged in book-making and that he would attempt to destroy evidence; and officer was justified by such information and observation, and by necessity of preventing destruction of evidence, in entering room, arresting defendant, and searching premises, and seizing book-making paraphernalia found therein. West's Ann.Pen.Code §§ 836, subd. 1, 844.

3. Searches and Seizures ⇐3(1)

To warrant search of house of suspected felon, officer who makes entry needs to be possessed of only such knowledge as would lead a person of ordinary caution or prudence conscientiously to believe the suspect to be guilty.

Ernest L. Graves, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Convicted of having occupied a residence with books, papers, apparatus and paraphernalia for the purpose of selling and registering bets on horse races, Penal Code, § 337a, subd. 2, defendant appeals from the judgment and from the order denying his motion for a new trial on the grounds that (1) the court admitted evidence obtained as a result of illegal search of private premises and (2) that there was no reasonable cause for making the search, over the objections of appellant.

During a period of two weeks after January 21, 1956, Officer Norris, a member of the vice squad of the Hollywood Division of the Los Angeles Police Department, was advised by a private, confidential informant that appellant was currently engaged in bookmaking. The officer had in the past received information from the same informant on many occasions and in each instance it was found to be dependable. The informant was not a member of any law-enforcing agency. But on the occasion in January he told Officer Norris that appellant daily, after leaving his residence about 9 a. m., visited a telephone spot

at some point in the Wilshire Division area; that the number of the telephone had a Dunkirk prefix; that appellant took bets from his own bettors over the Dunkirk telephone, but that such bets did not exceed $20 across the board; that appellant had been alerted to the likelihood that the police were in pursuit of him and that he had provided against such pursuit. Officer Norris acquainted Officer Kubiak with such information and admonished Kubiak that appellant would attempt to destroy any evidence "at the phone spot, like flushing it down the toilet as he had done in the past."

Kubiak saw appellant leave his home February 7 but lost sight of him. On February 8 he trailed appellant but again lost view of him after the latter left his automobile at Ninth and Oxford. But on February 9, about 9:30 a. m., the officer observed his prey enter the rear of the building numbered 820 South Oxford in Los Angeles. It is a rooming house with entrances on a side and at the front and rear. Kubiak absented himself for a while and at 11:30 a. m. returned with Officer Smith to the situs of his earlier observations on a parking lot north of the rooming home. From that point he saw appellant in plain view sitting at a table four feet from the window, talking into a telephone. Kubiak then by telephone requested Officers Norris and Johnson with Sergeant Riley to come to the vacant lot. Then, aided by a pair of field glasses, Kubiak again clearly saw appellant talking on the telephone in his same upstairs room. He thereupon hastily ascended the rear stairs to the second floor and cried out: "Police officers." At that instant through the glass door he saw appellant rise from the desk by which he was sitting with some papers in his hand and move speedily away. On observing such movement, Kubiak forced entrance. When he reached the inside, appellant rapidly walked toward the restroom, dropped pieces of torn paper in the commode and flushed it. The papers were retrieved by the officer who placed appellant under arrest.

As an expert on bookmaking, Kubiak determined that he was in the lair of a bookmaker. It contained all the equipment and accoutrement commonly found in the rendezvous of the bookmaker: papers, pencils, scratch sheets, daily racing forms, pieces of paper on which bets can be recorded, and telephones. In the room where appellant had been seen engaged in his operations, the telephone was on his desk on which lay the National Daily Reporter and nearby were racing forms, pencils and ball point pens. Also, the officer found there papers containing names and numbers. In the opinion of Officer Kubiak, the slips of paper contained wagers on horses running that day at various tracks in the United States. One sheet of paper was an "owe sheet" on which was a record of the moneys owed by the bettors to the bookmaker, or the sum due from the latter to the bettors.

Appellant, in reply to questions by the officer stated that he had been in the "820" house for two days; that it was obvious to the officer why appellant tried to flush the betting markers down the toilet; that exhibit 5[1] was in his handwriting but its figures were just bets of his own; that "there is nothing I can say. You've got me dead bang so why should I answer a lot of questions." He stated that the key Kubiak had taken from him was the key to the front door. The officer took an exemplar of appellant's writing. Found, also, on the desk was a sheet (exhibit 6) with a record of wagers on horses at various tracks. Such record was in appellant's writing.

To make the proof complete, Kubiak answered incoming calls on the telephone. One unidentified man's voice announced that he was "Jack" and inquired as to his account. Kubiak answered, "You're out completely." But the party with a per-

1. Exhibit 5 was the remains of two seven-by-ten-inch pieces of foolscap which he had torn into pieces and put in the toilet. They show names blocked above lists of names followed by amounts.

sistent confidence in appellant moaned and replied, "Give me two across on Marcliff in the fourth." It was proved that such communication from "Jack" was an attempt to place a bet of $2 to win, $2 to place, and $2 to show on Marcliff, a horse running in the fourth race at Santa Anita on February 9.

[1, 2] It is contended that the court erred in allowing evidence obtained as the result of an allegedly illegal search of private premises and seizure of such proofs. People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. Respondent contends that the search and seizure were an incident to a lawful arrest and therefore legal. We thus have another appeal planted in the Cahan decision. But it is doomed to failure because when a police officer has reasonable cause to believe that a suspected person has committed a felony, the officer is authorized to make an arrest of the suspect and also make a search of the latter's premises and to seize such evidences of the alleged crime as may there be found. Penal Code, § 836, subds. 1, 3 and 4; People v. Simon, 45 Cal.2d 645, 648, 290 P.2d 531; People v. Soto, 144 Cal.App.2d 294, 301 P.2d 45; People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535; People v. Montes, 146 Cal.App.2d 530, 303 P.2d 1064; People v. Gonzales, 141 Cal.App.2d 604, 606, 297 P.2d 50. Appellant had the misfortune to commit his crime in the presence of the officer. While standing on the vacant lot adjoining appellant's premises, Officer Kubiak observed appellant through the latter's window performing acts commonly done by a bookmaker, which was the character given appellant by Kubiak's informant. When the officer proceeded to appellant's door, he again observed his activities through the glass door. Convinced of appellant's criminal activities, the officer entered the door forcibly. He witnessed appellant leave his desk and hasten to the bathroom where he cast the papers into the toilet bowl. Kubiak retrieved the torn papers and arrested appellant. There was no longer any doubt in Kubiak's mind of appellant's guilt. Not only had he attempted to do away with evidence of his offense, but there was the room with all necessary equipment for the operation of a bookmaker.

Prompt action by the officer in recovering a part of the evidence and in placing the culprit under arrest was justified by the necessity of having all available proofs before the court as well as the appellant himself. People v. Moore, 140 Cal.App.2d 870, 873, 295 P.2d 969. Having witnessed the commission of the felony, it was Kubiak's duty to make the arrest of the felon. Penal Code, § 836, subd. 1. An officer's delay to enter promptly the premises where a felony is being committed may enable the accused to destroy or secrete the evidence of his crime. People v. Maddox, 46 Cal.2d 301, 305, 294 P.2d 6.

The Maddox case is an accurate parallel to that at bar. The officer there had had the defendant's home under surveillance for about a month and had seen narcotic addicts frequent it. He arrested the suspect. It was, at the trial, contended that the arrest was illegal because the officer did not demand admittance as required by Penal Code, § 844, even though he had reasonable grounds for his act. The court held that because the officer had reasonable grounds for the arrest, his compliance with the requirements of section 844 would have delayed his entry "and cases might arise in which the delay would permit destruction or secretion of evidence so that what the search turns up would depend on the officer's compliance with the section. * * * When as in this case, he has reasonable grounds to believe a felony is being committed and hears retreating footsteps, the conclusion that his peril would be increased or that the felon would escape if he demanded entrance and explained his purpose, is not unreasonable." People v. Maddox, supra, 46 Cal.2d at page 305–306, 294 P.2d at page 9. Inasmuch as the officer had seen appellant doing acts that conformed with the information of his informant, it was his duty to invade the

premises and arrest the accused. Having no evidence to the contrary, the officer is presumed to have acted legally. Id., 46 Cal.2d at page 304, 294 P.2d 6. No good reason appears for strict compliance with section 844 to protect basic constitutional guaranties. Id., 46 Cal.2d at page 306, 294 P.2d 6. "We conclude therefore that when there is reasonable cause to make an arrest and search and the facts known to him before his entry are not inconsistent with a good faith belief on the part of the officer that compliance with section 844 is excused, his failure to comply with the formal requirements of that section does not justify the exclusion of the evidence he obtains." Id., 46 Cal.2d at page 306–307, 294 P.2d at page 9.

Appellant contends that inasmuch as reasonable cause must be shown to exist at a time prior to the arrest and prior to the forced entry and inasmuch as the information received from the "confidential informer" would have been insufficient upon which to secure a warrant from a magistrate, no reasonable cause existed for the arrest. In other words, he argues that the information given by the informer to Officer Norris was insufficient to constitute reasonable cause to believe that appellant was guilty of a felony, citing Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36. But the cited case is a complete answer to his contention. There the Chief of Police of San Diego received information of bookmaking from a man unknown to him which he passed on to his officers. The Supreme Court held that while such information by an anonymous informer is relevant on the issue of reasonable cause, an arrest may not be based solely upon such information and evidence must be presented to justify the conclusion that reliance on the information was reasonable. In the Willson case, the court concluded that observations made of the defendant by the officer prior to the arrest were sufficient to justify reliance on the information. So it is here. The observation of appellant through the window and the window of the door, taken in connection with the facts reported by the informant, were enough to justify reliance on the information given by such confidential informer. Here the informer was well known to the police and had been found to be reliable on previous occasions. In the case at bar the information given by a reliable informant, coupled with the observations of the officers, abundantly justified the forcible entry and arrest of appellant.

[3] Since appellant's arrest was justified, the seizure of all available evidences of his book-making pursuits in his office was not a violation of the Cahan rule. People v. Brown, 45 Cal.2d 640, 643, 290 P. 2d 528. Not only had the officer reasonable grounds for believing a felony had been committed but prior to his entry he had seen appellant doing acts usually done by a bookmaker. But he now contends that no "reasonable cause" was shown for the seizure of the papers in his office. Why should a concrete wall ten feet thick and a mile high be interposed between an accused felon and proof of his crime? To warrant a search of the house of one so accused, the officer who makes an entry needs to be possessed of only such knowledge of the suspect as would lead a person of ordinary caution or prudence to suspect and conscientiously to believe the defendant guilty. People v. Smith, 141 Cal.App. 2d 399, 403, 296 P.2d 913. Not only did Officer Kubiak have the benefit of the experience and judgment of his fellow officer who had dealt with Steinberg on prior occasions, but after having pursued that gentleman to the castle of his dreams, he witnessed the actual performance of the felony. Where such crime was done in the very presence of the officer, the latter could not escape his duty to arrest the accused pursuant to Penal Code, § 836.

The judgment and the order denying the motion for a new trial are affirmed.

FOX and ASHBURN, JJ., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

148 Cal.App.2d 817

MORTGAGE FINANCE CORPORATION, a corporation, Plaintiff and Appellant,

v.

Jere STRIZEK, Jessie Dow Strizek, and Town and Country Village, Inc., a corporation, Defendants and Respondents.

Civ. 8969.

District Court of Appeal, Third District, California.

Feb. 28, 1957.

Real estate broker brought action to recover for services allegedly performed as a broker. The Superior Court, Sacramento County, James H. Oakley, J., entered judgment adverse to the broker, and the broker appealed. The District Court of Appeal, Van Dyke, P. J., held that pendency of mandamus proceedings by real estate broker, whose license had expired without renewal, and stay order that Real Estate Commissioner, who had revoked broker's license, refrain from exercising any control over broker's business and from proceeding to revoke broker's license did not relieve broker from necessity of applying for a renewal of license and did not result in a judicial license of broker, and that therefore broker could not maintain action for services rendered after expiration of license.

Judgment affirmed.

1. Brokers ⇐42

Where license of real estate broker had expired before broker rendered services as a broker, broker could not maintain action to recover for such services, in view of provision of Business and Professions Code that no broker shall bring or maintain any action for collection of compensation for performance of any services without alleging and proving that he was a duly licensed real estate broker at time alleged cause of action arose. West's Ann.Bus. and Prof. Code, § 10136.

2. Brokers ⇐42
Mandamus ⇐171

Pendency of mandamus proceedings by real estate broker, whose license had expired without renewal, and stay order that Real Estate Commissioner, who had revoked broker's license, refrain from exercising any control over broker's business and from proceeding to revoke broker's license, did not relieve broker from necessity of applying for a renewal of license and did not result in a judicial license of broker, and therefore broker could not maintain action for services rendered after expiration of license. West's Ann.Bus. and Prof.Code, § 10136.

McDonough & Wahrhaftig, Sacramento, for appellant.

Devlin, Diepenbrock & Wulff, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

Appellant, as plaintiff, brought this action against respondents, as defendants, to recover for services alleged to have been performed by it as a real estate broker. It alleged that it was duly licensed at the time it performed the services and when its cause of action arose. Respondents in their answer denied these allegations and also generally denied the allegations as to the merits. When the cause came on for trial, the court, on motion of respondents and acting under Section 597 of the Code of Civil Procedure, first tried the special defense that appellant was not licensed. It held that the defense was made out and, accordingly, entered judgment that appellant could not maintain the action. In this the court acted under the provisions of the Business and Professions Code, Section 10136, which declares that:

> "No person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker * * * at the time the alleged cause of action arose."

It appears without dispute that appellant had been licensed as a real estate broker for the year 1950–1951; that on April 3, 1951, the Real Estate Commissioner noticed a hearing upon charges of misconduct made against appellant and on June 22 ordered that appellant's license be revoked, the order to be effective as of July 9, 1951; that on July 6, 1951, appellant filed a petition for a writ of mandamus in the Superior Court in and for the City and County of San Francisco to review the commissioner's decision, whereupon that court issued an alternative writ and at the same time made the following order: "It is hereby ordered * * * that until further order in the premises, you, the said D. D. Watson, Real Estate Commissioner, and all of your agents, deputies, employees and attorneys, do absolutely desist and refrain from exercising or attempting to exercise any control or authority over petitioner [appellant] and its business, and from proceeding to revoke petitioner's license to do business in this State." By statutory provision appellant's license would expire at midnight, June 30, 1951, unless renewed upon application. Appellant made no application for renewal prior to the expiration date, nor did it make any application for renewal thereafter.

[1] There is nothing in the law which compels a licensed real estate broker to continue in business or to renew his license, and if he does not do so he is unlicensed after the expiration date. That is the status which appellant achieved as of midnight, June 30, 1951, and which it has retained ever since. It was, therefore, unlicensed when it contracted to serve defendants as a real estate broker and when, according to its allegations, the cause of action here sued upon arose. It, therefore, came under the ban of said Section 10136 of the Business and Professions Code and the judgment of the trial court should be affirmed.

[2] Appellant contends, however, that by reason of the pendency of the mandamus proceedings and by reason of the stay order we quoted above, its license did not expire and it was not necessary for it to apply for renewal thereof. It argues that the pendency of the mandamus proceedings and the stay order of the court conferred upon it what it refers to as a "judicial license" to continue in business with all the benefits and privileges that flow from a license therefor. We do not agree.

Under the provisions of Section 1094.5 of the Code of Civil Procedure, which governs the review of administrative orders by the courts, it is provided that the court in which proceedings under that section are instituted may stay the operation of the administrative order or decision pending the judgment of the court. Similar provisions for stays are provided when and if the matter comes before the appellant courts, but the stay orders so authorized are in aid of the jurisdiction of the reviewing courts, including the superior court, and do not authorize any interference with the general powers and duties of the commissioner to supervise the actions of licensees and to enforce as against them the provisions of the laws governing their business. Although the language of the order made by the superior court appears to be broad enough to justify an interpretation such as appellant seeks to put upon it, we think it must be interpreted in the light of the controlling statutes and, so interpreted, does no more than to stay the force and effect of the order of revocation pending a determination by the court of the validity of that order. If it must be interpreted as supplanting the authority of the commissioner over appellant as a licensee or as being some sort of "judicial license", removing appellant from the control of the commissioner, then it is to that extent a void order.

Since the appellant was unlicensed when the cause of action here sued upon arose, it cannot maintain its action.

The judgment of the trial court is affirmed.

PEEK, J., and WARNE, J. pro tem., concur.

148 Cal.App.2d 815

Fred WESTBROOK et al., Plaintiffs and Respondents,

v.

SOCIAL CENTER HALL ASSOCIATION OF STOCKTON, a corporation, et al., Defendants and Appellants.

Civ. 8926.

District Court of Appeal, Third District, California.

Feb. 28, 1957.

Action brought for involuntary dissolution of nonprofit corporation. The Superior Court, San Joaquin County, George F. Buck, J., granted the relief sought, and an appeal was taken. The District Court of Appeal, Van Dyke, P. J., held that since question presented had been whether plaintiffs constituted more than one-third of total membership and were thus entitled to maintain action, validity of alleged memberships of plaintiffs was proper subject of inquiry, and held that trial court had properly made determination with regard to whether board's purported termination of certain of plaintiffs' memberships was valid.

Affirmed.

1. Corporations ⇐614(3)

Where question presented, in action brought for involuntary dissolution of nonprofit corporation, was to whether plaintiffs constituted more than one-third of total membership and were thus entitled to maintain action, validity of alleged memberships of plaintiffs was proper subject of inquiry, and court properly made determination with regard to whether board's purported termination of certain of plaintiffs' memberships was valid. West's Ann. Corp.Code, § 4650(b).

2. Corporations ⇐173

Membership in a nonprofit corporation may be terminated in manner provided in articles or by-laws, or by death of a member. West's Ann.Corp.Code, § 9608.

3. Corporations ⇐173

Nonprofit corporation's by-law, expressly empowering board to "pass upon" and "refuse" membership, gave board no authority to terminate membership. West's Ann.Corp.Code, § 9608.

See publication Words and Phrases, for other judicial constructions and definitions of "Pass Upon" and "Refuse".

Firth & Kohler, Stockton, for appellants.

Forslund & Wilson, Stockton, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment ordering dissolution of the Social Center Hall Association of Stockton, a non-profit corporation, which was organized by elderly people for social purposes and to conduct educational activities in promoting the Townsend Plan.

Memberships were for life, the initiation fee being one dollar and no dues were thereafter payable. Under the by-laws the board of directors was empowered, "To pass upon and to refuse membership to any individual when it may be deemed necessary for the good and welfare of the corporation." Purporting to act under this by-law, the board, without hearing, or charges, or notice, declared the termination of 42 memberships following internal dissension in the group, whereupon respondents brought this action for involuntary dissolution of the corporation. Respondents alleged that they had been members of the organization for a period of not less than six months and constituted more than one-third of the total membership, as required by Section 4650 of the Corporations Code, which provides:

"A complaint for involuntary winding up or dissolution of a corporation * * * may be filed * * * by:

* * * * * *

"(b) A shareholder or shareholders who have been record holders for a period of not less than six months and who hold not less than 33⅓ percent of the number of outstanding shares."

[1–3] The sole question presented on this appeal is whether or not the 88 plaintiffs in this case constituted more than one-third of the total membership of 245 and therefore whether or not the court had jurisdiction of the dissolution proceeding. The trial court found that they did and further found that the board's purported termination of 37 plaintiff memberships was null and void. Appellant attacks this latter finding on the ground that the cancellation of such memberships could not be set aside in this action. The contention is untenable. The basic issue which the trial court had to determine was the validity or invalidity of the alleged memberships of the plaintiffs. Abalian v. Townsend Social Center, 112 Cal.App.2d 441, 446–447, 246 P.2d 965. Germane to that basic issue was the validity of the purported termination of 37 plaintiff memberships which the court found to be "for life" and not subject to cancellation in the manner attempted by the board of directors. The finding must be upheld. Membership in a nonprofit corporation may be terminated in the manner provided in the articles or by-laws. Otherwise, it ceases upon the death of the member. Corp.Code, Sec. 9608. Appellant's by-laws expressly empowered the board to "pass upon" and "refuse" membership, but there cannot be implied therefrom authority of the board to terminate a membership once acquired. Whether or not the by-laws could have vested the board with such power is immaterial. The fact is they did not do so. Therefore, the board's attempt to make such terminations was a nullity and of no force or effect. Consequently, the trial court correctly held that the 37 members whose memberships had been declared cancelled were proper party plaintiffs and that the 88 plaintiffs constituted more than one-third of the total of 245 members. It may be noted that the 245 members included 68 members who had become such during the six months immediately preceding the commencement of this action. However, the 68 members were not among the 88 plaintiffs. Consequently, it need not be here decided whether or not the 68 newest members were properly counted in computing the total membership. The 88 plaintiffs, who had been members for more than 6 months, constituted more than one-third of the total membership whether the total membership be considered to have been 177 or 245. Therefore, the conditions of Section 4650 of the Corporations Code were satisfied.

The judgment is affirmed.

PEEK, J., and WARNE, J. pro tem., concur.



Garlan EPLEY, an individual doing business under the fictitious firm name and style of Retailers Credit Association, Plaintiff, Cross-Defendant and Respondent,

v.

Amelia CALIFRO, etc., et al., Defendants and Cross-Complainants,

Lena Califro, Defendant, Cross-Complainant and Appellant.*

Civ. 8959.

District Court of Appeal, Third District, California.

March 6, 1957.

Rehearing Denied April 1, 1957.

Hearing Granted May 1, 1957.

Suit on open book account. Plaintiff filed his complaint on March, 1951, and defendants in December 1951 filed answer and cross-complaint, but cause did not come on for trial until July 1955, more than three years after service of summons on defendants. The Superior Court, Yuba County, Warren Steel, J., dismissed action, but subsequently, on plaintiff's motion, entered or-

* Opinion vacated 323 P.2d 91.

der setting aside its previous order dismissing the action, and defendants appealed. The District Court of Appeal, Peck, J., held that where order dismissing action was made under mistaken impression that no appearance had been made by defendants, when record disclosed that both defendants had appeared, court had inherent power to correct its mistake and notice to defendants was not necessary to validity of final order.

Affirmed.

1. Judgment ⇐297

The court has power to correct mistakes in its proceedings, and to annul, within a reasonable time, orders and judgments inadvertently made.

2. Judgment ⇐303

Where judgment of court has been deliberately exercised in cause, and final result reached as conclusion thereof, it should not be disturbed, except by formal methods prescribed by statute, but rulings, orders, and even judgments, inadvertently made, are not result of judgment, but of oversight, neglect, or accident, and are subject to correction by judge or court making them. West's Ann.Code Civ.Proc., § 581a.

3. Judgment ⇐363, 388

Where court on its own motion dismissed action as to defendants under mistaken impression that no appearance had been made by defendants, when record disclosed that defendants had appeared by way of answer and cross-complaint, court had inherent power to grant plaintiff's motion to vacate its earlier order, and notice to defendants was not necessary to validity of final order. West's Ann.Code Civ.Proc., § 581a.

Barbagelata, Zief & Carmazzi and Henry J. Broderick, San Francisco, for appellant.

Heenan & Arnoldy, Marysville, for respondent.

PEEK, Justice.

This is an appeal by defendant and cross-complainant Lena Califro from that portion of an order of the trial court granting the motion of the plaintiff to vacate a previous minute order of the court dismissing the action as against herself. The defendant Mareck has not appealed.

From the pertinent portions of the record on appeal (which consists solely of the clerk's transcript) it appears that by his complaint, filed on March 22, 1951, plaintiff as assignor of the California Engineering & Surveying Service, sought to recover from the defendants on an open book account. On December 14, 1951, an answer and cross-complaint was filed by the defendants wherein Thomas T. Califro appeared in propria persona and as attorney for the other two defendants, Lena Califro and Andy Mareck. On September 30, 1952, an answer to the cross-complaint was filed. The cause did not come on for trial until July 21, 1955, or more than three years after service of summons on the defendants. The minutes of the court show that the only appearance was made by counsel for Amelia Califro, administratrix of the estate of Thomas; that "the court ordered said action dismissed as to Defendants Andy Mareck and Lena Califro * * * according to Section 581a of the Code of Civil Procedure"; that the cause was then heard on its merits; that various documents were introduced in evidence and witnesses were sworn on behalf of plaintiff and the remaining defendant; and that the cause was then ordered to be submitted upon the filing of briefs by the respective parties.

Thereafter on July 29, 1955, plaintiff filed his motion to vacate the prior order of submission and dismissing the action as to the defendants Andy Mareck and Lena Califro, and in support thereof an affidavit of Mr. Arnoldy, one of plaintiff's counsel, was filed. In said affidavit it was averred that subsequent to the submission of the cause, the affiant further examined the file in said action and discovered that Thomas T. Califro had filed an answer and cross-complaint on behalf of himself and the other defendants and prayed that the court vacate its order dismissing the defendants Mareck and Lena Califro from said action. Neither Lena

Califro nor Andy Mareck were served with notice of plaintiff's motion. On October 14, 1955, the court made its order wherein it noted that the previous order dismissing the action as to Lena Califro and Andy Mareck had been made "inadvertently"; that notice of plaintiff's motion had not been served upon the defendants Lena Califro or Andy Mareck or their attorneys; that the only appearance was by counsel for Amelia Califro as administratrix of the estate of Thomas Califro; that plaintiff's motion had been submitted upon counsel's affidavit and the record and proceedings taken in said action, from which the court concluded that said order should be entered setting aside the previous order. It is from this order that Lena Califro now appeals.

Section 581a of the Code of Civil Procedure provides in part that:

"All actions, heretofore or hereafter commenced, must be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if summons has been served, and no answer has been filed, if plaintiff fails, or has failed, to have judgment entered within three years after service of summons, except where the parties have filed a stipulation in writing that the time may be extended."

[1] However, independent of statutory provisions, it has long been the rule that, "* * * the court has power to correct mistakes in its proceedings, and to annul, within a reasonable time, orders and judgments inadvertently made. * * * Where the judgment of a court has been deliberately exercised in a cause, and a final result reached as a conclusion thereof, there are good reasons why it should not be disturbed, except by the formal methods prescribed by statute; but rulings, orders, and even judgments inadvertently made are not the result of judgment, but of oversight, neglect, or accident, and are subject to correction by the judge or court making them." Wiggin v. Superior Court, 68 Cal. 398, 402, 9 P. 646, 648; see also Hall v. Polack, 42 Cal. 218.

Thus it was held in Krug v. Meehan, 108 Cal.App.2d 416, 417, 239 P.2d 46, 47, a case not wholly unlike the present, that where an appeal had been dismissed as being premature under a mistaken assumption that the issues raised by a cross-complaint had not been disposed of when, as a matter of fact, the cross-complaint has been dismissed, the court properly vacated the order of dismissal concluding that under the circumstances it not only had "* * * the inherent power but the duty to vacate its former judgment." Also, where in an action for unlawful detainer a writ of restitution signed by the judge who tried the case was thereafter ordered recalled by another judge, it was held not to be an abuse of discretion of the latter to set aside and vacate the order made by him and restore the original order, since he did not know at the time he made the former order that relief of similar effect had been denied by the judge who tried the case at the time that judge issued the original writ of restitution. Watkins v. McCartney, 70 Cal.App. 137, 232 P. 982. A similar conclusion was reached in Bastajian v. Brown, 19 Cal.2d 209, 120 P.2d 9, where the trial court signed findings of fact under the mistaken belief that they had been served on the opposing party as provided in section 634 of the Code of Civil Procedure. There the court held that under the inherent power of the court, it can vacate and correct its judgments which are improvidently or inadvertently made. See also Robson v. Superior Court, 171 Cal. 588, 154 P. 8.

[2, 3] It is quite apparent from the record before us that when in the present case the court on its own motion dismissed the action as to Lena Califro and Andy Mareck pursuant to section 581a of the Code of Civil Procedure, it did so under the mistaken impression that no appearance had been made by them, when in truth the record then before the court disclosed that both defendants had appeared by way of answer and cross-complaint. This conclusion is further strengthened by the order of the court in granting the motion to vacate its

earlier order when at the very outset thereof it was stated that such order had been "inadvertently" made.

Since the action taken by the trial court herein would appear to be within the rules enunciated as regards the inherent power of the court to correct such mistakes, it necessarily follows that notice was not necessary to the validity of the final order. Morgan v. State Board of Equalization, 89 Cal. App.2d 674, 677, 201 P.2d 859.

The order is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



149 Cal.App.2d 29

C. Eugene SMITH, Plaintiff and Appellant,

v.

Vernon R. SMITH and Raymond V. Smith, Defendants and Respondents.

Civ. 5364.

District Court of Appeal, Fourth District, California.

March 8, 1957.

Rehearing Denied April 1, 1957.

Hearing Denied May 1, 1957.

Action for accounting, for declaratory relief, and for judgment for value of withdrawing partner's interest in partnership. The Superior Court of Tulare County, Robert K. Meyers, J., rendered judgment and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that under the circumstances the withdrawing partner was entitled only to book value of his interest in partnership on date of his withdrawal.

Affirmed.

1. Partnership ⇐336(3)

In action by withdrawing partner for value of his interest in partnership, record disclosed that dissolution was under original partnership agreement which provided that withdrawing partner was to receive net book value of his share.

2. Partnership ⇐336(3)

In action by withdrawing partner for value of his interest in partnership, record disclosed that audit and report correctly set forth the value of such partner's interest.

3. Partnership ⇐346

Under the articles of partnership, withdrawing partner who had 20 per cent interest in partnership was properly charged with 20 per cent of cost of preparation of auditor's report and statement.

4. Partnership ⇐80

Where partnership agreement provided that value of withdrawing partner's interest was to be determined by net book value as of a particular date, there was no error in the court's refusal to grant withdrawing partner's request for permission to inspect partnership books in connection with transactions after such date.

Francis T. Cornish, Berkeley, for appellant.

McCormick, Moock & McCormick, Visalia, for respondents.

BARNARD, Presiding Justice.

This is an action for an accounting, for declaratory relief, and for judgment for the value of plaintiff's interest in a partnership.

The defendant Vernon R. Smith was the sole owner of an olive packing plant and business known as the "V. R. Smith Olive Company." In 1951, desiring relief from some of the burdens of the business because of his age, he formed a partnership with his three sons and allowed them to pay for their interest in the partnership out of the profits, except for an initial gift of $13,000 to each son for that purpose. Articles of Copartnership dated April 1, 1951, were executed by Mr. Smith as senior partner, and by the sons Leslie Smith, Raymond Smith, and Eugene Smith as junior partners.

These articles provided, among other things, that the nature and extent of the partnership property should be as shown on the opening books of the partnership, together with later acquired assets; that the fiscal year of the partnership should commence on April 1 of each year; that no partner should terminate his association with the others except by giving three months notice prior to the end of a fiscal year; that the senior partner should have a 55% interest in the partnership and the junior partners should each have a 15% interest; that the partners should receive compensation for their work as agreed upon, such compensation to be considered an expense of the partnership; that full and correct books, accounts and records should be kept; and that at least once each year a statement of the operation of the partnership should be rendered to each partner.

Article 9 provides that if termination of this partnership "shall be caused by one or more, but not all, of the Junior Partners, such act shall not require or cause a winding up of this partnership, but this partnership may be continued by the remaining partners in accordance with the terms hereof, and the withdrawing partner, or partners, shall be entitled to receive, in cash, from said partnership an amount equal to the net book value of his share in said partnership as of date of his withdrawal, such amount to be payable in six equal semi-annual installments, without interest; the first installment being payable six months after date of termination." It further provides that if the senior partner should cause such termination the business shall be wound up, and that the partners shall be paid their interests in the same manner. It was further provided that:

> "Net book value of the partnership business shall be the value of all partnership assets and property as fixed, determined and carried upon the books of the partnership, exclusive of any allowance of value for good will and name, less all debts and obligations as may then be owing by the partnership."

The parties also executed another agreement providing for the duties and salaries of the partners. It was agreed that the junior partners should devote all of their time and effort to the business and relieve the senior partner of as many of his duties as he desired; that the senior partner should be free to devote as much time to the business as he desired, but that he was to retain control of the business to the extent he considered necessary for its efficient management; that the salary of V. R. Smith should be $1,000 a month, that of Leslie $650 a month, that of Raymond $550 a month, and that of Eugene $500 a month. It was further provided that the acquisition of the 15% interest of each junior partner had taken place at book value, that V. R. Smith had made gifts to each of the three sons in the amount of $13,000 each, and that the balance of $17,419.43 was payable in three equal annual installments.

The capital of the partnership was contributed entirely by Vernon R. Smith. The partnership books were set up showing certain assets and certain liabilities, with a net value of $237,093.51. There was never any formal transfer of the assets to the partnership or any formal assumption of the liabilities by the partnership, but the business was carried on by the partners as though this had been done. While some of the provisions of the articles were not strictly complied with, the things done were with the consent of all of the partners and their intentions clearly appear. During the first few months they thus changed the ending of the fiscal year from April 1 to September 30 to correspond with the close of the actual business year, and the first auditor's report and statement of the condition and operation of the partnership was made as of September 30, 1951. A second such report was made as of September 30, 1952 and the final report as of September 30, 1953. These reports were all made by the same firm of certified public accountants although the name of the firm was changed in part as one member of that firm died and another man took his

place. The first two reports were made by the man who died, and the last report by the man who took his place, who had worked with him, and who followed the same method of accounting that had been followed from the beginning.

Leslie Smith withdrew from the partnership as of September 30, 1951. No formal documents were executed in that connection but each of the remaining partners acquired one-third of Leslie's interest, and they continued the business. It is undisputed that thereafter V. R. Smith's interest was increased to 60% and the interests of Raymond and Eugene were increased to 20% for each of them. One-third of the amount to be paid Leslie was charged on the books to each of the continuing partners, and when Eugene withdrew from the partnership on September 30, 1953 he still owed $5,588.39 for the additional 5% interest which he acquired when Leslie withdrew. By agreement between the parties the value of Leslie's interest was being paid to him by the partnership at the rate of $400 a month, instead of in six semi-annual payments as provided for in the partnership articles. Apparently, the value of that interest was determined as provided for in the articles.

Trouble developed between Eugene and his father in the summer of 1953. The father complained that Eugene refused to do certain work assigned to him; that he absented himself from the business; that he countermanded orders and otherwise interfered with the work of others; and that he called the father a "liar". Eugene complained that his father did not tell him all about the business. The accountant tried unsuccessfully to get them to agree to go on working together. Eugene told the accountant that he wanted to withdraw from the partnership, and the father asked Eugene to withdraw. On July 18, 1953, the three partners signed a typed statement reading in part: "The partners agree that the partnership is to be dissolved as to the partner Clarence Smith as of September 30, 1953, provided that renewed attempts of all of them do not result in a change of minds. * * * Clarence shall have the option to continue as an employee for three months to December 31 1953 at a salary of $500 per month." The hoped-for reconciliation did not take place and Eugene withdrew from the partnership as of September 30, 1953. He remained as an employee for three months for which he was paid $500 per month. This arrangement was made because Eugene needed something to live on, as it was then too late to get a job teaching school. He had formerly been a schoolteacher, his salary being $180 a month a year or two before this partnership was formed. The remaining partners started to pay Eugene for his interest in the partnership by paying him $400 on January 1, 1954, and $400 on February 1, apparently with the idea of doing the same as they were doing with Leslie. Eugene became dissatisfied, a controversy arose, and this action was brought on May 5, 1954.

The action was partially tried on two days in November, 1954, whereupon it was continued at the plaintiff's request for the purpose of giving a certain auditor an opportunity to examine the books and records of the partnership. The trial was resumed in April, 1955. At the outset of that hearing the question was asked as to whether the plaintiff had examined the books of the partnership and plaintiff's counsel replied "We have not". The trial then continued for three days.

The auditor's report as of September 30, 1953, stated that the net book value of Eugene's interest in the partnership as it appeared on the books amounted to $39,912.72. Among other things, the court found that this audit report on the books of the partnership is correct and accurate, except as it reflects the situation with respect to an automobile which was retained by the plaintiff, and that this discrepancy was caused by the plaintiff. After making the proper correction in this connection the court found that the plaintiff's share in the net book value of the partnership was $38,785.69; that from this amount should be deducted one-third of the bal-

ance still owed by the partnership to Leslie Smith for the purchase of his interest; that this amount should be further reduced by $694.15, being the plaintiff's 20% share of the cost of the audit of the partnership books as of September 30, 1953; and that it should be further reduced by the $800 which had already been paid the plaintiff. It was further found that the parties agreed on July 18, 1953 that the partnership would be dissolved as of September 30, 1953 under the provisions of Article 9 of the Articles of Copartnership, and it was terminated under the terms of that agreement; that this termination was caused by the plaintiff; that it is not true that the defendants ever prevented the plaintiff from participating in the business of the partnership; and that it is not true that they ever prevented him from having access to the books of the partnership, or withheld any information from him regarding the financial condition of the partnership or the partnership books and records. Judgment was entered accordingly awarding the plaintiff $31,703.14, payable in six semi-annual installments commencing April 1, 1954, with interest after each installment became or becomes due. The plaintiff has appealed from this judgment.

[1] At the conclusion of the trial the matter was submitted to the court on briefs. In his brief the plaintiff argued that he was entitled to the actual cash value of his interest in the partnership, instead of the net book value shown on the books. He stated that he was willing to accept the report and statement of the accountant for the purpose of determining the value of his interest, but argued that the value of his interest as thus shown should be increased by adding certain items in order to show "the actual value instead of book value." As to the amount that should be awarded him, the main contentions here made are with respect to three of the additions for which the plaintiff contended in the trial court, and as to which the court held against him.

The appellant's first contention is that he was entitled to the actual value of his interest in the partnership on the date of his withdrawal, that this amount was due at that time, and that he was entitled to interest thereon from that date. It is argued that the partnership was dissolved as to him by mutual consent under the agreement of July 18, 1953, and not under the terms of the partnership agreement; that September 30 was not the end of the fiscal year as fixed by the Articles and three months' notice was not given; that since the Articles of Copartnership made no provision for a dissolution by mutual consent the general corporation law of the state governs, and the provisions of the Articles as to how his interest should be arrived at, or how paid, should not be considered; and that the court's finding to the effect that the partnership was dissolved as to the appellant under the terms of the partnership agreement is not sustained by the evidence. While the "agreement" of July 18 was signed by the parties a little less than three months before the end of the fiscal year, as changed and acted on throughout the partnership, it clearly appears from the language there used and the conduct of the parties that the agreement of July 18 was intended merely to provide for a termination as to Eugene at a certain date, and that it was not intended to change or affect the provisions of the Articles with respect to how that dissolution should be accomplished or how the value of his interest should be determined. That this was also the appellant's understanding is sufficiently shown by his complaint, to which he attached a copy of the Articles of Copartnership, and in which he alleged "that pursuant to the terms and provisions of" the partnership agreement there became due to him on March 31, 1954 an amount equal to one-sixth of his interest in the partnership, and that there would become due to him on each September 30 and March 31 thereafter up to September 30, 1956, an amount equal to one-sixth of the value of his

interest. In the prayer of his complaint he prayed that the value of his interest in the partnership be ascertained and that he have judgment for that amount, payable in six installments in accordance with the above allegation of his complaint. The court's findings in this regard are in accord with the partnership agreement and the allegations and prayer of the complaint, and conform with the intention of the parties as disclosed by the evidence. While the evidence supports the finding that the dissolution as to the appellant was caused by him it makes no practical difference whether it was caused by him or by his father, since under the terms of the partnership agreement the appellant is entitled to the same relief in either event.

[2] It is further contended that the audit and report of September 30, 1953, which was adopted and used by the court, was not a true, correct or accurate report and did not correctly set forth the value of appellant's interest in the partnership; that it was not prepared in accordance with the best established methods of accounting; and that it resulted in four errors in determining the value of appellant's interest, only one of which was corrected by the trial court, that being the one in connection with the automobile. This audit was prepared before any controversy arose as to how payment should be made to the appellant. It was prepared by an established firm of certified public accountants, and the same methods of accounting were followed as had been used in each of the preceding accounts and reports for the previous fiscal periods. It was supported in all respects by the testimony of the accountant who prepared it. A certified public accountant who was called by the appellant testified that he could not say that the account was wrong in any particular, that there were some things in it that he would like to ask questions about, and that he thought this report "was probably as accurate as could be made at that time." The finding that this audit report of the books of the partnership as of September 30, 1953 is correct and accurate, except for the matter of the automobile which was corrected, is sustained by the evidence.

The first of the errors in accounting claimed by the appellant is in respect to the percentage used in reducing the value at which finished goods were carried or shown on the inventory on the books of the partnership for that year. The inventory showed a certain amount of finished goods on hand, and in valuing these goods on the audit report the auditor reduced the inventory figure by 30%. It was conceded by everyone, including all of the accountants who testified, that some such reduction should be made to cover anticipated costs of selling and other charges properly to be considered in that connection. One accountant who testified for the appellant testified that he would have used a reduction figure of 25.34% instead of 30%, and that he based this on the experience shown by the profit and loss sheet of the preceding year. While this witness testified that under good accounting practice "Your past year's experience would be about the best thing to go by", he also testified that "Of course, it would be adjusted by the field of the market at that particular time," and that what would be done would vary according to whether you were going into an "up market" or a "down market". The accountant who prepared the report testified that in arriving at the 30% he took into consideration the experience of the last three years and, after making an inquiry as to the various items of expense, tried to come as near as possible to the probable costs and proper charges. The preceding year a figure of 28% was used and in the 1951 report 40% was used. An accountant called by the appellant testified that on the figures shown on the inventory an allowance of 32.17% would not be out of line, and that "I would say that somewhere in that neighborhood would be probably a fair figure." If in making this deduction the figure of 25.34% had been used instead of 30% it would have added about $5,000 to

the amount to which the appellant would be entitled. However, the evidence in this regard, although conflicting, sufficiently sustains the finding made.

It is next contended that the audit report failed to include an amount covering prepaid freight and storage charges on certain finished goods which were stored in outside warehouses, which amount would probably be later collected. It is argued that about $200,000 worth of goods were stored in warehouses back east on which freight and some storage charges had already been paid; that the practice was to add such charges to the selling price when the goods were sold; that on $21,000 worth of goods which were actually sold about $2,500 was thus added to the selling price; that on a similar basis the value of all the goods stored in outside warehouses would probably be increased by about $25,000; that these "recapturable" freight and storage charges were an asset which should have been included in the audit report; and that the appellant's recovery should have been increased by about $5,000. While it was the usual practice to add such freight and storage charges to the price of the goods when sold, no one could tell in advance what the total selling price of the goods would be, and further storage and possible freight charges might well be incurred. Both the amount of any recapturable charges and the prices that would ultimately be received for the goods were unknown at the time in question. These goods were carried on the books at their estimated value, which was all that could be done. The partnership agreement provided for a settlement on the basis of the assets as shown on the books at the time of withdrawal of a member, and no such anticipated asset could logically be, or was, shown on the books at that time. No such asset had been shown on the books during any previous year, and if such a change in the method of keeping books should now be made it should logically relate back to the beginning of the partnership, with a corresponding increase in the cost of the appellant's interest therein. Under the facts and circumstances shown by the record, and in view of the agreement of the parties and their conduct, the court was justified in refusing to include this as an existing asset shown on the books of the partnership.

It is next contended that error appears in the auditor's report in that the full book value of certain corporate stock was not included as an asset of the partnership. It appears in this connection that V. R. Smith owned all of the stock of a corporation known as "Associated Olive Oil Company", this being one of the assets which he turned over to the partnership. The stock had cost Mr. Smith $20,000. On October 1, 1950, six months before the partnership was formed this stock had a book value on the books of the corporation of only $13,985.74. On September 30, 1951, six months after the partnership was formed it had a book value of $13,755.45. When the books of the partnership were opened this stock was given its cost value of $20,000, and it has always been carried on the books of the partnership at that value. However, it has been listed as an asset under the heading of the "Investment in" that corporation, and by adding to the $20,000 the amount advanced to the corporation, deducting the amount currently owed by the partnership to the corporation for olive oil purchased, and listing the net amount as an asset. While the auditor's report here in question stated that the book value of this stock was $34,301.27, the investment in the corporation was listed as an asset of $24,253.25, being $20,000 plus advances of $16,200 and less $11,946.75 currently owed to the corporation. The appellant contends that the book value of this stock had increased by $20,315.53 since October 1, 1950, (six months before the partnership was formed) and that he is entitled to one-fifth of that increase. It appears that the book value of this corporate stock had fluctuated considerably from time to time. The corporation was handled as a separate business, and on the books of the partnership its actual investment in the corporation was carried as one of the

assets. A public accountant, who testified for the appellant, testified that on an equitable basis the increase in the book value of the stock might well be considered as a profit, but that the matter could properly be carried on the books of the partnership in either of two ways, by carrying it at its cost value or by "earmarking" an increased value of $14,000. The total investment in the corporation was carried on the books of the partnership as an asset at all times, and the agreement provided for a division of the assets as shown on the books. The court was justified in accepting the auditor's report in this connection.

[3] It is further contended that the court erroneously charged the appellant with 20% of the cost of preparation of the auditor's report and statement of September 30, 1953. It is argued that a retiring partner ought not to be charged with the cost of determining the value of his interest and that, if the Articles of Copartnership are considered, the expense of preparing this statement was an obligation which the partnership incurred after September 30, 1953. The Articles of Copartnership provided that full books and accounts should be kept showing the partnership business, and that at least once a year a statement of the operation of the partnership should be furnished to each partner. A regular auditor was hired and this was the third of such audits and reports which were regularly made. Although a large part of the work of preparing this report may have been done after September 30, 1953, the obligation to prepare this report existed before that date, with a corresponding obligation to pay for it.

[4] No error appears in the court's refusal to grant the appellant's request for permission to inspect the partnership books in connection with transactions after September 30, 1953, since under the agreement the value of his interest was to be determined by the net book value as of that date. The appellant argues at some length about another obligation which was in fact assumed by the partnership, although he admits that this point should not be considered. We are not impressed with the argument that the judgment appears inequitable since the appellant paid $38,869 for his interest in the partnership and the court found that he should be allowed only $32,503, of which he had already been paid $800. The court found that he was entitled to $39,912 less certain amounts for which he was still obligated. While he put no money into the partnership, except for $900 toward the purchase price of a $3,150 automobile which he retained, he has received $49,753, including salary, the automobile and the judgment, for his 2½ years' work in the partnership business. He entered the partnership under an agreement which provided how the value of his interest would be determined. The evidence supports the court's findings, and its refusal to adopt another and different method of determining the value of that interest.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



148 Cal.App.2d 890

Cornie QUIRING and Rachel Quiring, his wife, Plaintiffs and Respondents,

v.

Attilio ZAMBONI and Louise Nettie, Defendants,

Attilio Zamboni, Appellant.

Civ. 8909.

District Court of Appeal, Third District, California.

March 4, 1957.

Guest passenger's action against her driver and driver of oncoming vehicle with which her driver collided while endeavoring to make left turn off highway.

The Superior Court, Shasta County, Richard B. Eaton, J., directed a verdict for plaintiff's driver but rendered judgment for plaintiff as against driver of oncoming vehicle, and an appeal was taken. The District Court of Appeal, Van Dyke, P. J., held that it had been within trial court's discretion to permit plaintiff's driver to wait until after argument before moving for directed verdict, and that such a procedure could not have been prejudicial to appellant, who was allowed to re-argue case and clear up any confusion which might have resulted from belated motion.

Affirmed.

1. Appeal and Error ⇐1061(4)
Trial ⇐173

In guest passenger's action against her driver and driver of oncoming vehicle with which her driver collided while endeavoring to make left turn off highway, it was within trial court's discretion to permit plaintiff's driver to wait until after argument before moving for directed verdict; and such a procedure could not have been prejudicial to other defendant, who was allowed to re-argue the case and clear up any confusion which might have resulted from belated motion.

2. Trial ⇐312(2)

In guest passenger's action against driver of oncoming vehicle with which her driver collided while endeavoring to make left turn off highway, post-retirement instruction, informing jurors that defendant would be liable for any injury proximately caused by his negligence and directing them to make written finding as to his negligence, was not subject to claimed infirmities of being, in effect, a direction to jurors to return verdict for plaintiffs if they found any negligence whatsoever on defendant's part or of tending to influence jury to disregard rule requiring plaintiff to prove causal connection.

3. Appeal and Error ⇐1069(2)
Trial ⇐307(3)

In guest passenger's action against driver of oncoming vehicle with which her driver collided while endeavoring to make left turn off highway, it was error to permit depositions, which had been introduced in evidence, to be taken to jury room; but, on record presented, such error would not require reversal of judgment for plaintiff. West's Ann.Code Civ. Proc., § 612.

L. C. Smith, Redding, for plaintiffs-respondents.

William J. Connolly and Donald F. Farbstein, San Francisco, and Frank Shuman, Redding, for defendant-appellant.

Glenn D. Newton, Redding, for defendant-respondent Nettle.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered upon a jury's verdict which awarded respondents $15,000 as general and special damages sustained by them when Mrs. Quiring was injured in a collision between an automobile driven by appellant Zamboni and an automobile being driven by defendant Mrs. Nettle, with whom Mrs. Quiring was riding as a guest. Appellant does not challenge the sufficiency of the evidence as to actionable negligence or resultant injury and damages, but complains of error by the court in: 1. Allowing depositions to be taken into the jury room; 2. Permitting appellant's co-defendant Mrs. Nettle to move for a directed verdict in her favor after arguments had been concluded; and, 3. Giving erroneous instructions to the jury during the jury's deliberations.

The record discloses the following: Mrs. Nettle was proceeding north on a two-lane main highway beyond Redding when she decided to stop at a roadside restaurant on the west or left side of the highway. Before attempting to cross she

pulled off on the right-hand shoulder to let oncoming cars pass, then seeing no vehicles approaching from either direction she proceeded to cross to the restaurant. She indicated her intention to turn left by use of the directional signals with which her automobile was equipped.

It was late in the afternoon on a clear, dry day and there were no physical obstructions to a view of the highway in either direction for approximately 250 feet. She had crossed both lanes of the highway and was entering the restaurant premises when her car was struck broadside by that of appellant who was traveling south. Mrs. Quiring testified when she first saw appellant's car it was 300 feet distant and coming at a terrific rate of speed. It laid down skid marks for 150 feet. Mrs. Nettle did not see appellant's car until a moment before the impact. Appellant testified that he observed Mrs. Nettle's car when it was parked on the shoulder, but thereafter he was watching oncoming traffic and did not see her crossing the highway until her car was directly in his path at a distance of only 40 to 60 feet. He said he applied his brakes and swerved off the highway to the right in an attempt to avoid the collision.

[1] At the close of testimony, counsel for Mrs. Nettle stated that he wished to make a motion for a directed verdict in her favor but did not want to do so until after the argument, as he wanted to be sure the facts would not support a holding of wilful misconduct on her part and for that purpose desired to listen to opponent's argument. The court expressed concern at deferring the motion in that way lest confusion be introduced into the case. Appellant's counsel did not at that time object to this procedure. After the arguments were in, counsel for Mrs. Nettle asked leave to make his motion, and appellant's counsel then did object, claiming that counsel had waived his right to make the motion by reserving it and permitting argument to be addressed to the jury on the subject of Mrs. Nettle's liability and by arguing the matter himself. The objections were overruled and the motion was made and granted, the court stating that it would allow appellant's counsel to re-argue the case if he desired. This offer was accepted but with a reservation of his objection, and counsel did argue further, pointing out to the jury the changed aspects of the case and explaining to them that the issue of his client's liability was in no wise affected by the dismissal from the cause of Mrs. Nettle. It was within the court's discretion to permit the belated motion. Gibson v. Southern Pacific Co., 137 Cal.App.2d 337, 346, 290 P.2d 347. Furthermore, we think that appellant failed to show how he was prejudiced by the procedure followed in view of his re-argument, which appears to us to have cleared up any confusion which might have resulted from the motion having been made and granted after argument.

[2] After retiring for deliberation the jury returned to court with the following written query: "What constitutes negligence? Can we say that he was negligent but not to the point where he should pay comp." In response the court reread the original instructions on negligence and then stated: "If you believe defendant Attillio Zamboni was guilty of negligence, he is liable for any injury proximately caused thereby. If you do not believe said defendant was guilty of negligence, he is not liable. You must decide this issue, and cannot straddle it. You will add at the foot of your verdict a hand written finding 'Defendant Attillio Zamboni (was) or (was not) guilty of negligence.'" The court followed this with the usual instruction that the jury must consider the instructions as a whole and then asked the jury if he had answered their questions and whether or not the jury desired to ask further questions. Receiving no response, the court returned the jury to the jury room for further deliberations. Appellant argues that the sup-

plemental instruction we have quoted was in effect a direction to the jury to return a verdict for plaintiffs against Zamboni if they found any negligence whatsoever on his part and was not an answer to the question presented. He argues that the court should clearly have told the jury the appellant was liable to pay compensation only if the negligence found was the proximate cause of the accident and of the injuries to Rachel Quiring, if the jury found her to have been in fact injured at all. Appellant had denied in his answer that she had been injured, and at least concerning the extent of the injuries the evidence was sharply in conflict. We think appellant's arguments untenable. The supplemental instruction expressly required both negligence and proximate cause as conditions to recovery, and the general instructions had properly defined proximate cause. The jury must have understood that appellant not only had to be guilty of negligence, but that his negligence had to be a proximate cause of the injuries actually sustained before a verdict against him could be rendered. The court was not required in responding to the jury's question to redefine proximate cause and appellant's counsel did not ask the court to do so. Appellant complains further of the court's requiring a special finding of the jury as to presence or absence of negligence on the part of appellant, saying that the written requirement would tend to influence the jury to disregard the rule that a plaintiff must prove causal connection between any negligence found and the injuries complained of. We do not think the requirement of a written finding as to negligence was fitted to have such an effect upon the jury. The court admonished them expressly when giving the supplemental instruction and requiring the written finding that they must consider all of the instructions that had been given to them, and it cannot be assumed that they disregarded the rule of proximate cause.

[3] Appellant further assigns as error the act of the trial court in permitting depositions which had been introduced in evidence to be taken to the jury room. This, of course, did violate the express prohibition contained in Section 612 of the Code of Civil Procedure and would have constituted sufficient ground for the granting of a new trial. Brandwein v. Rodriguez, 133 Cal.App.2d 433, 436, 284 P.2d 130. Motion for a new trial based in part on this error was made and denied. After a careful examination of the record we have concluded that the error will not justify reversal. The depositions were those of the three parties to the action, that is, those of Mrs. Quiring, Mrs. Nettle and appellant. All three had testified as witnesses in the cause, and under cross-examination some discrepancies between their testimony and their depositions had been pointed out. We cannot assume that if the jury read the depositions that they singled out any one and ignored the others. Generally speaking, the depositions comported with the testimony of the deponents at the trial. It does not affirmatively appear from the record that appellant objected to the jury having the depositions at the time they were taken into the jury room. Neither does it appear that the jury requested the depositions. Apparently the court, while instructing the bailiff to conduct the jury to the consultation room, also directed him to take with him and leave with the jury the exhibits, including the depositions. We think it only fair, however, to dispose of this issue upon the assumption that objection was made, since, on argument of the motion for new trial, respondents' counsel did not deny appellant's assertion that objection had been made. Absent such objection, the trial court was still bound by the statutory mandate, Sec. 612, C.C.P. and erred in permitting the depositions to be taken to the jury room. However, an examination of the entire record has convinced us that the error did not result in a miscarriage of justice and,

therefore, we cannot, under the admonition of Article VI, Section 4½, of the California Constitution, reverse the judgment.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.



149 Cal.App.2d 1

In the Matter of the ESTATE of Mary Ethel SITTON, Deceased.

Beatrice E. SITTON, Individually and as Special Administratrix of the Estate of Elgan W. Sitton, deceased, Contestants and Appellants,

v.

Lila Lillian HARVEY, Proponent and Respondent.

Civ. 8786.

District Court of Appeal, Third District, California.

March 8, 1957.

Probate proceeding. The Superior Court, Butte County, J. F. Good, J., admitted a lost holographic will to probate, and contestant appealed. The District Court of Appeal, Warne, J. pro tem., held that the evidence sustained the order admitting the will to probate and dismissing the contest thereof.

Affirmed.

1. Wills ⇐302(8)

In proceeding for probate of lost will, existence of will at testator's death can be proved by circumstantial evidence and inferences which may reasonably be drawn therefrom.

2. Wills ⇐302(8)

In proceeding for probate of lost holographic will, evidence sustained order favorable to proponent.

3. Wills ⇐334

In proceeding for probate of lost holographic will, finding that will had been in existence and unrevoked at time of decedent's death did not conflict with finding that due search and inquiry after her death had failed to produce will, and neither of such findings conflicted with further finding that will was lost sometime between day it was executed and day after decedent's death, and such findings were not lacking in any essential element to sustain order admitting will to probate.

4. Wills ⇐386

In proceeding to probate lost holographic will, it was function of trial court to weigh testimony of witnesses and pass upon its credibility and to resolve conflicts and harmonize seeming conflicts if possible.

5. Wills ⇐130

Material fact was that lost holographic will was dated, and specific date was immaterial.

Ware & Kutz and George P. Kading, Chico, for appellants.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for respondent.

WARNE, Justice pro tem.

Contestants appeal from an order admitting a lost holographic will to probate and dismissing the contest thereof. Proponent of the lost will was Lila Lillian Harvey, sister of decedent, Mary Ethel Sitton, hereafter referred to as Ethel Sitton. Contestants were Elgan W. Sitton and Beatrice E. Sitton, parents of the deceased husband of the decedent. Contestant Elgan W. Sitton having died during the pendency of the proceedings, the appellants are Beatrice E. Sitton, individually and as special administratrix of the state of Elgan W. Sitton, deceased.

Ethel Sitton, the decedent, was the surviving widow of G. W. (Buck) Sitton, the son of Elgan W. and Beatrice E. Sitton and when Buck died, she inherited his en-

tire estate, all of which was community property. There were no surviving children of the marriage.

Ethel Sitton died September 14, 1952, as the result of injuries sustained when an automobile she was driving overturned. No will was found. At the time of her death, the decedent resided in her own home at Durham, a few miles south of Chico, California. She worked as a bookkeeper for an appliance store in Durham, managed by Robert Edmiston. Another employee of the store was Eugene Conant.

In June of 1952, Ethel scheduled a trip east with a Mrs. Steadman. Prior to her departure she sought an appointment with attorney James William Morgan of Chico about making a will. This appointment and a subsequent appointment were not kept, but either on June 18 or 19, 1952, during a telephonic conversation he instructed her on the requirements of a holographic will. Morgan testified that following this conversation, "right shortly before" noon on the 19th, Ethel came to his office, identified herself, showed him a piece of paper and asked him if it was any good. The instrument was purportedly witnessed by Eugene Conant and Robert Edmiston. It was dated either the 18th or 19th of June, 1952. To the best of Mr. Morgan's recollection the instrument read: "To whom it may concern, I am going on a trip east and in the event that anything happens to me (death) all my possessions are to go to Lila Harvey." He further testified that he asked her if she signed it and she said she had.

Eugene Conant testified that he signed the instrument Ethel executed, although he did not remember whether the will was dated. He stated that when he first saw the instrument Ethel had just finished writing it and was signing her name. He stated that he was familiar with Ethel's handwriting, and that it was entirely in her handwriting; that he read the will, and by its terms all of her property was left to her sister, Lila.

Robert Edmiston testified that on the 18th or 19th of June, Ethel Sitton phoned him and asked him to sign a letter that was on his desk at the store where they both worked. The next morning he read and signed the letter as a witness. He stated that it was entirely written, dated and signed in Ethel Sitton's handwriting. He also testified that the letter read: "To whom it may concern, I am leaving on a trip east, if anything should happen to me, all my worldly belongings to go to my sister Lila Harvey, * * *." It was signed "Mary Ethel Sitton". He also testified that when he signed it, Eugene Conant's signature was on it.

There was testimony that after Ethel made the will, she had often declared to friends and relatives that she wanted her property to go to her sister, Lila. Mr. Conant testified that Ethel mentioned the will and to whom her property was to go, at her home in August of 1952. He also testified that on September 13, 1952, at the store in Durham, Ethel said, "some day she knew everything she had would go to her sister, Mrs. Lila Harvey". Mrs. Steadman testified that before they left on the eastern trip, Mrs. Sitton said, at the Steadman home, on June 20, 1952, "I even made out a will", and that on the way back from the eastern trip, Mrs. Sitton said, "everything was fixed up 'for my sister'". A Mrs. Cudd testified that in Mrs. Sitton's cabin at Butte Meadows two weeks before her death, Mrs. Sitton mentioned her will and stated that "she thought everything was settled and that she had left everything to Lila". And when asked, "Did she tell you then she had a will made out?" Mrs. Cudd answered, "As far as I remember, yes, she had a will, I know she had taken a trip before then * * * and she told me she had things fixed * * * so her sister would have everything". Mrs. Krajcerik testified that at the Butte Meadows cabin in August, 1952, Mrs. Sitton said, "she had made out her will and was leaving everything to mother". Mrs. Krajcerik and her mother, Lila Harvey, the respondent, were present at a dinner on September 10, 1952, celebrating the 50th birthday of Mrs. Sitton. Mrs. Krajcerik

testified that on that occasion Mrs. Sitton told "mother she had everything fixed for her so mother would have whatever was hers". And referring to what Mrs. Harvey said on that occasion, Mrs. Harvey testified, "She told me that night she had it fixed so I would get everything".

A Mrs. Hadley, an employee in a grocery store next door to the appliance store in which Ethel worked, and an acquaintance of Ethel, testified that on the day that Ethel left on her trip east she had a conversation with her in which Ethel said, "Well, I am going home to make my Will"; and, asked whom she was going to leave her money to, Ethel said, "I guess I will leave it to my sister on this trip"; that after Ethel returned from the east, she had another conversation with her in which the will was again mentioned, and that Ethel said, "But I tore that up". It is to be noted that this statement, in part, is contrary to Ethel's statements made to several of the other witnesses at a later date and amounts to nothing more than a conflict in the evidence.

At about 2:10 A.M. on September 14, 1952, Mrs. Sitton left a cafe in the town of Orland and had driven her car about five miles east thereof, when the accident occurred. Her purse was found about 250 to 300 feet south of the vehicle and off the highway in the weeds. It was open. It contained no money, no identification, no keys or anything. Identification and other papers kept by Mrs. Sitton in the sun visor of her automobile were missing. All that was located by the way of identification was a 3A card issued to a Mrs. Sitton and an automotive repair bill bearing the name "Ethel Sitton". So far as is known, no one saw the accident.

Sometime before noon on September 14, 1952, the undertaker delivered to Mrs. Harvey certain keys on a large safety pin, one of the keys being a key to Mrs. Sitton's home. A small key ring containing the car keys and also a key to the home was never accounted for. On the afternoon of the day of the accident, Mrs. Harvey, with several other people, went to the home of her sister Ethel at Durham. They found the house in a state of disorder. The desk in which Ethel kept her private papers and which she kept locked had been broken open and the papers were disarranged and scattered over the floor. The lights were on. Clothing in the wardrobe closet was off the hangers and strewn on the floor. Books were pulled from the shelves and left open on the floor. A black tin box, in which Ethel kept papers and things of value, was missing.

[1, 2] Contestants argue that there is no evidence that the letter of June 20, 1952, was in existence at the time of the death of Ethel Sitton on September 14, 1952, and assert that "any claim that there was proof of the existence of such a letter at the time of decedent's death is based wholly on speculation and conjecture". We do not believe that there is merit in this contention. True, there was no direct proof. However, direct proof is not necessary. The existence of a will at the testator's death is to be proved as any other question to which the general rules of evidence apply. It may be proved by circumstantial evidence and the inferences which may reasonably be drawn therefrom. In re Estate of Moramarco, 86 Cal.App.2d 326, 194 P.2d 740; In re Estate of Ronayne, 103 Cal. App.2d 852, 230 P.2d 423. As pointed out in the statement of facts, both before and after the execution of the will of June 20, 1952, Mrs. Sitton referred to respondent as the object of her bounty, and on many occasions after she returned from the east in July, 1952, and even as late as September 10, 1952, just four days prior to her untimely death, she stated that respondent was to have everything. These facts, coupled with the evidence as to the state of disorder in which decedent's home was found on September 14, 1952, including the breaking open of the decedent's desk where her private papers were kept, and the fact that, after what thus appeared to be a search for some document, the tin box in which she kept papers and things of value was miss-

ing, and, finally, the proof supplied by the contestant Elgan W. Sitton, in his testimony that, on the afternoon of the day of Ethel's death, someone phoned his daughter that a letter written by Ethel had been found, and that the letter stated that she was going on a trip back east, and that if anything happened to her, everything she had was to go to Lila, all combined to furnish satisfactory evidence that the will was in existence at the time of the death of testatrix.

[3] Contestants also urge that the findings addressed to the issue of the will's existence were erroneous, being contradictory, and that the said findings do not dispose of the issues presented by the pleadings. The argument is not sound. Findings that the will had been in existence and unrevoked at the death of the decedent, that due search and inquiry after her death had failed to produce the will, do not conflict with each other, nor do either of them conflict with the further finding that the will was lost sometime between the date it was executed and the day after decedent's death; neither do these findings lack any essential element.

[4, 5] Appellants also contend that the provisions of the will were not clearly and distinctly proved by at least two credible witnesses. This contention is without merit. As heretofore stated, both Edmiston and Morgan testified that the will was entirely written, dated and signed by the testatrix. Eugene Conant, other than not remembering whether the will was dated, also testified concerning the provisions of the will. When Edmiston signed it, Conant had already signed, and Edmiston said it was dated. The contestants challenge the credibility of the witness Morgan. It was the function of the trial court to weigh his testimony and to pass upon its credibility, to resolve conflicts and to harmonize seeming conflicts, if possible. There is nothing incredible, as a matter of law, in Morgan's testimony that he saw the holographic will which Mrs. Sitton had signed, that it was dated and that the names of Conant and Edmiston were signed thereto as witnesses. The court found that the will was dated June 20, 1952. The testimony was that it was dated between June 18, and 20, 1952. The material fact is that it was dated. The specific date is immaterial. In re Estate of Reynolds, 94 Cal.App.2d 851, 853, 211 P.2d 608.

The order appealed from is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



149 Cal.App.2d 40

Albert E. CHAPIN, Petitioner and Respondent,

v.

The CITY COMMISSION OF The City of FRESNO, State of California, and Gordon G. Dunn, Commissioner of Public Safety and Welfare, A. Segel, Commissioner of Public Works, James P. Owens, Commissioner of Finance, J. D. Stephens, Jr., J. O. Thorpe, Hattie Mae Hammat and Ted C. Wills, Legislative Commissioners; and The Retirement Board of The Fresno Fire and Police Retirement System and Gordon G. Dunn, Sgt. Harry L. E'Bell, F.P.D., Capt. M. H. Inman, F.F.D., Rollin A. Pickford, Sr., and James P. Owens, constituting the members of the said Retirement Board of the Fresno Fire and Police Retirement System, Respondents and Appellants.

Civ. 5369.

District Court of Appeal, Fourth District, California.

March 8, 1957.

Rehearing Denied April 1, 1957.

Hearing Denied May 1, 1957.

Mandamus proceeding. The Superior Court, Fresno County, Philip Conley, J., granted the relief sought, and respondents appealed. The District Court of Appeal, Mussell, J., held that where change in method of computing retirement benefits resulted in substantial disadvantage to policeman and such disadvantage was not accompanied by comparable new advantages, ordi-

nance effecting such change constituted unreasonable modification of policeman's vested contractual rights.

Affirmed.

1. Municipal Corporations ⇐187(2)

Policeman's right to pension vested upon his acceptance of employment and performance of services under provisions of ordinance authorizing such pension.

2. Municipal Corporations ⇐187(7)

Where change in method of computing retirement benefits resulted in substantial disadvantage to policeman and such disadvantage was not accompanied by comparable new advantages, ordinance effecting such change constituted unreasonable modification of policeman's vested contractual rights.

3. Mandamus ⇐105

Mandamus was proper remedy for policeman seeking to compel payment of pension under repealed ordinance.

4. Mandamus ⇐187(4)

Where objection to failure to make municipality a party defendant was not raised in trial court by demurrer or answer to mandamus petition, it was waived. West's Ann.Code Civ.Proc., §§ 434, 1085.

5. Mandamus ⇐24, 66

Writ of mandate may be issued to compel municipal court and officers to do an act specifically enjoined by law. West's Ann.Code Civ.Proc., § 1085.

6. Courts ⇐91(1)

Latest pronouncement of Supreme Court on subject involved was binding upon District Court of Appeal, notwithstanding contention that doctrine of stare decisis would preclude application of doctrine set forth therein having any retrospective effect.

C. M. Ozias, Fresno, and James C. Purcell, San Francisco, for appellants.

Manfredo, Best & Forbes and A. A. George, Fresno, for respondent.

MUSSELL, Justice.

Albert E. Chapin, petitioner and respondent herein, was employed as a member of the police department of the city of Fresno on March 15, 1915, and excepting the period between March 12, 1920 and July 1, 1920, continued in said employment until January 17, 1952, at which time he was retired by the order and direction of the pension board of said city. Chapin made no request for retirement and the order retiring him was made without notice to him. The action of the pension board was approved by the city commission of the city of Fresno.

At the time of his retirement Chapin held the rank of assistant chief of police of the city, which rank he had held since September 16, 1939, and the salary attached to the rank of assistant chief was $545 per month. This salary was increased in various amounts between September 1, 1952, and the date of the judgment herein, at which time it was $660 per month.

Pension ordinance No. 1021 of the city of Fresno became effective November 11, 1920, and section 2 thereof provided that any member of the fire or police departments who had served in such department for thirty years, in the aggregate, in any capacity or rank whatever, should, on his request or by order of the pension commission, if it be deemed for the good of the department, be retired from further service and that thereafter, during his lifetime, he should be paid a pension in equal monthly installments equal to two-thirds of the annual salary attached to the rank or position held by him in such department for one year prior to the date of his retirement. Ordinance No. 1415 of said city, effective October 8, 1927, repealed ordinance No. 1021 but reenacted the above provisions of section 2 of said ordinance, and in addition provided that in the event of a subsequent change in salary, the pension should be two-thirds of such salary, as changed. Ordinance No. 1512, effective September 22, 1928, amended section 2 of ordinance No. 1415 to provide that in no

event should such pension exceed the sum of $175 per month. Ordinance No. 1934, effective March 26, 1933, again amended section 2 of ordinance No. 1415 to provide that in no event should such pension exceed the sum of $150 per month. Ordinance No. 3116, effective May 1, 1945, repealed ordinance No. 1415, as amended, by reenacting the same provisions as contained in section 2 of ordinance No. 1415, as amended, with the same maximum limitation of $150 per month. Ordinance No. 4342, effective January 16, 1954, amended section 2 of ordinance No. 3116 to increase the maximum limitation from $150 to $200 per month.

On April 9, 1953, a written claim and demand for the payment of moneys due Chapin under the provisions of ordinance No. 3116 was served on the clerk of the city commission, and no payment having been made to Chapin pursuant to said claim and demand, on August 4, 1953, he served a written claim and demand on the clerk of the city commission for the payment to him, under the provisions of section 2 of ordinance No. 1415 of the sum of $363.33 for each month from the date of his retirement. On January 9, 1956, Chapin filed his first amended petition in the trial court in which he sought an alternative writ of mandate compelling the respondents to determine the amount of pension due him as provided by section 2 of ordinance No. 1415 of said city, and to order payment thereof or show cause why it should not do so. The trial court ordered the issuance of the alternative writ and after a demurrer to the petition was overruled and an answer was filed, the matter was tried by the court, and judgment was entered in favor of the petitioner, Chapin. On March 2, 1956, a peremptory writ of mandate was issued requiring the respondents to determine the amount due petitioner under and by virtue of the provisions of section 2 or ordinance No. 1415 of said city and to compute the pension and interest as therein set forth and computed on the basis of two-thirds of petitioner's annual salary. The commissioner of finance of the city was ordered to pay the computed amounts and to pay petitioner thereafter, during his lifetime, in equal monthly installments, a yearly pension equal to two-thirds of the annual salary attached to the rank held by him for one year prior to the date of his retirement, as provided in section 2 of ordinance No. 1415 of said city, as originally enacted.

The principal contention of appellants (respondents in the superior court) is that petitioner was deprived of no vested contractual or constitutional rights by the amendment and repeal of the provisions of ordinance No. 1021 and section 2 or ordinance No. 1415, as originally enacted. Petitioner contends in this connection that by rendering substantial services under ordinances 1021 and 1415, he acquired a vested contractual right to be paid a pension as provided by section 2 of ordinance No. 1415, as originally enacted, and that the provisions of the subsequent ordinances fixing a maximum limitation on the amount petitioner could receive as a pension constitute attempted unreasonable, ineffective and illegal modifications of petitioner's vested contractual rights. The trial court found in accordance with petitioner's contention and we conclude that its findings, conclusions and judgment are supported by substantial evidence and cannot be here disturbed.

[1] Albert Chapin's right to a pension vested upon his acceptance of employment and performance of services under the provisions of ordinance No. 1415 of the city of Fresno. In Kern v. City of Long Beach, 29 Cal.2d 848, at page 852, 179 P. 2d 799, at page 801, the court said:

> "This court has stated in two recent decisions that the right to a pension vests upon acceptance of employment. In Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 579, 59 P.2d 104, 106, the court said: 'It has been clearly held that the pension provisions of the city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and a member of the police

department, and are an indispensable part of that contract, and that the right to a pension becomes a vested one upon acceptance of employment by an applicant.' In French v. French, 17 Cal.2d 775, 777, 112 P.2d 235, 236, 134 A.L.R. 366, we said: 'The Dryden case concerned the rights of a policeman in a pension fund to which he had made contributions while he was on active duty. It was held that by the provisions of the city charter, under which that fund was created and maintained, the right to a pension was an integral part of the contract of employment and became a vested right at the time the employment began.' See, also, Aitken v. Roche, 48 Cal.App. 753, 755, 192 P. 464."

In Wallace v. City of Fresno, 42 Cal.2d 180, 183, 265 P.2d 884, it was held that the right to a pension arises before the happening of the contingency which makes the pension payable, and it cannot be constitutionally abolished by subsequent changes in the law. Chapin, having accepted employment and rendered the services under the provisions of ordinances Nos. 1021 and 1415 of the city, was then entitled to retirement pay of two-thirds of the annual salary attached to the rank or position held by him in the police department for one year prior to the date of his retirement.

[2] The next question is whether the city could thereafter lawfully change and reduce his pension allowance by limiting it to $150.00 or $175.00 per month. In Allen v. City of Long Beach, 45 Cal.2d 128, 131, 287 P.2d 765, 767, it is said:

"An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. Wallace v. City of Fresno, 42 Cal.2d 180, 184, 265 P.2d 884; Packer v. Board of Retirement, 35 Cal.2d 212, 214, 217 P.2d 660; Kern v. City of Long Beach, 29 Cal.2d 848, 854–855, 179 P.2d 799. Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. (Wallace v. City of Fresno, 42 Cal.2d 180, 185, 265 P.2d 884; see Packer v. Board of Retirement, 35 Cal.2d 212, 214, 218–219, 217 P.2d 660."

In the instant case it is clear that the change in the method of computing benefits from a fluctuating amount equal to two-thirds of the salary currently attached to the rank held by Chapin to a limited maximum amount results in a substantial disadvantage and detriment to him, as is apparent from a computation of the trial court in its findings. It is also apparent that such disadvantage and detriment are not accompanied by comparable new advantages. The provisions of the ordinances of the city limiting the maximum amount of pension to be granted to Chapin therefore constituted an attempted unreasonable, ineffective and illegal modification of his vested contractual rights. Cochran v. City of Long Beach, 139 Cal.App.2d 282, 287, 293 P.2d 839.

[3] Appellants' claim that the superior court was without jurisdiction in the matter is not meritorious. In Kern v. City of Long Beach, supra, 29 Cal.2d 848, 179 P.2d 799, the petitioner sought a writ of mandate compelling respondent to pay him a pension under the provisions of the city charter which was repealed shortly before he would have been entitled to retire, and the court held that the issue presented was properly raised by a proceedings in mandamus. (Citing numerous cases.) In this connection it is argued that petitioner cannot maintain mandamus proceedings because the record clearly shows that he has

not exhausted his legal remedies. This conclusion is not tenable. Petitioner did not apply for retirement. He was retired by order of the pension board, made without notice to him, and without a hearing, and our attention has not been directed to any procedure prescribed by the ordinance involved or the city charter whereby Chapin should have sought an alternative remedy.

Appellants argue that the petition herein fails to allege facts sufficient to constitute a cause of action because the only action taken by petitioner was to file a written notice of claim and demand on the clerk of the city commission and that said clerk had no right or authority to determine any matter respecting the pension involved. However, this clerk was also clerk of the pension board and the notice of claim was directed to the city of Fresno, to the clerk and to the board. Furthermore, the ordinances involved do not require a person retired by order of the pension board to make application for a pension.

Appellants claim that the superior court's determination was confined to the hearing and determination, if any, by the retirement board of the city and cite Thompson v. City of Long Beach, 41 Cal.2d 235, 259 P.2d 649 as authority for this contention. In that case proceedings had before the board were reviewed by the superior court. In the instant case no such proceedings were conducted before the board and the provisions of section 1094.5 of the Code of Civil Procedure are not, therefore, applicable.

[4, 5] Appellants further claim that the failure of the petitioner to make the city of Fresno a party defendant makes the entire proceedings a nullity. This claim is likewise without merit. This objection was not raised in the trial court by demurrer or answer and was, therefore, waived. Code Civ.Proc. Sec. 434. Moreover, section 1085 of the Code of Civil Procedure provides, in part, that a writ of mandate may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station. The writ may be issued to compel a municipal board and officers to do an act specifically enjoined by law. Packer v. Board of Retirement, 35 Cal.2d 212, 217 P.2d 660; Sweesy v. Los Angeles, etc., Retirement Bd., 17 Cal.2d 356, 110 P.2d 37.

[6] Appellants also contend that "The doctrine of *stare decisis* precludes application of the doctrine set forth in Allen v. City of Long Beach, 45 Cal.2d 128 [287 P.2d 765] having any retrospective effect." We conclude that the decision in that case is the latest pronouncement on the subject involved in this action and is binding upon us. In Cochran v. City of Long Beach, supra, 139 Cal.App.2d 282, 293 P.2d 839, the amendment substituting a pension of a fixed amount for the fluctuating type was enacted in 1951, prior to the decision in the Allen case and prior to the retirement of the employee. On the appeal it was there held that the Allen case required reversal of the judgment. Furthermore, in the Allen case the court said, 45 Cal.2d at page 133, 287 P.2d at page 768, that the cases there relied upon by the city, which were decided prior to Kern v. City of Long Beach, 29 Cal.2d 848, 179 P.2d 799, were not there controlling.

In view of what we have heretofore said, we deem it unnecessary to pass upon other points raised by the appeal. We find no reversible error in the record.

The attempted appeal from the order denying motion for a new trial is dismissed. The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

148 Cal.App.2d 873

Evelyn F. CHAMBERS, Evelyn F. Chambers, Guardian ad litem for Judith Ann Chambers, Dorsey Chambers and Donald Stafford Chambers, Minors, Plaintiffs and Appellants,

v.

The SOUTHERN PACIFIC COMPANY, a corporation, et al., Defendants and Respondents.

Civ. 5353.

District Court of Appeal, Fourth District, California.

March 1, 1957.

Hearing Denied April 25, 1957.

Action for damages resulting from death of motorist fatally injured in railroad crossing accident. From a judgment of Superior Court of Kern County, W. L. Bradshaw, J., on a verdict for defendants, plaintiffs appealed. The District Court of Appeal, Mussell, J., held that where motorist stopped approximately eight feet from railroad tracks and then proceeded to drive onto tracks on which train was approaching at about 50 miles per hour, doctrine of last clear chance was not applicable.

Judgment affirmed.

1. Railroads ⇐338.4, 351(22)

Where motorist stopped approximately eight feet from railroad tracks and then proceeded to drive onto tracks upon which a train was approaching at about 50 miles per hour engineer had no time to avoid the accident, last clear chance was inapplicable, and court properly refused an instruction on that doctrine, in action for death of motorist.

2. Railroads ⇐320

Where motorist stopped approximately eight feet from railroad tracks, engineer of train approaching crossing at about 50 miles per hour had right to assume that motorist would remain stopped until train had passed.

3. Appeal and Error ⇐1069(3)

In action for death of motorist fatally injured in railroad crossing accident, where the jury by written note asked judge what form of verdict it should use where preponderance of evidence showed that motorist was guilty of the greater negligence, and judge, in absence of counsel, verbally instructed bailiff to inform jury to use form favoring railroad, issue of proximate cause was not excluded, and there was no prejudicial error, since it was evident that jury had already agreed upon verdict and was only seeking advice as to what form should be used. West's Ann.Code Civ. Proc., §§ 613, 614.

4. Appeal and Error ⇐1064(1)

In action for death of motorist fatally injured in railroad crossing accident, where court repetitiously instructed jury on duties and standards of care of motorist and refused to give reciprocal instructions relative to engineer, mere repetition of instructions which were correct statements of law did not, under circumstances, constitute reversible error.

Mack, Bianco, King & Eyherabide, Bakersfield, Louis C. Spiess, Jr., Los Angeles, and Robert E. King, Bakersfield, for appellants.

Borton, Petrini, Conron & Brown, Bakersfield, for respondents.

MUSSELL, Justice.

On September 22, 1954, at about 2:00 p. m., Donald Thomas Chambers, while driving a Chevrolet automobile in a southerly direction at what is known as the Giumarra Winery Crossing, about 7 miles east of Bakersfield, collided with a westbound Southern Pacific diesel unit and received fatal injuries. This action for damages was instituted by the widow Evelyn F. Chambers, for herself and on behalf of their three minor children. A jury returned a verdict in favor of the defendants and against the plaintiffs, and plaintiffs appeal from the judgment entered in accordance with the verdict.

A reversal of the judgment is sought on the grounds that (1) The trial court erro-

neously refused to instruct the jury on the doctrine of last clear chance; (2) The trial court erred in communicating secretly by messages with the jury while the latter had the case under consideration and deliberation and without the presence of counsel; and (3) The court erred in repetitiously instructing the jury and in refusing to give certain instructions offered by the plaintiffs.

The decedent, approaching the crossing involved from the north on a 19 foot wide private road, stopped his car at a railroad crossing sign, a boulevard stop sign, and a sign reading "Private property. Permission to pass over revocable at any time." These signs were on the west side of the road and at spur tracks which ran parallel with the main railroad tracks, where the accident occurred. The two spur tracks were approximately 14 feet wide and the area or dividing strip between the spur tracks and the westbound main line, where the accident occurred, is about 52 feet. Both sides of the grade crossing are posted with a standard crossarm sign, a boulevard stop sign and a private property sign. After stopping at the spur tracks, decedent proceeded slowly across this dividing strip to a point 6 to 8 feet north of the westbound main tracks and there stopped his car. At that time one of two trucks, traveling in a northerly direction over the crossing, stalled on the rails of the eastbound main track which, at that point, runs parallel with and adjacent to the westbound main track. The trucks were in the center of the roadway, apparently blocking decedent's southbound progress over the crossing. The decedent remained in this stopped position while the driver of the truck attempted to start it, without success, got out of it, and, with the other truck driver's help, pushed it back off the tracks. The decedent then started across the westbound main track and the left front part of his automobile collided with the right front corner of defendants' diesel engine. The view of this crossing is unobstructed easterly and westerly therefrom for at least two miles and on the day of the accident the visibility was good.

The engineer testified that he was operating three diesel electric units, coupled together; that he was traveling about 50 miles per hour as he approached the crossing and that he and the fireman were the only persons on the train; that he first saw the decedent's car as it was crossing the spur tracks and that it proceeded slowly south and stopped clear of the westbound main track; that it remained stopped at this point for about a minute; that he blew the whistle at the crossings 1,632 feet east of the point of impact and also at the crossing 3,042 feet east thereof; that he also blew the whistle several times just before the impact. Clarence F. Oeff, the fireman, testified that he was sitting on the left side of the engine cab and his vision was cut off for 50 or 75 feet by the front of the engine; that the engineer started blowing a series of short crossing whistles in the neighborhood of the Bryan Smith shed (approximately 850 feet east of the crossing involved) and at that time he (Oeff) saw the decedent's car traveling over the spur track toward the main line; that the car appeared to stop about 6 or 8 feet from the main line, when it went out of vision; that the engineer had also started a crossing whistle when the train passed over the crossing 1,632 feet east of the point of collision.

Eddie Ortiz, the driver of the truck which stalled at the crossing, testified that when his truck stalled he got out and pulled up the hood to see what was wrong and he and his helpers then pushed the truck back off the track; that he then noticed the train coming and, at the time, the decedent's car was stopped, waiting for them to "do something or get out of the way, or something"; that he heard no whistle or bell sounding. Rudy Ortiz, driver of the second truck, testified that he stopped the truck to the east of the one driven by his brother, Eddie; that he first saw the decedent's car at the stop sign; that he was helping push the truck back when he first

saw the train; that he heard the train whistle at about the same time as the crash; and that the decedent's car was then moving slowly forward; that he saw the decedent grip the wheel of his car and make a motion as if he was reaching for the gear shift.

A section foreman, who was working on the tracks west of the crossing, testified that he saw the train when it reached the second crossing east of the one here involved; that he heard the whistle as the train passed the first crossing to the east and then heard a short whistle and saw the dust. Two men who were unloading boxcars for the A. F. C. Fertilizer Company, and were about 300 feet east of the Giumarra crossing, heard the train whistle a few seconds before the crash. A labor foreman working in a building approximately 300 feet east of the Giumarra crossing testified that he saw the locomotive approaching the crossing 1,632 feet east of the Giumarra road and heard no whistle, bell or horn then nor until he heard the screeching of brakes and the crash. A carpenter, working in the same building, testified that he saw the engine at the crossing 1,632 feet east and that no whistle or bell was sounded up to the time he heard the squeal of brakes and the crash. An employee of the Giumarra Bros., who was standing on a loading dock 168 feet west of the crossing, testified that he heard the crash and no train whistle sounded until after the noise of the accident. Another employee of the same company testified that he was standing on this dock and heard no whistle or horn until after the crash.

The first question to be determined is whether the trial court erred in refusing to instruct the jury on the doctrine of last clear chance. The formula prescribing the conditions for the application of this doctrine is stated in Brandelius v. City & County of San Francisco, 47 Cal.2d 729, 306 P.2d 432, 439, as follows:

"'(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.' Doran v. City & County of San Francisco, supra, 44 Cal.2d 477, 483, 283 P.2d 1, 5; Daniels v. City & County of San Francisco, supra, 40 Cal.2d 614, 619, 255 P.2d 785."

It is also stated therein:

"In analyzing the required conditions for the application of the doctrine as set forth in said decisions, it should be noted that the time element is the all important factor. In other words, if the doctrine is to be applied and a recovery is to be permitted despite the contributory negligence of the injured party, there must be substantial evidence to show that the defendant had a last clear chance to avoid the accident by the use of ordinary care following the time that the injured party had lost any similar opportunity to avoid the accident by the use of such care."

[1, 2] In the instant case the uncontradicted testimony is that the decedent, after stopping at the spur track, proceeded slowly southward until he reached a point approximately 6 to 8 feet from the first track of the westbound main line and there stopped. He was then in no position of danger. When he then proceeded to drive onto the tracks, a distance of approximate-

ly 8 feet, the engineer, who had a right to assume that he would remain stopped until the train passed, had no time to avoid the accident. Under the circumstances shown, the doctrine of last clear chance was inapplicable and it was not prejudicial error to refuse an instruction on that doctrine.

[3] It appears from the affidavit of the trial judge herein that while the jury was deliberating and before it returned a verdict, it sent a written note to the judge asking which form of verdict it should use where the preponderance of evidence showed that plaintiff (sic) was guilty of the greater neligence. The court then verbally instructed the bailiff to inform the jury as follows: "The answer to your question is to use the form favoring the Southern Pacific and its employees." These proceedings took place in the absence of counsel for the respective parties and without calling the court into session. Appellants claim that this constituted prejudicial error and was contrary to the law as set forth in sections 613 and 614 of the Code of Civil Procedure. However, no prejudice affirmatively appears and it is evident that the jury had agreed upon a verdict and were only seeking advise as to what form should be used. In Santina v. General Petroleum Corp., 41 Cal.App.2d 74, 77, 106 P.2d 60, 62, the court said:

> "It is true that a departure from the code provisions specifying the method of communication between the court and the jury is an 'improper irregularity' and goes 'to the substance of the right of trial by jury' (Nelson v. Southern Pacific Co., 8 Cal.2d 648, 655, 67 P.2d 682, 686, but it does not follow from this that any and every departure from that method has a 'probable substantial relation to the disposition of the cause'. These are the 'exceptional circumstances' referred to in the Nelson case, and it is but another way of saying that the error must be substantial and real, not merely fancied or technical. Where any error is relied on for a reversal it is not sufficient for appellant to point to the error and rest there. Since the appellate court must affirmatively find prejudice such finding must be based either upon the facts found in the record or upon the reasonable inferences to be drawn therefrom. In the face of the constitutional limitation there is no room for the presumption that prejudice results from the fact of error alone. The fact of prejudice is just as essential as the fact of error."

Appellants contend that the statement to the jury in answer to their inquiry was prejudicial because it excluded the issue of proximate cause. This contention is likewise without merit. The jury did not inquire about proximate cause and had apparently decided that issue, upon which they had been fully and fairly instructed by the court.

[4] Finally, it is argued that the court erred in repetitiously instructing the jury on the duties and standards of care of the deceased motorist and in refusing to give reciprocal instructions on the duties and standards of care of the engineer. An inspection of the instructions given and refused on this subject discloses no prejudicial error and it is not shown that the instructions given were incorrect statements of the law applicable; nor does it appear that the trial court indicated his opinion either for or against the appellants. The mere repetition of instructions upon the same subject under the circumstances did not constitute reversible error. Faeh v. Union Oil Co., 107 Cal.App.2d 163, 165, 236 P.2d 667.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting. SCHAUER, J., not participating.

148 Cal.App.2d 927

Carl SWIFT, Plaintiff and Respondent,

v.

Herman WINKLER and Florence Winkler, et al., Defendants and Appellants.

Civ. 22058.

District Court of Appeal, Second District, Division 2, California.

March 5, 1957.

Hearing Denied May 1, 1957.

Personal injury action. The Superior Court, Los Angeles County, Samuel R. Blake, J., entered judgment on verdict for plaintiff, and defendants appealed. The District Court of Appeal, Fox, J., held that, where question of liability in personal injury action was close, and, if there was liability, plaintiff was entitled to recover substantially more than the damages awarded by jury, misconduct of plaintiff's counsel in bringing out, by question asked prospective juror, that particular insurer was interested in the case as defendants' insurer constituted reversible error.

Judgment reversed.

1. Trial ⇐108½

On voir dire examination of prospective jurors, counsel is permitted to ask in good faith whether a prospective juror is interested in a particular insurance company or in any insurance company.

2. Trial ⇐108½

On voir dire examination in personal injury action, pursuit by plaintiff's counsel of fact that prospective juror was insured with particular insurer and his inquiry as to length of time juror had had such insurance and as to whether there was any thing in the situation which would prevent prospective juror from being a fair juror and whether there had been any litigation over it carried unmistakable implication that such insurer was interested in the case as defendants' insurer and, therefore, was improper.

3. Appeal and Error ⇐1060(1)

Where question of liability in personal injury action was close, and, if there was liability, plaintiff was entitled to recover substantially more than the damages awarded by jury, misconduct of plaintiff's counsel in bringing out, by question asked prospective juror, that particular insurer was interested in the case as defendants' insurer constituted reversible error.

Early, Maslach, Foran & Williams, George Maslach and Harry Boyd, Los Angeles, for appellants.

John A. Jorgenson, Los Angeles, for respondent.

FOX, Justice.

This is an action to recover damages for injuries plaintiff suffered when he fell while in the act of stepping up on the front porch of defendants' grocery store. Plaintiff charges that his mishap was due to defendants' negligence. A jury returned a verdict in plaintiff's favor for $5,000. Defendants appeal.

In seeking a reversal defendants make two principal contentions: (1) that they were not negligent; and (2) that counsel for plaintiff, in his voir dire examination of prospective jurors, intentionally and prejudicially conveyed the idea to the jurors that defendants were insured. Since we have concluded that the judgment must be reversed on the second ground it is not necessary to pass on defendants' first contention beyond the point of determining that the question of liability is a close one.

At approximately 6:30 p. m. on March 29, 1954, plaintiff drove up to defendants' store in Tujunga for the purpose of purchasing some groceries. He parked close to the store which is some 30 feet from the paved portion of the highway. This intervening space is a dirt area which was wet but firm since it had rained slightly and was still misting. There was a concrete porch fifteen inches in height extending across the front of defendants' store. There were steps, directly in front of the store door, leading up to this porch. On this particular occasion the automobile

of another customer was parked in front of the steps and close to the bottom slab. Because of this obstruction plaintiff went around to the east end of the porch which had worn smooth from people stepping up on it. Plaintiff observed nothing unusual about its surface except that it was wet. Plaintiff put his right foot on the porch, and as he was trying to raise himself his foot slipped, he lost his balance, attempted to regain it but fell backwards landing on his back on a stone. After the fall some mud was observed on the porch where plaintiff had stepped and slipped.

Plaintiff received a serious fracture of the second lumbar vertebra. He suffered severe pain and was in the Veterans Hospital for more than a month. For some weeks thereafter he was unable to do more than eat and sleep and take care of his personal needs. With the aid of a cane he walked down to the corner and back. Plaintiff had not resumed his business activities at the time of the trial which was a little more than two years after the accident. He was not able to drive a car which was essential to his former business activities in calling on his clientele. Defendants offered no medical testimony but rested their case upon the hospital records.

In his voir dire examination counsel for plaintiff asked the first 23 prospective jurors, separately, substantially the following question: "Are you or your immediate family interested as an agent, stockholder, or otherwise in the Farmers Insurance Group with the principal offices at 4680 Wilshire Boulevard, in Los Angeles?" In response to this question Mrs. Eleff, who was later accepted as a juror, stated "We have Farmers' Insurance, but we just pay to it." Then the following took place:

"Q. [by counsel for plaintiff] You do have Farmers' Insurance? A. Yes, but we don't hold stock, stockholders or nothing.

"Q. How long have you had that? A. About a year or so.

"Mr. Maslach [attorney for defendants]: Your Honor, I think such questions are improper now.

"The Court: Well, I think the objection came at the same time as the answer. The question has been answered.

"Q. By Mr. Jorgenson [attorney for plaintiff]: Well, is there anything in that situation that would prevent you from acting as a fair juror in this case? A. Never.

"* * *

"Q. You never had any law suits over it? A. No, the fact is we are not really satisfied with Farmers' Insurance. We wish or would like to take a different one."

In response to a preliminary voir dire question by the court Mrs. Damask,* who was the twenty-fourth prospective juror, replied: "I think maybe I am slightly prejudiced."

"Q. [by the Court] About what? A. Well, when you carry insurance, it seems to me that you shouldn't be mutilated * * * in order to be compensated for any injury you received.

"* * *

"Q. [by the Court] You are not assuming that anybody is insured in this case, are you? A. My Heavens, it sure was brought out that they were."

Before any evidence was taken defendants moved for a mistrial on the ground the idea of insurance had been improperly injected into the case through the voir dire examination of the jurors by the plaintiff's attorney. The motion was denied.

[1] The care that must be exercised on voir dire examination of prospective jurors on the question of insurance is well expressed in Robinson v. Wada, 10 Cal.App.2d 5, at

* Mrs. Damask was later challenged for cause by counsel for defendant but the challenge was disallowed by the court.

pages 7 and 8, 51 P.2d 171, at page 172, (Hearing denied):

"While the probable prejudice resulting from any reference to insurance in an action for damages is universally recognized, it is likewise recognized that a plaintiff is entitled to a fair and impartial jury. Therefore the rule permitting counsel to ask in good faith whether a prospective juror is interested in a particular insurance company or in any insurance company has been established as a rule of necessity. The authorities, however, have quite definitely limited the scope of the examination along this line. Reference may be made here to the exhaustive discussion of this subject in Arnold v. California Portland Cement Co., 41 Cal.App. 420, 183 P. 171. The court there said [41 Cal.App.] on pages 425 and 426, 183 P. 171 on page 173: 'But counsel must take pains to propound such questions in such a manner as not unnecessarily to convey the impression that the defendant is in fact so insured. It is misconduct on the part of counsel for plaintiff in such actions so to frame his question that it goes beyond what is reasonably necessary to serve the legitimate purpose of eliciting the facts he is entitled to adduce in order to secure a jury free from bias or prejudice, if it is also apparent that the question may fairly be said to have the effect of serving the illegitimate purpose of prejudicing the jury by fixing in their minds the idea that the defendant is protected by insurance against liability for negligence. * * * Asking a juror whether he is interested in a specified casualty company, or, generally, in any insurance company, if the question be propounded in good faith, may be necessary in order to insure the plaintiff a body of jurors unbiased by any connection in favor of the party really interested in the defense of the action. But beyond this it is neither necessary nor proper to go. It is not permitted to counsel, under the guise of testing their qualifications as jurors, to go beyond what is necessary to insure a body of unbiased jurors and seek to create the impression that an insurance company, and not the defendant in the case, will be called upon to respond to such damages as the jury may assess. When questions propounded to prospective jurors overreach the limit, they may prove unprofitable to the party asking them.'"

The court points out that the Arnold case has been cited with approval many times and gives a list, 10 Cal.App.2d at page 8, 51 P.2d at page 172, of such cases. The discussion on this particular point is concluded by the quotation from Curtis v. McAuliffe, 106 Cal.App. 1, at page 12, 288 P. 675, at page 679, that: "The rule established in those cases goes far enough, and we cannot approve any extension of it." The principle of the Arnold and Robinson cases, supra, was more recently quoted and applied in Stevenson v. Link, 128 Cal.App.2d 564, 569–571, 275 P.2d 782.

[2] Applying these principles to the present case it is clear that on the voir dire examination of Mrs. Eleff counsel went beyond what was "necessary to insure a body of unbiased jurors" and that such examination served "unnecessarily to convey the impression" that defendants were insured.

When counsel ascertained that neither Mrs. Eleff nor any of the immediate members of her family were "[i]nterested in any way as a stockholder or otherwise" in the company he had adequately explored this area. He went further, however, and developed the fact that the Eleffs have Farmers' Insurance. As if that had some special significance counsel then said, "You do have Farmers' Insurance?" to which Mrs. Eleff responded "Yes, but we don't hold stock * * *." In further pursuit of this inquiry counsel then asked: "How long have you had that?" She replied: "About a year or so." At this point counsel protested that this line of examination was improper. Counsel for plaintiff, however, pursued the matter by inquiring if there was "anything in that situation that

would prevent" her "from acting as a fair juror in this case" and if there had been "any law suits over it" to which he received negative replies. Counsel's pursuit of the fact the Eleffs had Farmers' Insurance, the length of time they had had such insurance, whether there was anything in that situation that would prevent her from being a fair juror in this case and whether there had been any litigation over it carries the clear and unmistakable inference and implication that the Farmers' Insurance Group was interested in this case as the insurers of the defendants. This was indeed improper. Arnold v. California Portland Cement Co., supra; Robinson v. Wada, supra; Stevenson v. Link, supra.

That members of the jury got the idea that defendants were insured is demonstrated by Mrs. Damask's reply to the court's inquiry if she assumed that anybody was insured in this case. She stated "*My Heavens, it sure was brought out that they were.*" (Italics added.)

Robinson v. Wada, supra, is closely analogous to the problem at hand. What transpired in that case is thus stated by the court, 10 Cal.App.2d at pages 8 and 9, 51 P.2d at page 172: "When counsel examined Mrs. Rose M. Hoover, the following questions were asked and following answers were given: 'Q. You are not financially interested in the State Farm Mutual Insurance Company of Bloomington, Illinois? A. My car is insured in that. Q. In that company? A. Yes. * * * Q. Would the fact that your car is insured in this company, do you think that would tend or cause you to lean in their favor a little bit? A. I don't see why it would.' Counsel for appellant objected after the answer was given. The objection was sustained and the jury was admonished. In examining Mrs. Maude C. Evans, the following questions were asked and the following answers were given: 'Q. Are you or any of your family, interested financially in the State Farm Mutual Insurance Company of Bloomington, Illinois? A. I cannot say positively, Mr. Evans attends to that business, but if the line is carried by the Farmers Cooperative Exchange, I think the car is insured in that company. Q. I am almost sure that is the Farmers Inter-Exchange Insurance Company of Los Angeles, you are speaking of, at any rate no matter what it is would that have any bearing on your sitting in this action? A. No.'" The court held that "the foregoing examination went beyond what was reasonably necessary to serve the legitimate purpose for which questions may be asked regarding the possible interest of the juror in an insurance company [10 Cal.App.2d at page 9, 51 P.2d at page 173]."

[3] The further question arises as to whether the misconduct was prejudicial. There are numerous cases in which judgment have been affirmed despite such misconduct where the question of liability is not close and the damages awarded were not disproportionate to the injuries received. But this is not such a case. Here the question of liability was indeed a close one. Furthermore, it is apparent from the record before us that if there is liability in this case plaintiff is entitled to recover substantially greater damages than the jury awarded. In such circumstances "The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant. Such attempts on the part of counsel have frequently been held to be improper and prejudicial. [Citing cases.]" Citti v. Bava, 204 Cal. 136, 139, 266 P. 954, 955; Squires v. Riffe, 211 Cal. 370, 374, 295 P. 517; Robinson v. Wada, supra, 10 Cal.App.2d at page 10, 51 P.2d at page 173. We are of the opinion that on the record before us "it must be held that the misconduct of respondent's counsel in making the statements with reference to insurance [on

voir dire examination] was so prejudicial as to constitute reversible error." Stevenson v. Link, supra, 128 Cal.App.2d at page 571, 275 P.2d at page 787.

The judgment is reversed.

MOORE, P. J., and ASHBURN, J., concur.

Hearing denied; CARTER, J., dissenting.



148 Cal.App.2d 949

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William CARTER, Defendant and Appellant.

Cr. 2689.

District Court of Appeal, Third District, California.

March 6, 1957.

Defendant was convicted of assault with deadly weapon upon fellow prisoner. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgment on verdict, and defendant appealed. The District Court of Appeal, Peek, J., held that admission of evidence of two knives and picture of cabinet behind which one knife was found was not improper where victim identified knives as similar to those used in assault and one of knives was found immediately after assault in same room where prisoner was apprehended.

Affirmed.

1. Criminal Law ⇐404(4), 438

In prosecution of prisoner for assault with deadly weapon wherein it was alleged that he and two other prisoners had assaulted and stabbed a fourth prisoner, evidence of two knives and picture of cabinet behind which one knife was found was properly admitted, where victim identified knives as similar to those used in assault and one of knives was found immediately after assault in room in which prisoner was apprehended. West's Ann. Pen.Code, § 4501.

2. Criminal Law ⇐1035(6)

Where defendant did not object because no Negroes were impaneled on jury at time of trial, he could not raise such objection on appeal.

3. Jury ⇐120

The absence of Negroes on jury does not violate defendant's rights in absence of showing that qualified Negroes were deliberately and systematically excluded.

Max H. Hoseit, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by James M. Sanderson, Deputy Atty. Gen., for respondent.

PEEK, Justice.

The defendant appeals from a judgment entered upon the jury's verdict finding him guilty of a violation of section 4501 of the Penal Code. Upon defendant's request, attorney Max H. Hoseit was appointed by this court to represent him on appeal. Mr. Hoseit has now reported to the court that the record discloses substantial evidence to support the verdict of the jury and that he finds no error therein. The defendant, however, not being satisfied with the advice of counsel, has filed with the court a document which he denominates his brief on appeal. By reason of the circumstances, this court has made an independent study of the record. It is our conclusion that there is no merit in defendant's contentions which are essentially that the evidence is insufficient to support the verdict; that the court erred in the admission of certain exhibits into evidence; that he was denied a speedy trial; that the district attorney committed prejudicial misconduct in his argument to the jury; and that his constitutional rights

were violated in that no Negroes were impaneled on the jury. Other contentions are made, but since none of the matters concerning which defendant complains appear in the record before us, they cannot be considered on appeal.

On September 13, 1955, one Thompson, an inmate of Folsom State Prison, was working at his job in the mattress room. His duties included taking linens from the laundry and transporting them back to the mattress room where they would be segregated for distribution to various parts of the prison. At about 9 a. m. on that date, as Thompson was returning to the mattress room from the laundry along the corridor separating that room from the education building, he was attacked by three inmates, Clifford Jefferson, Willie Williams and the defendant. Jefferson and the defendant had crude knives. Thompson was stabbed numerous times about the arms, chest, back and the left hand. Officer Burlson, upon observing the fight, ran towards the men and as he did so Carter and Jefferson ran past him into the education building and up to a small balcony. Burlson followed them and found Carter sitting at one of the desks in a classroom opening off of the balcony. Jefferson was found in a nearby typing room. Thereafter a search was made of the education building, and a knife was found in the room where Carter was apprehended by Burlson. There was a moist, red substance on the handle of the knife. A second knife was found under a water cooler in the same building, and its handle was likewise smeared with a red substance. Defendant testified in his own behalf and denied having made any assault upon Thompson. He admitted being in the corridor where the assault took place but testified he did not see Thompson until their struggle outside of the education building when Thompson accused him of being one of his attackers. He also testified he had not been upstairs in the education building and that no guard spoke to him before he was struck by Thompson. Several inmates testified on behalf of the defendant. Their testimony, however, did nothing more than create a conflict in the evidence.

Disregarding all conflicts, there was positive identification of defendant by Thompson as one of the men who cut him with a knife and testimony by guard Burlson that defendant was one of those who engaged in the attack upon Thompson.

[1] We find no error in the admissibility into evidence of the two knives and of a picture of the cabinet behind which one knife was found which showed a blood spot on the wall above it. The knives were identified by Thompson as being similar to those used in the assault upon him; one of the knives was found immediately after the assault in the same room where defendant was apprehended; and hence they were properly admitted into evidence.

Defendant's contention that he was denied a speedy trial is also without merit. The record shows that he personally agreed to the original trial date, and thereafter waived time for trial. Moreover no question in this regard was raised in the trial court, and hence he thereby waived the benefit of the provisions he now relies upon. People v. Villarico, 140 Cal.App.2d 233, 235, 295 P.2d 76.

We find nothing in the record concerning the remarks of the district attorney to support defendant's contention of misconduct. It is contended that the district attorney read statements of one Williams which were not in evidence; however, the record reveals that at no time did the district attorney read or refer to any purported statement of Williams. Nor do we find where the district attorney misquoted the testimony of guard Burlson.

[2, 3] It is the further contention of defendant that he was deprived of a fair and impartial trial because no Negroes were impaneled on the jury. Again, no question in this regard was raised at the time of trial. People v. Shannon, 203 Cal. 139, 263 P. 522. The lack of Negroes on a jury does not violate a defendant's

rights in the absence of a showing that qualified Negroes were deliberately and systematically excluded. People v. Hines, 12 Cal.2d 535, 86 P.2d 92; People v. Jackson, 88 Cal.App.2d 747, 199 P.2d 322.

The remaining contentions made by defendant all refer to matters wholly outside of the record on appeal, and hence may not be considered now by this court.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J., pro tem., concur.



148 Cal.App.2d 895

Tommie REYNOLDS, a minor, by his Guardian ad litem, Ghnon Reynolds, Plaintiff and Appellant,

v.

Franz H. SALMONSON and Leslie Salmonson, Defendants and Respondents.

Civ. 8984.

District Court of Appeal, Third District, California.

March 4, 1957.

Action by boy who was blinded at age of five by explosion of dynamite caps which he and two seven year old boys found in pocket of coat hanging on wall of unlocked pump house of his father's employers. The Superior Court, Sutter County, Arthur Coats, J., rendered judgment for employers, and boy appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained finding that presence of caps in pump house was unknown to employers, and that they had been placed there, or permitted to be there, by no act of employers, or those for whose act they were responsible, and employers were not negligent in not discovering caps, by reasonable inspection, before children found them.

Affirmed.

Explosives ⇦8

In action by boy who was blinded at age of five by explosion of dynamite caps, which he and two seven year old boys found in pocket of coat hanging on wall of unlocked pump house of his father's employers, evidence sustained finding that presence of caps in pump house was unknown to employers and that caps had been placed there, or permitted to be there by no act of employers, or those for whose act they were responsible, and that employers were not negligent in not discovering caps, by reasonable inspection, before children found them. West's Ann.Health & Safety Code, §§ 12150, 12221.

J. Adrian Palmquist, Oakland, and James F. Boccardo, San Jose, for appellant.

Rich, Fuidge & Dawson, Marysville, and Weis & Weis, Yuba City, for respondents.

VAN DYKE, Presiding Justice.

Plaintiff Tommie Reynolds, a minor, brought this action against respondents to recover damages for injuries sustained when he was made blind by an explosion of dynamite caps on September 15, 1947. On July 25, 1955, a judgment of the court sitting without a jury was entered in favor of respondents, and plaintiff appeals.

Prior to the accident, appellant's father and his family were living in a dwelling house located on orchard property owned by Franz Salmonson, his wife and their son Herbert. Franz and Herbert had operated the ranch for others from 1943 and became the owners a few months before the accident. Reynolds, senior, was employed by Franz and Herbert as a farm laborer. The dwelling house was furnished under the terms of his employment. A pump house, housing an electrically driven irrigation pump, was located about 60 feet from the dwelling. It was not kept locked. At the time of the explosion, appellant was five years of age, and on that day he, his brother Ronnie, aged seven, and a cousin Larry, also aged seven, were playing around the pump house. They entered it as they

had frequently done. That they frequently entered the pump house was known to Herbert and Franz, who had warned them to stay out. On September 13th, the children had entered the pump house and had found a coat hanging on the wall inside. In the pocket of the coat they had found a can which contained dynamite caps. They had no knowledge of the danger of these caps. Ronnie took the can from the coat, placed it on a crossbeam in the pump house, and when the children entered on September 15th they took the can from the pump house and endeavored to open it by pounding on it with a piece of iron. The caps exploded, causing the injury for which appellant sued.

The evidence further discloses that in February, 1943, Franz purchased dynamite caps, which were used in blasting operations on a neighboring farm, operated by Franz and Herbert for its owners. When the blasting was over, some caps were unused, and these Herbert took, announcing his intention of disposing of them in the river. After the accident and preceding this action, Herbert died, but it was in evidence that, having announced his intention of disposing of the caps, he drove easterly toward the Feather River inferably for that purpose. The coat in which the caps were found by the children did not belong to any member of the Salmonson family nor to the family of appellant. There was evidence that at various times before and after Herbert and Franz became the owners of the ranch, they thoroughly cleaned the pump house and removed therefrom all loose articles and things not needed in the operation of the pump for the irrigation of the orchard; that when the pump was running it was necessary for someone to enter the pump house several times a day and inspect the pump; that among others who frequently entered for that purpose was appellant's father; that no one so entering the pump house recalled having seen the coat prior to the accident; that neither Herbert nor Franz had ever had any actual knowledge of the presence of the caps in the pump house.

The trial court made findings that the caps found in the pump house by the children were not the caps purchased four years before by Franz for blasting operations on the neighboring ranch; that the owners of the property and their employees had no occasion or reason to enter the pump house when the pump was not being used; that the pump had not been used for about six weeks prior to the accident; and that none of the Salmonsons had entered the pump house during that period, and in the exercise of ordinary care of the premises were not required to do so; that the caps were not in the pump house at any time prior to the time they were found there by the children; that the respondents, neither by or through themselves or their agents or employees, had carelessly or at all kept the caps in the pump house; that when the Reynolds family moved into the dwelling house the caps were not there nor were they thereafter placed there by the respondents or by any person for whose acts they were responsible. Finally, the court found as a fact that respondents had not been careless or negligent in regard to the maintenance of the pump house, and that the explosion and the injuries were not the result of any negligence on their part.

The sole contention on the appeal is that the foregoing findings are not supported by the evidence. The contention cannot be sustained. From the fact that respondents had used caps four years before and had some left, from respondents' possession and control of the premises where the caps were found, from the improbability that a stranger would trespass and leave his coat and the caps in the pump house, from these and other circumstances the trial court could have concluded that respondents had in fact kept the caps where they were found, in violation of the duty they owed appellant and of the pertinent statute, Health & Safety Code, secs. 12150 and 12221 and were responsible for the in-

juries inflicted on appellant. This, however, the court was not bound to conclude. The issue was one of fact, and from the negative evidence that the respondents had not used or had in their possession or control any dynamite caps after disposing of those used four years before in blasting operations on the nearby ranch, from the evidence that none of those who frequented the pump house had seen the coat in the pocket of which the caps were placed in the pump house, until the children found it hanging there, the trial court could conclude, as it did, that the presence of the caps in the pump house was unknown to the respondents, and that they had been placed there or permitted to be there by no act of the respondents or those for whose actions respondents were responsible. It is true that, since the Reynolds family, including the children, were properly on the premises, the dwelling house and its immediate environs at least, being furnished to Reynolds, senior, as a part of his compensation for labor, liability could be fastened upon respondents if they were negligent in allowing so highly dangerous a commodity as dynamite caps to be in a place where the children could obtain them (10 A.L.R.2d p. 22, et seq.); but here again whether or not respondents were negligent in not having, through more frequent inspections of the premises, discovered the presence of the caps was a question of fact for the trial court. Any negligence in their care of the premises had to be related to the matter of inspection under all the circumstances, including those as to the use of the pump house which the court found to be of such a nature as not to require anyone to be in there, except when the pump was operating, since the pump house, according to the testimony, was used for no other purpose than to house the pump. Having found the respondents did not store or keep the caps in the building, the question of whether or not respondents, in the exercise of due care, should have, by reasonable inspection, discovered the caps before the children did, was for the trial court to determine. The circumstances support the court's findings absolving respondents.

We find no error in the record.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.



148 Cal.App.2d 867

Isabelle Krossber DOUGLASS, Plaintiff and Appellant,

v.

Russell DOUGLASS, Defendant and Respondent.

Civ. 22267.

District Court of Appeal, Second District, Division 3, California.

March 1, 1957.

Annulment proceeding by wife. The Superior Court, Los Angeles County, Bayard Rhone, J., denied annulment, and wife appealed. The District Court of Appeal, Shinn, P. J., held that wife was entitled to annulment.

Judgment reversed with instructions.

1. Marriage ⇐58(7)

Test as to whether marriage should be annulled is whether the false representations or concealment were such that essential purpose of injured spouse inherent in the contracting of the marriage was defeated. West's Ann.Civ.Code, § 82.

2. Marriage ⇐58(7)

Wife, who was induced to marry by husband's false representations that he was an honest, law abiding, respectable, and honorable man and that he had a little girl who was well provided for, was entitled to annulment in view of facts that father had been convicted of grand theft, was a parole

violator and a fugitive from justice, and was guilty of failure to support two children of a former marriage. West's Ann.Civ. Code, § 82.

3. Marriage ⇐58(7)

Either party to marriage has right to annulment decree where the fraud relied upon as justification for rescission of the marriage contract is so grievous that it places injured party in a relationship which is intolerable because it cannot honorably be endured. West's Ann.Civ.Code, § 82.

4. Equity ⇐11

Equity will not deny relief where a plan of deceit, which has been laid out and consummated, must inevitably defeat the essential purposes of the deceived party in entering into the relationship.

Krag & Krag and William L. Mock, Alhambra, for appellant.

SHINN, Presiding Justice.

Isabelle Krossber Douglass sued Russell Douglass for annulment of their marriage contracted August 9, 1955. She alleged that her consent to the marriage was induced by defendant's fraud in that he falsely and fraudulently represented to her that he was an honest, law abiding, respectable and honorable man and concealed from her his real character; she believed and relied upon said representations and otherwise would not have consented to the marriage. Defendant, in fact, had been convicted March 17, 1951 in Minnesota of the offense of grand theft; he was paroled to the Minnesota State Board of Parole; February 18, 1952, by order of the court, stay of execution of sentence was vacated and he was committed to the county jail at Moorhead, Minnesota. The foregoing facts were concealed from plaintiff with the fraudulent intent of deceiving her; November 24, 1955, upon the discovery of the falsehood of defendant's representations and of his true character, plaintiff severed her relations with defendant and has not since cohabited with him. Late in 1955, defendant was apprehended by law enforcement officers of Minnesota, was returned to that state and placed in jail. Defendant defaulted and his default was duly entered.

Plaintiff testified at the trial to all the facts alleged in her complaint. Some three months after the marriage, law enforcement officers appeared at the Douglass home, took defendant into custody and caused him to be returned to Minnesota. Documentary evidence was introduced as proof of the Minnesota conviction, parole and revocation of parole. The revocation was due to the failure of Douglass to support two children by a previous marriage. At the time of the trial Douglass was still incarcerated in a Minnesota jail. Plaintiff testified further that prior to her marriage defendant represented that he had "a little girl that was well provided for" whereas, in fact he had two children and had not supported them. The cause was submitted upon the evidence of plaintiff and the court denied annulment. Plaintiff appeals.

[1, 2] In denying plaintiff relief the court stated: "But I have failed to find any California case that supports the decree of an annulment in a case such as we have here. In fact, I have found a great many cases to the contrary." We have made a diligent search of the authorities and have found no case which would serve as a precedent for denial of a decree of annulment to a plaintiff upon the facts established in the present case. The test in all cases is whether the false representations or concealment were such as to defeat the essential purpose of the injured spouse inherent in the contracting of a marriage. Nothing short of this would justify an annulment; nothing more is required to establish the voidable character of the marriage contract. The facts of the decided cases are of infinite variety. Quite a few of them are listed in Schaub v. Schaub, 71 Cal.App.2d 467, 162 P.2d 966, and in Bruce v. Bruce, 71 Cal.App.2d 641, 163 P.2d 95. Millar v. Millar, 175 Cal. 797, 167 P. 394, L.R.A.1918B, 415, discusses the subject of annulment at length. The facts of the present case differ ma-

terially from those of all of the California cases involving annulment upon the ground of fraud. Such a factual situation is rarely to be found in the law books. We venture to say that no case is to be found in which any court which was free to decree an annulment of a marriage upon the ground of fraud has refused a decree to a litigant who was shown to be in the unfortunate position which Mrs. Douglass occupied at the time of her trial. Her right to an annulment is to us so clear as to make it wholly unnecessary for us to concern ourselves with the question whether our concept of justice has found expression in the decisions of other courts.

[3, 4] Section 82 of the Civil Code which lists fraud as a ground for annulment does not specify the particular frauds which will justify the rescission of a contract of marriage, but we do not doubt that either party to the marriage has a right to a decree of annulment where the fraud is so grievous that it places the injured party in a relationship that is intolerable because it cannot honorably be endured. "Equity will not deny relief where a plan of deceit has been laid out and consummated which must inevitably defeat the essential purposes of the deceived party in entering into the relationship." Schaub v. Schaub, supra, 71 Cal.App.2d 467, 476, 162 P.2d 966, 971. It would serve no good purpose to engage in a discourse upon the California cases in which various frauds have been held either sufficient or insufficient to justify a decree of annulment.

At the time of her marriage to defendant Mrs. Douglass had two children by a former marriage. There was no reason whatever to doubt that in consenting to marry defendant her purposes were such as any normal mother of two children would have in contracting a second marriage, namely, to have a home, a husband of honorable character whom she could respect and trust, one whom she would be proud to have as a companion and to introduce to her friends, and who would be a suitable stepfather for her children. These are the essentials of the marital relationship which plaintiff expected and in all these respects her hopes were shattered and her purposes defeated. The facts that defendant stood convicted of grand theft, as a parole violator, a fugitive from justice and a father guilty of failure to support two children of a former marriage were not the only ones which blighted plaintiff's future. Even in those circumstances the defendant might eventually have turned out to be a worthy husband, for it is no doubt true that men who have served prison terms oftentimes prove to be as good husbands as many others whose unacquaintance with prison walls has been due entirely to their good fortune; but the fraud of defendant in concealing his criminal record and true character was a deceit so gross and cruel as to prove him to plaintiff to be a man unworthy of trust, either with respect to his truthfulness, his moral character or a disposition to be a law-abiding citizen. Denial of the prayer of plaintiff for annulment would mean that when defendant is released from prison she must either receive him and extend to him the rights and privileges that are usually due from a wife, or, rejecting and repulsing him, resign herself to the miserable and humiliating existence to which she would stand condemned by the fraud of the defendant and the court's harsh and unsympathetic denial of her plea for liberation. This, in our opinion, would be an unjust and intolerable imprisonment to inflict upon the innocent plaintiff. We can have no part in it.

The judgment is reversed with instructions to grant a decree of annulment.

WOOD and VALLÉE, JJ., concur.

148 Cal.App.2d 862

Filomena Delgato KIPLINGER, Plaintiff and Respondent,

v.

Clark W. KIPLINGER, Defendant and Appellant.

Civ. 21730.

District Court of Appeal, Second District, Division 3, California.

March 1, 1957.

Action by divorced wife against husband to quiet title to realty, or in the alternative, for partition. The Superior Court, Los Angeles County, Henry M. Willis, J., entered judgment that wife owned the property as her separate property and husband appealed. The District Court of Appeal, Parker Wood, J., held that evidence was insufficient to support findings that title to property was inadvertently placed in names of husband and wife as joint tenants, and that it was intent of parties that property be separate property of wife, and that husband had no interest in the property and that wife was owner of the property as her separate property.

Judgment reversed.

1. Husband and Wife ⇐14(3)

Where deed was to husband and wife as joint tenants, there was a presumption that title to the property was as described in the deed and burden was on wife, who sought to establish that property was her separate property, to rebut that presumption.

2. Husband and Wife ⇐14(3)

Presumption that title to property was as described in a joint tenancy deed, to husband and wife, arising from form of the deed, could not be rebutted solely by evidence as to source of funds used to purchase the property.

3. Husband and Wife ⇐14(3), 264

In action to quiet title to realty, or in the alternative for partition, evidence was insufficient to support findings that title to property was inadvertently placed in names of husband and wife as joint tenants and that it was intent of parties that property be separate property of wife, and that husband had no interest in the property and that wife was owner of the property as her separate property.

4. Husband and Wife ⇐229(6)

Where wife's complaint in action to quiet title alleged that husband claimed an interest in certain realty and that wife did not believe that husband had any interest in such realty, and husband, in his answer, denied generally and specifically such allegations, but also stated he joined wife in request for partition of the realty and asked that the realty be sold and proceeds be distributed equally between the parties, even though husband made his denial of interest by general reference to the complaint in view of fact that his answer also asserted he claimed an interest in the realty, a triable issue was presented as to his claimed interest in the realty.

Tanner, Thornton & Myers and John Bricker Myers, Los Angeles, for appellant.

Abe Richman, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action to quiet title to real property or, in the alternative, for partition. Judgment was that plaintiff owns the property as her separate property. Defendant appeals from the judgment.

Appellant contends that the evidence does not support the findings.

Plaintiff and defendant were married in September, 1949. In January, 1950, they acquired record title to real property (house and lot) in Encino by a deed which recited that the property was conveyed to them "as joint tenants." In acquiring the property, a down payment of $351.96 was made, and plaintiff and defendant executed a note and a trust deed for a G. I. loan in the amount of $9,500. The unpaid balance of the loan at the time of trial was $8,337.49. Plaintiff obtained an inter-

locutory divorce on April 22, 1953. In the divorce action plaintiff alleged that the property was community property. No disposition of the property was made in the divorce action. The present action was filed April 12, 1954.

The allegations in the cause of action to quiet title were, in part, that: Title to the property was inadvertently placed in the names of the parties as joint tenants. It was the intent of the parties that the property be the property of plaintiff inasmuch as plaintiff furnished the entire consideration therefor and had made all the payments on the encumbrance which was placed upon the property at the time of the purchase. Defendant claims an interest in the property. Plaintiff does not believe that defendant has any interest in the property.

In his answer, defendant denied those allegations and he requested a partition of the property.

Plaintiff testified that: She was living on the property at the time of trial and had lived there continuously since February, 1950. Defendant also lived there from February, 1950, until the early part of 1952, with the exception of an eight-month period commencing in August, 1950. He had not lived there since the early part of 1952. When defendant left in August, 1950, and when he moved out in 1952, he stated that he did not want any part of the house, that all "he wanted was his name taken off his G. I. loan so he could reuse it." She (plaintiff) made the down payment of $351.96, and all the payments which were payable on the loan since the purchase. Defendant did not turn any money over to her, and the funds of the parties were not commingled in a bank account. She had maintained the property since early in 1952, and the improvements she made thereon included painting, gardening, and installing a fence. Her two children by a previous marriage lived with her. She was employed as a waitress during the time she was married to defendant. She obtained a final decree of divorce from defendant.

Defendant testified that: The payments made on the house during the time that he lived there were made from a checking account in which his funds were deposited. He lived with plaintiff from November, 1949, until April, 1952, with the exception of a six-month period commencing in April, 1950. He had made no contribution toward the payments on the house since April, 1952. When he left in 1950, he probably did say to plaintiff that he wanted nothing to do with the house, that he wanted no part of it, and that all he wanted was to be relieved of the responsibility of being on the note because some day he might wish to use his G. I. loan for the purchase of another house. When he left in 1952, he did not make substantially the same statement. He had no conversation with plaintiff when he left in 1952.

The court found, among other things, that the title to the property was inadvertently placed in the names of plaintiff and defendant as joint tenants, and that it was the intent of the parties that the property be the property of plaintiff inasmuch as she furnished the entire consideration therefor and has made all the payments on the encumbrance; that defendant has no interest in the property; and plaintiff is the owner of the property as her separate property.

Defendant contends that the evidence does not support those findings.

[1–3] The fact that the deed was taken in joint tenancy established a prima facie case that the property was in fact held in joint tenancy. King v. King, 107 Cal. App.2d 257, 259, 236 P.2d 912. There was a presumption that the title to the property was as described in the deed and the burden was on plaintiff to rebut that presumption. Schindler v. Schindler, 126 Cal.App.2d 597, 601–602, 272 P.2d 566. The presumption arising from the form of the deed could not be rebutted solely by evidence as to the source of the funds used to purchase the property. Gudelj v. Gudelj, 41 Cal.2d 202, 212, 259 P.2d 656. There was no other evidence to rebut the

presumption arising from the form of the deed. Testimony to the effect that, about 6 months after the deed was made and also about 2 years after it was made, defendant said he did not want any part of the property was not evidence that the deed was inadvertently made in the names of the parties as joint tenants. There was no evidence of fraud or mistake. There was no evidence that title was inadvertently taken in the names of the parties as joint tenants or that it was the intent of the parties that the property be the separate property of plaintiff. Plaintiff stipulated that in the divorce action she "thought and alleged" that the property was community property. In addition to the down payment of $351.96, the property was purchased by means of a G.I. loan, which loan was obtained on defendant's eligibility therefor. It appeared from the testimony of plaintiff that defendant had not been relieved from liability on that loan. The findings, above referred to, are not supported by the evidence.

[4] Respondent (plaintiff) asserts that the judgment should be upheld because the answer did not present a triable issue. Her argument is that defendant, in his answer, denied that he has any interest in the property, and therefore that he cannot complain of the finding that he has no interest in the property. As above shown, the complaint alleged among other things that defendant claims an interest in the property, and plaintiff does not believe that defendant has any interest in the property. Those allegations of the complaint were in a paragraph which contained several other allegations. In his answer, defendant referred to that paragraph and certain lines therein, and then stated that he "denies generally and specifically" those allegations. By such a denial he denied the allegation that he claims an interest in the property. It is to be noted, however, that in his answer he also stated that he joins plaintiff in the request for partition of the property. In the prayer of his answer, he asked that the property be sold and the proceeds be distributed equally between the parties. It thus appears that, even though defendant made a denial of interest by a general reference to certain lines of the complaint, the answer of defendant also asserted that he claimed an interest in the property. Defendant testified that: "My contention is that I have an interest in the property." Counsel for plaintiff cross-examined defendant as to the basis for his contention. The case was tried on the theory that defendant claimed an interest in the property. It does not appear that plaintiff was misled by defendant's answer. Respondent's contention that the answer did not present a triable issue is not sustainable.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.



148 Cal.App.2d 793

Elizabeth N. RUDE, Plaintiff and Respondent,

v.

Jack L. RUDE, Defendant, Appellant and Petitioner.

Civ. 22192.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1957.

Hearing Denied April 25, 1957.

Divorce action by wife wherein wife sought custody of parties' minor children and award of support for the children, attorney's fees, and costs. The Superior Court, Los Angeles County, awarded custody to wife, ordered husband to pay $500 per month for children's support and maintenance, and denied husband's petition for stay of the order pending appeal, and husband appealed. Husband also petitioned for writ of supersedeas. The District Court of Appeal, Fourt, J., held that Supe-

rior Court acted within its sound discretion in entering the order.

Writ discharged, and petition denied.

1. Divorce ⇐296, 312.4

In divorce action wherein wife sought custody of parties' minor children, support payments for the children, attorney's fees, and costs, Superior Court acted within its sound discretion in ordering husband to deliver custody of the children to wife and to pay $500 per month for support until further order of the court and in denying stay pending appeal.

2. Infants ⇐19

Reviewing courts should not, by issuing a writ of supersedeas nullify plain statutory purpose of Code of Civil Procedure provision that child custody provisions are not stayed by appeal. West's Ann.Code Civ.Proc., § 949a.

3. Appeal and Error ⇐901, 931(1)

Presumption is in favor of trial court's decision, and reviewing court cannot presume error.

4. Infants ⇐19

In child custody proceeding, basic fundamental before the court is what is best for the children.

5. Divorce ⇐296, 298(1), 312.6(5)

In child custody proceeding arising from divorce action, morals of parents, their financial condition, age of the children, and children's temperament and love of either or both parents are factors to be considered by trial court in determining children's best interests, and such proceedings are left to trial court's sound discretion and its determination would not be set aside in absence of abuse thereof.

Jones, Lane, Weaver & Daley, by Roy A. Weaver, Stockton, for petitioner.

Harry C. Cogen, Los Angeles, for respondent.

FOURT, Justice.

This matter involves the petition for, issuance of, vacation and discharge of, a writ of supersedeas.

The application of the defendant for the writ of supersedeas, among other things, sets forth that there is now pending in the superior court in Los Angeles county, a divorce action between the above entitled parties; that pending further proceedings, the plaintiff brought on for hearing a motion for custody of the two minor children of the parties, support for the children, attorney's fees and costs. The hearing was on oral and documentary evidence and affidavits. After four and one-half days of hearings, the trial court ordered that the defendant deliver both of the minor children in question into the custody of the plaintiff on or prior to December 15, 1956, at the plaintiff's home in Los Angeles county, and that the defendant pay to the plaintiff for the support and maintenance of the children $500 per month, to continue until the further order of the court.

The defendant petitioned the court for a stay of the order pending appeal, and such petition was denied after a hearing. An appeal from the order in question was perfected and is now pending.

The defendant and petitioner here contends that he and his wife, together with the children, did, from 1947 to 1952, reside in Beverly Hills, California, and that in 1952, they leased their home and went to Europe, and further, that in 1954, they sold the home. Two rather large and quite valuable farms, located in Stanislaus and San Joaquin counties, were at all times owned by the parties and are still owned by them, and are now before the court below for disposition. In about July, 1952, the parties to the action and their children left California, and in August, 1952, they established a residence in Geneva, Switzerland, where they continued to reside until September 1, 1955 on leased property. During this period of time the defendant made two or

three trips a year to California in connection with the farming properties, and the plaintiff came to the United States a couple of times for visits. The defendant further contends that the plaintiff left Geneva and came to California in about November 1955, and that the defendant and the children continued to stay in Switzerland and still reside there; that prior to her leaving for California plaintiff gave custody of the children to the defendant and that she had arranged to institute an action for divorce in the Swiss courts. After the plaintiff left Switzerland and came to the United States, the defendant instituted an action in divorce in the Swiss courts, and among other things, charged the plaintiff herein with adultery, and that action in Switzerland is still pending. The defendant further contends that he has good grounds for an appeal from the order in question and states that he believes the order was in excess of the court's jurisdiction, an abuse of the court's discretion and not in any respect supported by the evidence.

The children concerned in this proceeding are John Rude, aged about fifteen years, and Paul Daniel Rude, aged about eight years. The daughter, Judith Rude, is now of the age of twenty-one years. The two boys attend school in Switzerland.

It is also a contention of the defendant that if he complies with the order the school term of the children will be broken, their present family life will be disrupted and cause them great unrest.

The plaintiff has answered each and every contention of the defendant. She set forth, among other things, that the legal residence and domicile of the parties and the children was directly submitted to the trial court. Further, that the parties were extremely well to do financially, and that the European trip in 1952 was only an extended vacation trip; that substantially all of the assets of the parties were in California and that Mr. Rude had no business or occupation in Europe and lived entirely from the income of the California assets. Much documentary evidence was introduced consisting of about fifty exhibits, such as for example, income tax returns signed by the defendant wherein he gave Los Angeles as his residence. It was further pointed out that the defendant unfavorably compared American institutions with others and that the boys were being taught foreign philosophies. John, the older boy, wrote to his mother on May 1, 1956, in part, "I am having a wonderful time in Geneva and on our vacation trips. I want to keep on living here in Europe." The petitioner was not present at the hearing. However, his attorney as a witness for the plaintiff testified that he had met and consulted with his client in Denver, Colorado, less than three weeks before the hearing. It is the claim of the plaintiff, and she asserts that she has consistently urged that the petitioner's alleged residence in Switzerland was not bona fide, was false and fictitious and was advanced solely for the purpose of avoiding the jurisdiction of the California courts, and that the trial court properly determined the matter, that it would be for the best interests of the children that they be placed with the mother, the plaintiff herein, and that a writ of supersedeas would completely nullify the order of the trial court.

A writ of supersedeas issued from this court on December 27, 1956, wherein the trial court was restrained from enforcing those portions of the order appealed from which commanded the defendant to deliver the two boys to the plaintiff, and which ordered him to pay $500 per month support and maintenance for the boys. The petition was denied as to the other portions of the order. The stay was conditioned upon the record of appeal being filed without any delay and that appellant's opening brief be filed within rule time thereafter, and further, that the reply brief be within rule time.

Shortly thereafter, the plaintiff petitioned for a rehearing wherein she set forth, among other things, that "On January 4, 1957 the official court reporter advised plaintiff's counsel that defendant's counsel, Roy Weaver, had requested that the preparation

of the reporter's transcript on appeal be delayed as long as possible.", and accompanying such assertion was an affidavit of her attorney in support thereof. At the oral hearing defendant's counsel vehemently denied any such course of conduct and filed an affidavit to such effect. The court reporter indicated that he would not make a statement under oath with reference to the matter.

The plaintiff further set forth that the defendant has now filed an answer to the first amended complaint for divorce and that the case is now at issue. It was stipulated at the oral hearing on the petition for a rehearing that this court might consider the entire file and record in determining this matter. In reading the answer, it is interesting to note that the defendant in answering an allegation to the effect that he had lived openly and notoriously with one Tania Savoy in Switzerland, Italy and elsewhere, denied the same and denied that he took her to the United States with him on a trip, but admitted that she did travel from Switzerland to the United States at the same time by the same means of transportation that he used, and that she really made the trip with him at the invitation and request of his wife. The plaintiff alleged in her first amended complaint that the defendant committed adultery with Tania Savoy on several different times, occasions and places. The defendant, in his answer, denies all such assertions, excepting for one occasion in Monte Catini, Italy, about August 23, 1955, and on that occasion, he states that Tania Savoy was personally, by the hand, led to the bed of the defendant by the plaintiff, and that she and plaintiff requested and induced the defendant and Tania Savoy to remain in bed together. It is not disclosed whether the children were along when such amenities were being engaged in, but whether they were or not, it certainly discloses sharply a very decided lack of the qualities of fundamental decency and sound character on the part of either or both of the parties.

[1] The defendant, in a further affirmative defense to his conduct, sets forth that he has a strong feeling for the children and he purports to be interested in their "cultural development and social graces"; that early in 1955, his wife and Tania Savoy set about a campaign whereby his love for his wife was to be deadened and, in substance, Tania's love was to replace that of his wife's. He insists that he did his very best to resist but without avail, and that ultimately "this defendant engaged in family life and cohabitation with the said Tania Savoy". We presume that such phraseology is one way of answering a pleading where adultery is charged, without actually denying it, and at the same time not frankly admitting it as he did in reference to the August, 1955, episode. In any event, in our opinion, it in part demonstrates that the trial court was well within the bounds of sound discretion and that his analysis of the whole matter, even though he did not have the answer before him at the time he heard the original order to show cause, was substantially correct.

The petitioner herein relies heavily upon In re Chandler, 36 Cal.App.2d 583, 97 P.2d 1048. However, we are of the opinion that the language as used in Sampsell v. Superior Court, 32 Cal.2d 763, 776, 197 P.2d 739, definitely sets at rest the proposition whether the superior court has jurisdiction over the subject matter of a custody proceeding such as is presented here. In the case of Maloney v. Maloney, 67 Cal.App.2d 278, 280, 154 P.2d 426, 427, cited with approval in the Sampsell case, the court stated: "Although the children are beyond the territorial limits of California, they are still under the jurisdiction of the court below * * *, which attached at the time the suit was filed."

In the case of Currin v. Currin, 125 Cal. App.2d 644, 652, 654, 271 P.2d 61, 66, the district court, citing the Sampsell case as its authority, held as follows:

"Defendant challenges the jurisdiction of the court over the minor child of the parties to this action. Concededly, the legal residence and legal domicile of plaintiff mother was in the State of California. Defendant father contends that his was in the

State of North Carolina. If the court below was correct in determining that defendant father was a resident of the State of California at the time of the commencement of this action, then it necessarily follows that California was the legal residence and domicile of the child, and that the court was clothed with jurisdiction to make its order *in re* custody of said child.

* * * * * *

"While the evidence affecting domicile of defendant was in conflict, such a situation is not uncommon, and the decision in such cases rests exclusively with the trier of facts unless it can be said that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. Such is not the situation confronting us in the case at bar. We are persuaded that the instant case comes within the purview of the reasoning adopted in the case of Sampsell v. Superior Court, 32 Cal.2d 763, 773, 777, 778, 780, 781, 197 P.2d 739."

[2] This court recently had occasion to set forth the background of section 949a, Code of Civil Procedure, in Faulkner v. Faulkner, Cal.App., 306 P.2d 585, and no useful purpose would be served in relating the same matter here. Suffice it to say that appellate courts should not nullify the plain statutory purpose of the section in question by issuing a writ of supersedeas. Private Investors v. Homestake Min. Co., 11 Cal. App.2d 488, 491–492, 54 P.2d 535; United States v. Berg, 202 Cal. 10, 14–15, 258 P. 942.

We are not here indicating which of the parents is, in our opinion, best fitted to care for and attend to the said children. The trial judge determined that question upon substantial evidence and he ordered what he believed would be for the best interests of the children, which, in our opinion, was proper. Taber v. Taber, 209 Cal. 755, 756, 290 P. 36; Matter of Cozza, 163 Cal. 514, 126 P. 161; Lampson v. Lampson, 171 Cal. 332, 153 P. 238; Foster v. Foster, 8 Cal. 2d 719, 68 P.2d 719; Davis v. Davis, 41 Cal. 2d 563, 565, 261 P.2d 729; Holsinger v. Holsinger, 44 Cal.2d 132, 135, 279 P.2d 961.

We believe that probable error has not been made to appear in this case. It was appropriately said in Nuckolls v. Bank of California, 7 Cal.2d 574, at page 578, 61 P.2d 927, at page 929: "In the second place, probable error has not been made to appear. From the rather incomplete and unsatisfactory showing, it appears that there were at least two grounds for the trial court's judgment, either of which would be sufficient to sustain it. We cannot presume error. This court must consider the rights of respondents as well as those of appellants. Affirmances must be contemplated as well as reversals; in fact, until the contrary is shown, the presumption is in favor of the lower court's decision. A *supersedeas* is issued usually to protect the appellate court's jurisdiction. If a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction. Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928, 38 L.R.A.,N.S., 436; 2 Cal.Jur. 465, § 217."

[3] The presumption is in favor of the decision of the trial court and we cannot presume error.

We, of course, are not concerned at this time with the ultimate decision which should be made in this proceeding. Food & Grocery Bureau of Southern California v. Garfield, 18 Cal.2d 174, 178, 114 P.2d 579. Furthermore, the petitioner in this instance requested the trial court for a stay of proceedings under the provisions of section 949a, Code of Civil Procedure, and upon a hearing being held the motion for such a stay was denied. The ruling of the trial judge should not be disturbed unless it can be shown that there was a manifest abuse of discretion.

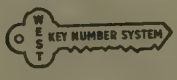
[4, 5] As heretofore indicated, the basic fundamental matter before the court was what is the best for the children. The morals or lack of morals of either of the parents, their financial condition, the age of the children, their temperament and the love of either or both parents are all factors to

be considered by the trial court in determining the best interests of the children. Necessarily, such proceedings are left to the sound discretion of the trial court and whatever it determines will not be set aside except it should clearly appear that there has been an abuse of discretion. Crater v. Crater, 135 Cal. 633, 635, 67 P. 1049. On reconsideration, we find no abuse of discretion in this case.

The writ of supersedeas heretofore issued is vacated and discharged, and the petition is denied.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



148 Cal.App.2d 851

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Gary MANN, Defendant and Appellant.

Cr. 5706.

District Court of Appeal, Second District, Division 2, California.

March 1, 1957.

Defendant was convicted of rape. The Superior Court, Los Angeles County, Beach Vasey, J., entered judgment, and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Moore, P. J., held that testimony of 16 year old prosecutrix was not rendered inadmissible against defendant on ground that prosecutrix might incriminate herself.

Judgment and order affirmed.

1. Witnesses ⇐306

In rape prosecution, testimony of 16 year old prosecutrix was not rendered inadmissible against defendant on ground that prosecutrix might incriminate herself. West's Ann.Pen.Code, §§ 261, 647; West's Ann.Const. art. 1, § 13.

2. Criminal Law ⇐1043(2)

District Court of Appeal would not consider objection to admissibility of certain testimony where defendant did not make the precise objection to the testimony during the trial.

Gray, Glass, Allen & Ransom, Gardena, by Karl K. Ransom, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Convicted by the court of rape as defined by subdivision one of section 261, Penal Code, appellant was committed to the youth authority. His motion for a new trial having been denied, he demands a reversal on the ground that the court required the prosecutrix "to give testimony which might tend to incriminate her." He contends (1) that the witness had the right to refuse to testify as provided in the state and federal constitutions; (2) that when the witness was forced to answer, her testimony was illegally obtained.

Prosecutrix was born January 6, 1939. On November 29, 1955, having completed her visit at the home of a girl friend in Lomita about 10 p. m., she answered the honk of an automobile horn by looking from the front door. She saw four men in the automobile who had come for another girl that was not present. One of them asked whether they could give her a lift on her way home. She entered the car and occupied the back seat beside appellant. Instead of driving to her home, the driver proceeded to the Palos Verdes Hills. She told them she "had to go home to go to work the next day * * * I have to get up at 6:30 in the morning so take me home." After they had talked for a while in the hills, they drove to a slough in the rear of Harbor Junior College about midnight. Three of the boys left. She was then alone with appellant. She there had an act of sexual intercourse with him. She was married December 11, 1955.

At the time the prosecuting attorney inquired as to the act of intercourse, appellant's counsel requested the court to advise the witness that she need not testify to "any fact which she feels might incriminate her * * * Article I, section 13, of the Constitution of California is sufficiently inclusive to allow a witness to take immunity even though the only punishment might be that of being filed on in the juvenile court * * * she might be filed upon under one of the subdivisions of Section 647, the *vagrany* section of the Penal Code."

[1] On appeal, the same contentions are renewed and additional authorities from this and other states are cited. Ex parte Nesson, 25 S.D. 49, 125 N.W. 124, 126, 27 L.R.A.,N.S., 872; In re Sadleir, 97 Utah 291, 85 P.2d 810, 812; State ex rel. Attorney General v. Simmons Hardware Co., 109 Mo. 118, 18 S.W. 1125, 15 L.R.A. 676; State v. Melvin, 144 Wash. 687, 258 P. 859; State ex rel. Sowders v. Superior Court, 105 Wash. 684, 179 P. 79. Such authorities are readily distinguishable. They do not bear upon the question of whether a prisoner accused of rape may resist the answers of the prosecutrix because of detriment she might suffer by confessing her participation in the crime. That question was settled by this court thirty-five years ago by People v. Gonzales, 56 Cal. App. 330, 204 P. 1088. At the trial of that case, the prosecutrix on the witness stand objected to being required to narrate the facts on the ground that by doing so she would incriminate herself. On appeal, appellant contended that the witness had the right to refuse to testify and that if she was compelled to do so it was error of which he had the right to complain. The court rejected such contention with the observation that conceding her claim to be correct, the error was not committed as against the accused and was not a matter about which he might complain. "The testimony was relevant and competent when given, and * * * was proper to be considered by the jury." People v. Gonzales, supra, 56 Cal.App. at page 331, 204 P. at page 1089; People v. Judson, 128 Cal.App. 768, 773, 18 P.2d 379.

Appellant contends also that by reason of the court's violation of the prosecutrix' guaranty of the privilege against self-incrimination, her answer may not be used against him, citing People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. That decision is not authority for appellant's contention. In effecting alterations of the rule against unreasonable searches and seizures, the Supreme Court was motivated by what it deemed to be lawless enforcement of the law by enforcement officers. It was concluded by the court that such practice of lawless enforcement, that is the making of unreasonable searches and seizures, could not be deterred except by a rule excluding evidence secured by searches and seizures which violated constitutional rights. Also, in order to prevent unreasonable searches and seizures, and because " 'other remedies have completely failed to secure compliance with the constitutional provisions' " the court extended the rule of exclusion so as to discourage searches and seizures which violated the constitutional guaranties of parties other than the defendant. People v. Martin, 45 Cal.2d 755, 760, 290 P.2d 855, 857. The purpose for which the rule of exclusion was adopted, to wit, to deter police from making unreasonable searches and seizures, was not intended to justify the exclusion of evidence secured by requiring a mere witness to give testimony which may tend to incriminate him. Good reason: no flagrant abuses of the privilege of freedom from self-incrimination appear to have annoyed either the highest court of this State or of the United States Supreme Court. Remedies for correcting the erring ways of trial courts are of long standing and readily available. See People v. Gonzales, supra, 56 Cal.App. 330, 204 P. 1088.

In the case at bar, the behavior of the trial judge when appellant entered his objection is a model of judicial response to a claim that human rights are about to be ignored. His patience, his eagerness to learn from counsel on both sides and his delib-

erate, thoughtful treatment of the problem dispel every similarity to facts of Rochin v. People of State of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, and of People v. Cahan, supra.

[2] Furthermore, appellant saw the finish of his trial without a mention of the Cahan rule. He first attempted to inject it as a defense on his motion for a new trial when the argument raged about whether the witness was subject to prosecution under section 647, subd. 5, of the Penal Code. Inasmuch as appellant did not make the precise objection that the prosecutrix' testimony was inadmissible under the Cahan decision, the reviewing court will not consider such objection. People v. Wheeler, 109 Cal.App.2d 714, 716, 241 P.2d 276; People v. Lindsey, 90 Cal.App.2d 558, 567, 203 P.2d 572; People v. McCauley, 45 Cal. 146, 148.

The judgment and the order denying the motion for a new trial are affirmed.

FOX and ASHBURN, JJ., concur.



148 Cal.App.2d 811

In the Matter of the ESTATE of Anna C. MORGAN, Deceased.

Eva Morgan DEADY, Contestant and Respondent,

v.

Leo MORGAN, Proponent and Appellant.

Civ. 8881.

District Court of Appeal, Third District, California.

Feb. 28, 1957.

Proceeding for probate of a will naming proponent as sole beneficiary, and disinheriting testatrix' daughter. The Superior Court, San Joaquin County, M. G. Woodward, J., entered judgment denying probate and proponent appealed. The District Court of Appeal, Peek, J., held that evidence sustained findings of undue influence and lack of testamentary capacity and that a confidential relationship existed between proponent and his mother.

Judgment affirmed.

1. Wills ⇐163(2)

Where there is substantial evidence that proponent of a will sustained a confidential relation with a testatrix, unduly profited by her will and actively participated in securing its execution, a presumption of undue influence arises and a burden is cast upon proponent to show that the testamentary document was not induced by coercion or fraud.

2. Wills ⇐55(1), 166(2)

In proceeding for probate of a will naming proponent as sole beneficiary, and disinheriting testatrix' daughter, evidence sustained findings of undue influence and lack of testamentary capacity and that a confidential relationship existed between proponent and his mother.

Jones, Lane, Weaver & Daley, Daniel S. Lane, and Charles H. Vance, Stockton, for appellant.

John A. Wilson, Stockton, for respondent.

PEEK, Justice.

This is an appeal from a judgment denying probate of a will. It is the contention of the proponent-appellant that the findings of undue influence and lack of testamentary capacity are not sustained by the evidence.

The record shows that the testatrix and her husband, William, were residents of La Jolla until his death in 1954. The proponent, Leo, was the son of the testatrix by a prior marriage and the contestant, Eva, was the daughter of Anna and William. Both children resided at the family home until adulthood, Leo until 1917. In

1933 he moved to Stockton where he has resided ever since. Eva who was married in 1932 left her parents' home at that time and since 1948 has been a resident of San Pablo. In April of 1948, Anna executed a will leaving all of her property to her husband for life with the remainder in equal shares to Leo and Eva. This will was copied by Mrs. Keele, a friend of long standing, from a former will, the only change being that William was named as executor in place of a bank. Anna suffered a stroke in 1951 from which she never completely recovered. In April of that year she executed a third will. Mrs. Keele testified that at Anna's request she copied the provisions of the 1948 will, changing it only to the extent that Eva was named as executrix in place of William. During William's last illness Anna, together with her children, consulted an attorney in San Diego concerning the possibility of a guardianship for William because of their property interests. They were advised that such a proceeding would be unnecessary since the property of Anna and William was all held in joint tenancy. William's will left all of his property to Anna for life with the remainder to Eva. Leo was not mentioned. Because Anna's will had only one subscribing witness, the San Diego attorney asked her if she would desire to execute a new and like will, to which she answered that she would. In accordance with her instructions, an identical will was drafted by the attorney. Following William's death, Anna decided she would stay with her children in the north and first went to the home of Leo in Stockton. The signature card on her commercial bank account was changed to require the signatures of Leo and Eva as well as her own. She continued to reside with Leo until her death. The day following her arrival in Stockton, Leo took her to an attorney who had represented him several years previously and whom he had known for some time. The attorney testified that their discussion concerned the probate of William's will and the preparation of another will for Anna. Under the terms of this will Eva was disinherited for the reason that "she is Willed all of the community interest" of William. The will also named Leo as executor. Thereafter the attorney discovered that there was no property of William to pass by will since all was in joint tenancy with Anna, and he so informed her. This indentical information had been conveyed to all of them by the attorney in San Diego. Thereafter Anna again went to his office where another will was executed and this will is the subject of the contest here. In the contested will Leo was named as her sole beneficiary, and again Eva was disinherited for the stated reason that she was "capable of taking care of herself." Some time during the same month that the last will was executed, Eva received a letter from Leo stating that their mother desired to have Eva's name removed from the bank signature card. When Eva arrived in Stockton, she was asked by her mother to remove the name and at the same time was offered money to do so. Eva refused the money but did agree to remove her name. Thereafter Leo took complete care of his mother's business affairs including the writing of all checks for her. During the time his mother remained with him, Leo refused to take her to San Pablo to visit Eva except on one occasion, although several times he took her to visit his sister-in-law who lived in the same locality. His daughter testified that in the early part of April he told his mother that he did not think she should visit Eva because she, Anna, would be put in a mental institution. Also during the month of April, unknown to Eva, Leo withdrew $4,400 from his mother's account which was later evidenced by an unsecured promissory note. In addition he charged her $75 a month for her support. Following a second stroke suffered by Anna, Leo filed a verfied petition seeking to have himself appointed her guardian upon the ground that she was mentally incompetent. Eva knew nothing of such proceed-

ing until she received formal notice of the same, whereupon she went to Stockton. Although she was advised by Leo's attorney that it would be difficult, she was appointed, at the suggestion of the court, as co-guardian with Leo. A few days thereafter Anna was taken to a hospital and on July 23 she died at the age of 82. Subsequent to the guardianship proceedings, Leo first told Eva that he knew nothing of the last will executed by Anna. Later he said that he had taken Anna to an attorney's office and that she had made a will but that he did not know its contents. Still later he told Eva she had nothing to worry about; that the provisions of the will had not been changed. The record also discloses testimony by Mrs. Keele that she had often discussed property matters with Anna, and that the testatrix had stated to her many times that her property would be equally divided between Leo and Eva. Anna's sister, Mrs. Moore, also testified that she had made similar statements to her; that as late as May, 1954, subsequent to the execution of the last will, Anna had told her of the new will and that it provided that half of her property was to go to Eva and half to Leo.

[1] It is the rule that where there is substantial evidence that the proponent sustained a confidential relation with the testatrix, unduly profited by the will and actively participated in securing its execution, a presumption of undue influence arises and a burden is cast upon the proponent to show that the testamentary document was not induced by coercion or fraud. In re Estate of Pellegrini, 138 Cal.App.2d 143, 291 P.2d 558.

[2] The evidence, viewed in light of the enunciated rule, amply supports the finding of the trial court that a confidential relationship existed between Leo and his mother. From April 1, until shortly before her death in July, decedent lived continually with Leo; he borrowed a large sum of money from her and charged a substantial amount for her expenses; he took care of all of her business affairs; her contact with the attorney who prepared the contested will was made by Leo; he exerted himself to keep Anna from seeing Eva; he told his mother she should not visit Eva because she would be put into a mental hospital; he took his mother to San Pablo to see his sister-in-law but except for one occasion he refused to take her to see Eva; he did not notify Eva concerning the guardianship proceedings; Anna at that time was approximately 82 years old, had suffered a stroke in 1951 from which she never completely recovered and was in a generally weakened physical and mental condition; she talked very little to any one; under the terms of the contested will she gave Leo all of the property which had been acquired by her and William, Eva's father and Leo's step-father, the value of which was approximately $45,000; and her disinheritance of Eva with whom she had always been on friendly terms was at variance with the intention she expressed both before she went to live with Leo and after the execution of the contested will.

The record contains no substantial evidence to rebut the presumption as found by the trial court. It necessarily follows that its conclusion upon the question of undue influence must be affirmed. Hence it becomes unnecessary to discuss appellant's remaining contention relative to the issue of mental incompetency.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

148 Cal.App.2d 879

Salvatore T. PALMA, Anthony J. Palma, Ray Lucido and Tom Allotti, doing business under the firm name and style of Sea Beach Packing Company, Plaintiffs and Respondents,

v.

WATSON SURPLUS LINES AGENCY, Inc., a corporation, et al., Defendants and Appellants.

Civ. 17110.

District Court of Appeal, First District, Division 1, California.

March 4, 1957.

Rehearing Denied April 3, 1957.

Hearing Denied May 1, 1957.

Action by insureds against fire insurers for a judgment declaring amount of loss sustained by insureds. The Superior Court, City and County of San Francisco, William T. Sweigert and Albert C. Wollenberg, JJ., entered judgment determining amount of insureds' loss and insurers appealed. The District Court of Appeal, Peters, P. J., held that where trial court under its equity powers ordered an appraisal of loss sustained by insureds as called for by fire policies brought before it in an action by insureds for a judgment declaring amount of its loss, it was not bound to proceed in accordance with appraisal procedure set forth in the policies and in conducting such appraisal was not required to itemize the property item by item as required by the policies but could make ultimate findings as to loss sustained.

Judgment affirmed.

1. Appeal and Error ⇐878(2)

Where insureds in trial court raised contention that insurers were estopped to attack court appraisal of insureds' fire loss by their refusal to appoint an appraiser as provided in policy, and such contention was impliedly rejected when court ordered a hearing to make a proper appraisal and insureds did not appeal, they were not in a position to raise such issue again on appeal.

2. Insurance ⇐575

An insurer's refusal to comply with a demand for an appraisal does not estop the insurer from contesting amount of loss that has to be fixed before its liability can be determined.

3. Insurance ⇐574(1)

When an appraisal is made by appraisers appointed under the terms of a standard form of fire policy, the appraisers are required to itemize separately the actual cash value of loss to each item. West's Ann.Ins.Code, § 2071.

4. Declaratory Judgment ⇐369

Where trial court under its equity powers ordered an appraisal of loss sustained by insureds as called for by fire policies brought before it in an action by insureds for a judgment declaring amount of its loss, it was not bound to proceed in accordance with appraisal procedure set forth in the policies and in conducting such appraisal was not required to itemize the property item by item as required by the policies but could make ultimate findings as to loss sustained.

5. Declaratory Judgment ⇐369

Where fire insurers refused to comply with appraisal provisions of a fire policy, insurers, in an action for determination of amount of loss, were governed by rules applicable to court proceedings and would not be permitted to retain privileges, options and rights predicated on assumption that both parties would abide by the terms of the policy, and therefore, insurers were not entitled to an itemization of insureds' loss on any theory that such itemization was necessary in order to allow them to exercise a policy privilege of repair, rebuilding or replacement of property destroyed or damaged. West's Ann.Ins.Code, § 2071.

6. Trial ⇐393(1)

Although a minute order, or an opinion of a trial court may be used to explain an ambiguous finding, neither can be used to impeach a finding or judgment.

7. Declaratory Judgment ⇐347

In action by insureds against insurers for a judgment declaring amounts of loss sustained by insureds in a certain fire, evidence sustained finding as to actual cash value of destroyed properties covered by fire policies.

Cooley, Crowley, Gaither, Godward, Castro & Huddleson, San Francisco, for appellants.

Winston Churchill Black, San Francisco, for respondents.

PETERS, Presiding Justice.

The respondents, as partners, in 1953 owned a fish cannery in Monterey. They were insured against fire by appellants. The insured premises consisted of three properties, all part of the cannery operation. The fish packing and reduction plant was located at 622 Ocean View Avenue. Across the street at 645 Ocean View Avenue they owned a building and contents, while at 622 Wave Street they owned some fish oil tanks and other property. On October 24, 1953, a fire occurred in the main building at 622 Ocean View Avenue, destroying most of the building and the equipment there located.

The appellants issued fire insurance in the total amount of $256,000 on the cannery properties. These policies contained a "100% Average Clause," whereby liability under them was determined by multiplying the total loss by the ratio of the total amount of insurance to the total actual cash value of the insured premises.

In this state we have a standard form of fire insurance policy, § 2071, Insurance Code, and the policies here involved complied with that section. That section requires the insured, within a specified time, to render to the insurance company a proof of loss. Admittedly, respondents complied with this section, claiming a loss of $252,643, and a liability of the appellants of $223,726.75. The policies and the code section also provide that if the insurance company and the insured cannot agree as to the actual cash value of the destroyed property or the amount of loss, "then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire." If the parties cannot agree upon an umpire then, at the request of either, a proper court shall select such umpire. "The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item." If the appraisers fail to agree, the items on which there is a difference of opinion shall be submitted to the umpire. "An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss." § 2071, Ins. Code.

Respondents appointed their appraiser as provided in the policies, but the appellants refused to do so. Respondents then brought an action for declaratory relief. The appellants, in their answer, admitted the execution of the policies, the occurrence of the fire, and timely receipt of proof of loss, but alleged that the demand for an appraisal was premature, that respondents' appointed appraiser was neither competent nor disinterested, and that respondents had failed, in certain specified particulars, to cooperate in the investigation of the loss. In November, 1954, the lower court, in this declaratory relief action, ordered the appellants to appoint an appraiser within 10 days, reserving "the power to make such appraisal itself, or through its designated officers, in the event of the failure or refusal of the defendants to so proceed." In January, 1955, the lower court found that appellants had failed and refused to comply with this order, exercised its reserved power, and decreed that it would proceed "to make such appraisal itself and that such appraisal shall be made upon evidence to be presented by the parties." In February of 1955 a lengthy hearing was had, and on March 29, 1955, the trial court filed "Supplemental Findings of Fact and Conclusions of Law"

and a "Supplemental Judgment." On June 2, 1955, the appellants filed their notice of appeal, purporting to appeal from the "final" judgment of March, 1955, and from the "interlocutory" judgment of November, 1954. In December of 1955, this court, on motion, dismissed the appeal from the November, 1954, judgment, on the ground that if it was a final judgment the notice of appeal was too late, while if it was interlocutory it could be reviewed on appeal from the March, 1955, judgment. In April of 1956 this court denied respondents' motion to dismiss the appeal from the March, 1955, judgment, because it was either a final judgment or a special order after final judgment, and in either event appealable, and the appeal therefrom was timely.

On the present appeal the appellants make no attack on the November, 1954, judgment. Their attack is centered upon the March, 1955, judgment. In that judgment the trial court declared and determined that the actual cash value of the property on October 24, 1953, excluding certain labels insured under another policy, was $289,983, and the loss caused by the fire was $236,962.34.

On this appeal there is no issue made about the total insurance coverage or total loss, and the parties agree that the actual cash value total should include the total values of the three properties insured. The appellants do contend, however, that the actual cash value figure should be higher, which would, of course, place a lower limit on their liability. They make two major points in reference to the actual cash value finding: (1) The trial court should have itemized the actual cash values of all of the insured properties, and (2), the trial court failed to include the actual cash value of all of the insured properties in its total figure.

Respondents contend that neither of these issues should be considered on their merits, because appellants are estopped from raising them. The claimed basis of the estoppel is that appellants refused to appoint an appraiser as provided in the policy, and thus put respondents to unneeded trouble and expense, and deprived them of their contractual right to an appraisal.

[1, 2] This estoppel theory was raised in the trial court, and was specifically rejected in the opinion prepared by the trial judge, and impliedly rejected when the court ordered a hearing to make a proper appraisal. Respondents have not appealed and are in no position to challenge the trial court's determinations. Moreover, it is well settled that the insurer's refusal to comply with a demand for an appraisal does not estop the insurer from contesting the amounts that have to be fixed before its liability can be determined. 7 Couch, Cyclopedia of Insurance Law, 5641; 45 C.J. S., Insurance, § 1129, p. 1373; 29 Am.Jur. 939.

One of the main questions involved is whether the trial court was required to itemize the loss to each piece of damaged property and to make a separate finding as to the actual cash value of each item. The trial court did not do so.

The trial judge held lengthy hearings, no different in character from any other court proceeding. On March 2, 1955, the following minute order was entered:

"Judgment for plaintiff in the sum of $243,241.34 for loss and damage as follows:

	Actual Cash Value	Loss and Damage
Building	80,000.00	80,000.00
Cannery	208,383.00	150,000.00
Fire Alarm System	1,600.00	1,600.00
Labels	8,195.00	6,279.00
Debris removed		5,362.34
		243,241.34"

Then on March 29, 1955, findings were filed, one of which reads as follows:

"That the actual cash value of the property described in said policies as 622 Ocean View Avenue, 641 [645?] Ocean View Avenue and 622 Wave Street, Monterey, California, was as of the date of October 24, 1953, prior to said fire, of the sum of $289,983.00 and the loss and damages to said property by reason of the fire on said date was in the sum of $236,962.34; that the actual cash value of the labels included under the separate provisional policy

was as of the date of said fire $8,195.00, and the loss and damage by reason of said fire $6,279.00."

The labels mentioned in the last part of the finding were covered under another policy, and are not involved on this appeal.

This was the only itemization made by the trial judge so far as the record discloses. The Proof of Loss, filed as an exhibit, shows that there were several hundred different items covered by the policies and subject to loss.

[3] It is the law that, when an appraisal is made by appraisers appointed under the terms of a standard form of policy, the appraisers are required to itemize separately the actual cash value and loss to each item. The policy here involved expressly provides, as required by statute, that "The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item." § 2071, Ins. Code. The cases seem to hold that such itemization is essential to a valid award. Riddell v. Rochester German Ins. Co. of New York, 36 R.I. 240, 89 A. 833; Sauthof v. American Cent. Ins. Co., 34 R.I. 324, 83 A. 441; see also Campbell v. Union Mut. Fire Ins. Co., R.I., 124 A. 469, 125 A. 273; 3 Richards on Insurance (5th ed.), 1854; 6 Appelman, Insurance Law and Practice, 385. It also seems to be the law, and the parties concede, that when the insured sues directly on the policy without a prior appraisal, this requirement of itemization is not present. (22 Appelman, Insurance Law and Practice, 534.)

[4] In the present case the appraisal was made by the trial judge and not by a board of appraisers. The trial judge conducted the hearing as a regular court proceeding and evidence was introduced, and witnesses examined and cross-examined. The question to be decided is whether such a proceeding is to be governed by the appraisal procedure set forth in the policy, or by the rules applicable to ordinary court trials, and particularly to the rules applicable to a suit on the policy.

We have been referred to no cases directly in point, and our research has not disclosed any such cases. But the problem does not seem too difficult.

The policy granted each party, the insurer and the insured, the right to a specific type of appraisal. This appraisal was to be by appraisers appointed by each of the interested parties, and they were to select an umpire. Disputes between the two appointed appraisers were to be submitted to an umpire selected by the appraisers. Obviously, as to such appraisals, itemization is necessary, because there is no reporter present at the appraisers' meetings, and the umpire would have no way of knowing what items were in dispute, and what the nature of that dispute might be. But when there is a suit on the policy itemization is not required because such is a normal court proceeding at which a reporter is present, and the parties offer evidence on the issues involved. Such evidence, as in the instant case, necessarily includes an itemization of the articles insured and damaged, but when the judge comes to draft his findings he is not required to set forth each item, but, as in other cases, may find the ultimate facts and is not required to set forth the minute evidentiary facts.

In the instant case the insurers failed to comply with the terms of the policy. There is no provision in the policy for the procedure to be followed when either party refuses to appoint an appraiser. The insured appealed to the court by asking for declaratory relief, and the court ordered the insurer to comply with the policy by appointing an appraiser, reserving power to conduct the appraisal in a court proceeding if the insurer failed to comply. The insurer failed to comply and such court appraisal was had. The court in the declaratory relief proceeding in its written opinion, conclusions of law and judgment referred to the "appraisal as provided for in the policies," and when the insurers failed to comply the insured asked the court to make such an order "as it may deem advisable in order to carry out an appraisal as provided in the policies." It is also a fact that

the judgment of March, 1955, did not purport to determine liability under the policies. It simply determined the reasonable value of the insured property and the amount of the loss. Thus, the trial court made the appraisal referred to in the policies, as an award. In other words, the award made by the trial court is similar to an appraisal made by duly appointed appraisers.

The basic question is whether when the trial court orders, under its equity powers, the appraisal called for by the policies to be had before it, is it bound to proceed in accordance with the appraisal procedure set forth in the policies and applicable to appraisers appointed by the parties?

Both parties discuss Saba v. Homeland Ins. Co. of America, 159 Ohio 237, 112 N.E. 2d 1, 44 A.L.R.2d 841. There were involved appraisal provisions identical with those here involved. The insurer, as here, refused to appoint an appraiser. The court held that this amounted to a disagreement to appoint an umpire and the court appointed an umpire to act with the insured's appraiser. The award made by these two was upheld. All that this case stands for is that, when either party to the insurance contract refuses to appoint an appraiser, it is a proper procedure for the court to appoint an umpire instead of relegating the parties to a suit on the policy. This does not mean that this was the only power of the court. In the Saba case the court appointed an umpire to work with the appraiser appointed by the insured. In the instant case the court substituted itself for both the appraisers and the umpire. Either procedure was proper, under the general equity powers of the court. The Saba case, however, is of no help on the issue here presented, namely, whether, when the court substitutes itself for the appraisers and umpire, is it bound by the provisions of the policy as to how that appraisal must be conducted?

We think that it is quite clear that the court need not, when conducting such appraisal, itemize the property item by item as is required by the policy when the appraisal is made by appraisers appointed by the parties. While it is true that the insurers have not forfeited their right to an appraisal by their refusal to comply with the policy, such refusal has caused the court to substitute a form of appraisal not provided for by the policies. When such substitute method is used it must be accepted in accordance with the traditional procedures applicable to such substituted method. A trial court generally is not required to make minute evidentiary findings, and no reason exists why such court, when making an appraisal, should depart from customary procedures. Because the insurers have made it necessary to adopt a substitute procedure, they must accept that procedure with its burdens as well as its benefits. As already pointed out, the itemization procedure is reasonable and proper when the appraisal is made by appraisers and an umpire as provided in the policies. But such itemization requirement is not necessary, reasonable nor practical when the appraisal is made in a court proceeding by a trial judge.

[5] Appellants contend that itemization is necessary in order to allow them to exercise one of their policy granted privileges. The policies provide, as does section 2071 of the Insurance Code, that "It shall be optional with this company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within 30 days after the receipt of the proof of loss herein required." Without itemization, so it is argued, this privilege would be denied to the insurers. The obvious answer to this contention, assuming that it is otherwise sound, is that the 30-day from proof of loss limitation applies both to the privilege of taking the property at the agreed upon appraisal, and to the privilege of replacing or repairing the property. That 30 days, due to the refusal of the insurers to proceed with the appraisal as provided in the policy, expired long before the trial court made its ap-

praisal. Thus, the right involved, because of the insurers' own actions or lack of action, was terminated.

Appellants argue that the 30-day limitation only applies to the option to rebuild, repair or replace, and not to the option to take all or part of the property at the appraised value, and point to various time provisions in the policy in reference to appraisals in support of this argument. The quoted provision, reasonably construed, makes the 30-day limitation applicable to both options. It should be remembered that, had the insured elected to sue on the policies, no itemization would have been made and the insurers would never have either of the options provided for in the policies and in the statute. It is only fair and just that, when the insurers refuse to comply with the appraisal provisions of the policy, and thus have subjected the insured to the expense and trouble of a court proceeding, they should be governed by the rules applicable to such court proceeding and should not be permitted to retain privileges, options and rights that are necessarily predicated on the assumption that both parties will abide by the terms of the policies.

The next major contention of appellants is that the trial court failed to include in its determination of actual cash value the value of certain of the properties covered by the policies. As already pointed out, in order to compute the liability of the insurers it was necessary to first compute the "actual cash value" of all of the insured properties, that is, the actual cash value of all three buildings and their contents covered by the policies. The insurers claim that the findings of the court do not include the actual cash value of the building at 645 Ocean View Avenue, which was not damaged by the fire, nor substantial parts of the building at 622 Ocean View Avenue, which was almost totally destroyed. To support this contention appellants refer to the evidence produced by respondents' panel of experts, to the minute order preceding the judgment and to the findings.

The respondents' evidence concerning values and losses was computed by a panel of seven experts. One of the seven coordinated the figures so that the figures actually presented were the result of the seven appraisals, but there was agreement on each item so that but one set of figures was produced. The panel fixed the cash value of the machinery and equipment at 622 Ocean View Avenue at $202,023.50, and the damage to it as $171,197.50. The cash value of the building there located was fixed at $80,360, which the panel concluded was a total loss. The cash value of the building at 645 Ocean View Avenue was fixed at $2,400 with no damage, and the cash value of the properties at 622 Wave Street at $4,290 with no damage. Together with certain items not here challenged, the cash value of all the insured properties was estimated at $291,143.50 and the total loss, excluding loss to a stock of merchandise, was fixed at $259,207.50.

The minute order of the trial court reads as follows:

"Judgment for plaintiff in the sum of $243,241.34 for loss and damage as follows:

	Actual Cash Value	Loss and Damage
Building	80,000.00	80,000.00
Cannery	208,383.00	150,000.00
Fire Alarm System	1,600.00	1,600.00
Labels	8,195.00	6,279.00
Debris Removed		5,362.34
		243,241.34"

But when it came to the findings, the trial court provided:

"That the actual cash value of the property described in said policies as 622 Ocean View Avenue, 641 [645?] Ocean View Avenue and 622 Wave Street, Monterey, California, was as of the date of October 24, 1953, prior to said fire, of the sum of $289,983.00 and the loss and damage to said property by reason of the fire on said date was in the sum of $236,962.34; that the actual cash value of the labels included under the separate provisional policy was as of the date of said fire $8,195.00, and the loss and damage by reason of said fire $6,279.-00."

In the minute order it will be noted that the court listed "Building" at $80,000.00,

while in the findings the court lists all three buildings and their contents and fixes the cash value (except the labels) in a lump sum of $289,983.00. Thus, the finding unequivocally declares that the court included the values of all three buildings. But, say appellants, the minute order says the cash value of the "Building" at 622 Wave Street is $80,000.00, which is within $360 of the figure submitted by the witnesses for respondents. In the same way they urge that "Cannery" at $208,383.00 in the minute order is within 50 cents of the figures submitted by respondents, which figures, while they included "machinery, etc. at 645 Ocean View Avenue," did not separately list the cash value of the building there located.

[6] The difficulty with appellants' argument is that they are attempting to impeach the finding and judgment by the prior minute order. The finding explicitly and without ambiguity states that it includes the actual cash values of all of the insured properties. It is true that a minute order, or an opinion of the court, may be used to explain an ambiguous finding, Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273; Coakley v. Ajuria, 209 Cal. 745, 290 P. 33; Oldis v. La Societe Francaise, 130 Cal.App.2d 461, 279 P.2d 184, but it is too elementary to require citation of authority that neither can be used to impeach a finding or judgment.

[7] As already pointed out, the trial court, in its findings, stated that the cash values included all three insured properties and their contents, listing them. It is a possibility that in arriving at these figures the trial court used the computations made by respondents' experts, because the results are in some respects roughly similar. But while this is a possible interpretation of the evidence, minute order and finding, it is by no means the only reasonable interpretation. The rough similarity of totals is all that appellants can point to to challenge the finding. That is not enough to impeach the finding, because there is evidence to support the finding. Thus, there is evidence that the cash value of the building at 622 Ocean View Avenue was only $20,000—not the $80,360 testified to by respondents' panel of witnesses. The panel estimated the cash value of the building at 645 Ocean View Avenue at a mere $2,400 and it is reasonable to infer that the computation of the cash value of the "Cannery" in the minute order of $208,383 included this item.

Under such circumstances we must accept the computations in the finding as correct. They have not been impeached by appellants.

The judgment of March 29, 1955, is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.



148 Cal.App.2d 915

SHIGERU YAMAMOTO, Plaintiff and Respondent,

v.

Schmul LIBERMAN et al., Defendants and Appellants.

Civ. 21592.

District Court of Appeal, Second District, Division 1, California.

March 5, 1957.

Action by buyer of a laundromat against sellers for rescission and recovery of purchase price deposit, wherein sellers cross-complained for declaratory relief. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment adverse to sellers and they appealed. The District Court of Appeal, Doran, J., held that where escrow opened for receipt of a portion of the purchase price provided that in the event the income of the business proved a certain amount per week for two weeks buyer waived any further proof of income, but that the parties agreed that the sale would be subject to a trial period of 14 working days, sale was conditional upon

laundromat financially proving itself during stipulated trial period and where it did not do so buyer was not required to pay broker's commission which escrow agreement provided was to be paid out of funds deposited and charged to account of seller.

Judgment affirmed as modified.

1. Sales ⇐130(3)

In action by buyer for rescission of sale of a laundromat, evidence sustained findings that sale was conditioned on business producing a certain gross income average per week for two weeks and that business did not produce required income and that such condition was not waived.

2. Appeal and Error ⇐1010(1)

An appellate court will not attempt a revaluation of evidence where record discloses substantial evidence in support of findings.

3. Appeal and Error ⇐1050(1)

Error, if any, by trial court in considering grounds for rescission of a sale of a laundromat to buyer not set forth in buyer's notice of rescission, was not prejudicial in view of fact that sellers were informed of actual ground for rescission and were not misled by the notice.

4. Brokers ⇐60
Sales ⇐85(1)

Where escrow opened for receipt of portion of purchase price of laundromat provided that in event the income of the business proved a certain amount per week for two weeks buyer waived any further proof of income, but that the parties agreed that the sale would be subject to a trial period of 14 working days, sale was conditional upon laundromat financially proving itself during stipulated trial period and where it did not do so buyer was not required to pay broker's commission which escrow agreement provided was to be paid out of funds deposited and charged to account of seller.

David I. Lippert, Los Angeles, for appellants.

Arthur J. Crowley, and Horace A. Ruderman, Hollywood, for respondent.

Carl J. Mooslin, Los Angeles, for respondent, Wilshire Realty Co.

DORAN, Justice.

This is an appeal by the defendants, sellers of the Fairfax Laundromat, from a judgment determining that the plaintiff buyer, Shigeru Yamamoto, was entitled to rescind the sale and recover the purchase price deposit less escrow expenses, and less commission paid to Wilshire Realty Company, broker making the sale. There was a cross-complaint by the sellers for declaratory relief, joining buyer, escrow holder and broker.

On October 8, 1954, an escrow was opened for the purchase by respondent Yamamoto of the laundromat in question for the sum of $25,000. The respondent paid into this escrow the amount of $10,000. Escrow instructions evidencing the agreement between the parties, contain the following provisions:

> "17. The parties do hereby agree that this sale is subject to a trial period 14 working days, commencing on the opening of business October 18, 1954, and ending on the close of business Sunday, October 31, 1954.
>
> "18. In the event the income of the business proves a gross income of $665.-00 average per week, with not more than a five per cent decrease, then in such event, the Buyer does hereby waive any further proof of income.
>
> "In the event this sale consummates all of the income of the business, during the trial period, less the current operating expenses, shall be credited to the buyer at close of escrow."

The escrow instructions further provide that,

> "6. The sellers hereto agree to pay Broker's Commission to Wilshire Realty Company in the amount of $2,250.00. The parties hereto authorize and instruct the Vista Escrow Company to pay said sum to the broker forthwith

out of the funds deposited in escrow and charge same to the account of the seller."

It was found by the trial court that the business had failed to make the stipulated gross income during the trial period; that this provision was a condition precedent to the sale, and that plaintiff had not waived such provision. The trial court further found that defendant James Donald Greenspan was a minor partner and a necessary party to the transaction but had never participated therein; and that Steven Sherman was likewise a partner with Schmul Liberman but did not participate in the transaction. The judgment permitted the Vista Escrow Company to retain $601.54 which included the escrow fees and expenses, plus a $300 attorney fee and $25 court costs. The Wilshire Realty Co. was held entitled to retain brokers' fees in the sum of $2,250. Defendants' cross-complaint was dismissed.

[1] The appellants maintain that "The sale was not subject to a condition precedent in respect to the volume of business", and that if such a condition existed, "proof of volume was waived". It is also contended that "The Court erred in considering any grounds for rescission not stated in the notice of rescission", namely, shortage of gross income; and erroneously admitted evidence tending to vary the escrow instructions.

Appellants' contentions cannot be sustained. Much of appellants' brief is predicated upon the proposition that the court's findings are not supported by the evidence. The record, however, discloses substantial evidence, albeit at times conflicting in nature, in direct support of the findings and judgment in plaintiff's favor. For example, the escrow instructions evidence the parties' understanding that the offer to purchase was "subject to a trial period 14 working days", during which time the business must prove "a gross income of $665.00 average per week, with not more than a five per cent decrease". There is evidence showing that the gross income for the two weeks' trial period was only $1,203.04, whereas, after deducting the stipulated five per cent variance, it should have been $1,263.50.

[2] Appellants' argument that this condition was amply met, based on the theory that gross sales merely meant "volume of business", and that there were packages of laundry on the shelves awaiting pick-up and payment, is untenable. As pointed out in respondent's brief, the agreement did not use the term "volume of business", but rather "gross income", which "means cash receipts and not merchandise on shelves". Moreover, it was plaintiff's testimony that during the trial period the business although operated at full speed with no Sundays off, did not produce the required income. The trial court found that this condition had not been waived, and there is evidence reasonably justifying the conclusion. It is an established principle that an appellate court will not attempt a revaluation of the evidence where the record discloses substantial evidence in support of the findings.

[3] The record fails to indicate any prejudice resulting from the fact that plaintiff's notice of rescission fails to set forth the grounds of mistake and fraud, and fails to take issue with the minority of the partner Greenspan and the presence of other partners in the transaction. The case was fully and fairly tried and all material facts relating to this and all other pertinent issues were duly canvassed. The appellants were far better informed in reference to these matters than the respondent, and could not have been misled by the notice.

Appellants' contention that "The Court erred in admitting evidence tending to vary the terms of the escrow instructions", finds no support in the record. The most that can be said for the evidence admitted is that it substantiates the language used in the agreement by which Mr. Yamamoto was entitled to a trial period to determine the weekly gross income. Seemingly, it is the appellants and not the respondent who are endeavoring to vary the terms of the written contract.

The plaintiff's complaint, amended to conform to proof, alleges that defendant part-

ner Greenspan was a minor at the time of the transaction, had no knowledge thereof and did not participate therein; that the partner Steven Sherman, likewise, did not sign any documents and did not participate in the purported sale. The trial court found that these facts were true, and it cannot be said that such findings are unsupported. Appellants' attempted justification of this part of the transaction is not persuasive. It is not an unreasonable assumption, as said in respondent's brief, that "The partners were never ready to consummate the deal".

[4] The trial court's determination permitting the Wilshire Realty Co. to retain commissions in the amount of $2,250 for negotiating the sale, is challenged by both the appellants and the respondent Yamamoto. This sum had been paid by the escrow agent out of the respondent's deposit in escrow. It is the claim of the Wilshire Realty Co. that "The broker's commission was not subject to any condition precedent in the escrow, or if so subject, the condition was fulfilled by buyer waiving the condition".

This provision in the judgment is seemingly inconsistent with the unequivocal findings and conclusions to the effect that the conditional purchaser Yamamoto was not at fault and had a contractual right to reject the offered business in the event that the trial period should prove unsatisfactory. As said in respondent's brief, "The broker and escrow company (occupying offices in the same building) were aware of the conditional nature of the sale and the broker accepted this commission conditioned on the consummation of the sale insofar as the plaintiff would be concerned".

Respondent Yamamoto was, legally speaking, a mere prospect until and unless the laundromat financially proved itself during the stipulated trial period. In this, the trial period did not meet the agreed requirements concerning gross income. Undoubtedly, this provision constituted one of the most material agreements. Such being the situation, the buyer should not be penalized by being compelled to assume payment of the broker's fees. Such an arrangement cannot reasonably be said to have been contemplated by the parties nor is it consistent with equitable principles.

The judgment is therefore modified by changing the Fifth Paragraph thereof to read as follows: "It is further ordered, adjudged and decreed that Cross-Defendant Wilshire Realty Company is not entitled to retain the sum of $2,250.00, heretofore paid to it by Vista Escrow Company; that said sum shall be paid to the plaintiff forthwith by the Wilshire Realty Company and that plaintiff recover judgment therefor". As so modified, the judgment is affirmed. It is further ordered that the findings of fact and conclusions of law be modified to conform to such judgment. The parties will bear their respective costs on appeal.

WHITE, P. J., and FOURT, J., concur.



148 Cal.App.2d 958

Richard WOODS, a minor, by Richard H. Woods, his guardian ad litem, and Richard H. Woods, Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, San Francisco Unified School District, Martinelli Construction Co., Inc., a corporation, Doe One, Doe Two, Doe Three, Defendants and Respondents.

Civ. 17060.

District Court of Appeal, First District, Division 2, California.

March 7, 1957.

Action for injuries sustained by ten year old boy while playing in a school building which was under construction. The Superior Court, City & County of San Francisco, Frank T. Deasy, J., rendered judgment for defendant, after sustaining de-

murrers without leave to amend, and plaintiffs appealed. The District Court of Appeal, Stone, J. pro tem., held that attractive nuisance doctrine may be applicable even where building under construction is involved.

Reversed.

1. Pleading ⇐225(1)

Only failure to state cause of action would warrant order sustaining demurrer without leave to amend.

2. Negligence ⇐32(1), 33(1), 39

Generally, owner of property is under no legal duty to keep it in a safe condition for others than invitees, and trespassers take risk of injuries from ordinary visible causes; but an exception in favor of trespassing children is recognized under the attractive nuisance doctrine.

3. Negligence ⇐33(3)

A possessor of land is liable for bodily harm to young children trespassing thereon, caused by artificial condition maintained on land if (1) place where condition is maintained is one upon which possessor knows, or should know, that such children are likely to trespass, (2) condition is one which possessor knows, or should know, and realizes, or should realize, as involving unreasonable risk of death or serious bodily harm to such children, (3) children, because of their youth, do not discover condition or realize risk involved in intermeddling in it, or in coming within area made dangerous by it, and (4) utility of maintaining condition is slight as compared with risk, to young children, involved therein.

4. Negligence ⇐39

Attractive nuisance doctrine may be applicable even where building under construction is involved.

5. Pleading ⇐207, 225(1)

Petition for injuries sustained by ten year old boy while playing in a school building which was under construction was subject to special demurrer for vagueness, uncertainty and ambiguity; but was not subject to demurrer without leave to amend on ground that attractive nuisance doctrine could not be applicable.

Philip Steiner, Robert K. Barber, San Francisco, of counsel, for appellants.

Boyd & Taylor, San Francisco, Dion R. Holm, City Atty., City and County of San Francisco, San Francisco, for respondents.

STONE, Justice pro tem.

The plaintiff Richard Woods, a minor, ten years of age, was injured while playing in a school building that was in the process of construction. The child was admittedly a trespasser but the plaintiff alleges the action comes within the attractive nuisance doctrine. The defendant's special and general demurrers to plaintiff's second amended complaint were sustained without leave to amend and judgment was entered accordingly. Plaintiffs have appealed from the judgment.

The pertinent allegations of the second amended complaint insofar as this appeal is concerned are contained in paragraphs 6 and 7 in the following language:

> "VI—On June 6, 1954, defendants Martinelli Construction Company, Inc., and Doe One were in the process of performing their said contract and at that time the school building being constructed by them in accordance with the said contract was partially completed. The defendants Martinelli Construction Company, Inc., Doe One and Doe Two, and each of them, negligently and carelessly stored and maintained in said partially completed school building during the course of its construction, and particularly on June 6, 1954, various items of machinery, motors, equipment, construction tools and materials, appliances and contrivances which were attractive to the minor plaintiff, Richard Woods, who lived with his parents near said premises, and to other children in the neighborhood, as defendants and each of them well knew. That said items of

machinery, motors, equipment, construction tools and materials, appliances and contrivances were an invitation to the minor plaintiff herein and to other children in the neighborhood, to enter upon said premises and to play thereon with said items of machinery, motors, equipment, construction tools and materials, appliances and contrivances, as defendants and each of them well knew, and the minor plaintiff and other children in the neighborhood, with the knowledge of defendants and each of them, did enter into said premises and play thereon with said items of machinery, motors, equipment, construction tools and materials, appliances and contrivances. That said premises were so negligently and carelessly constructed and maintained by the defendants and each of them, as to render them dangerous to children playing thereon, as was known to defendants and each of them, but was not known to the minor plaintiff. The defendants, and each of them, made no provision to safeguard and prevent children from playing in and about said partially completed building in its dangerous and unsafe condition or to advise or warn them of the danger thereof, and as so maintained the said partially completed building, and the said items of equipment, machinery, tools, motors, materials, and appliances and contrivances were an attractive nuisance.

"VII—On June 6, 1954, the minor plaintiff was attracted by said items of machinery, motors, equipment, construction tools and materials, appliances and contrivances, and went upon the said premises to play with the same. While playing with said items of machinery, motors, equipment, construction tools and materials, appliances and contrivances upon that day, the boards upon which the minor plaintiff was standing broke and gave way or turned, causing him to be thrown violently a distance of approximately twelve feet to a cement area on said premises. That at said time, plaintiff was of too tender an age to appreciate the danger which he incurred by entering into and upon said premises, and his fall was caused by the negligent and careless conduct of defendants Martinelli Construction Company, Inc., Doe One and Doe Two, and each of them, and their respective agents, servants and employees as aforesaid."

[1–5] Although the order sustaining the demurrers without leave to amend does not specify whether the special or general demurrer was sustained, only a failure to state a cause of action would warrant an order sustaining a demurrer without leave to amend. The special demurrer was directed toward the form of the pleading. Both appellant and respondent have recognized this fundamental rule of law and have directed their arguments on appeal to the question of whether or not plaintiff is precluded from recovery because a building under construction does not come within the attractive nuisance doctrine.

The attractive nuisance or so-called turntable cases are an exception to the general rule of law that the owner of property is under no legal duty to keep it in a safe condition for others than invitees, and that trespassers take the risk of injuries from ordinary visible causes. Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598. This exception was established in California by Barrett v. Southern Pac. Co., 91 Cal. 296, 27 P. 666, which was an actual turn-table case decided in 1891. It has always been recognized that each alleged attractive nuisance case must be determined from the facts and circumstances of the particular action. However, the conditions governing the application of the doctrine to the facts of the particular case were not entirely clear for many years, and some exceptions to the exception appear which are difficult to reconcile.

In some of the earlier cases the courts appear to have applied the doctrine that a child is not a trespasser when he is attracted to a dangerous contrivance but that rather he becomes an invitee. (19 Cal.Jur. p. 624, §

58.) Under such a theory the owner would owe the child the same duty of care as owed any other invitee. This theory was definitely rejected by Puchta v. Rothman, 99 Cal. App.2d 285, 221 P.2d 744 and Doyle v. Pac. Elec. Ry. Co., 6 Cal.2d 550, 59 P.2d 93, because in each of those cases an adult invitee would have been protected against the hidden peril or "trap" involved—tar-paper covering a vent opening on floor level and canvas covered sky light next to a cat-walk in an attic.

It is now settled that the child is considered a trespasser but whether or not the attractive nuisance exception is applicable to any given case depends upon whether or not four conditions are present. Those conditions which have been approved by recent California cases concerning attractive nuisances, Lopez v. Capitol Co., 141 Cal.App.2d 60, 66, 296 P.2d 63; Marino v. Valenti, 118 Cal.App.2d 830, 842, 259 P.2d 84, are set forth in Restatement of Torts, section 339. That section provides:

> "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if
>
> (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

Since the case of Puchta v. Rothman, supra, it has been inferred that the attractive nuisance doctrine does not apply to a building under construction. Before determining whether or not the Puchta case is the rule in California, it is necessary to analyze the building cases in the light of the four conditions set out in section 339. Considering each condition separately, the following results are disclosed:

Condition Number One, "The place where the condition is maintained must be one of which the possessor knows or should know that such children are likely to trespass" is applicable. Admittedly, a building under construction does attract children. In so holding, the courts have repeatedly cited with approval the following portion of the opinion in the case of Loftus v. Dehail, 133 Cal. 214, 218, 65 P. 379, 380:

> "Venturesome boys and even girls make playgrounds of unfinished buildings, climb perilous heights, and scamper over insecure boards and rafters." See Puchta v. Rothman, supra; Lopez v. Capitol Co., 141 Cal.App.2d 60, 296 P.2d 63.

Condition Number Two is also applicable to such structures. Certainly, the condition of a building under construction is one in which "the condition of which the possessor knows or should know and which he should recognize as involving an unreasonable risk of harm to such children." To hold otherwise would be contrary to common knowledge and readily shown to be specious by the records of the Industrial Accident Commission or any insurance company writing workman's compensation insurance. Such records reflect that the risk of injury to adults, many of them skilled and experienced workmen, in and about buildings under construction far exceeds the normal accident rate. The risk increases as the maturity of the individual decreases.

Condition Number Three poses a closer question but it has never been held to be inapplicable to a building under construction. In most instances, certainly with children of tender years, "The child because of his immaturity either does not discover the

condition or does not appreciate the danger involved." There have been intimations that the courts believe to the contrary as in Loftus v. Dehail, supra, and Puchta v. Rothman, supra. The inferences have been dicta and each case actually was decided on the basis of Condition Number Four, which will be discussed presently. In regard to Condition Number Three, the courts have held that in cases concerning an injury on a scaffolding erected adjacent to a building being remodeled, Lopez v. Capitol Co., supra, and a ladder attached to a building, Doyle v. Pacific Elec. Ry. Co., supra, there was no novel or hidden danger with which a child would be unfamiliar. But it does not appear that any court has held Condition Number Three would never be applicable to a building under construction as such.

Thus, by process of elimination we must conclude that buildings under construction are said to be an exception to the attractive nuisance doctrine because Condition Number Four does not apply. To state the matter conversely, in the case of a building under construction it has been held that the utility to the possessor of maintaining the conditions is not slight as compared with the risk to the children involved. This is clearly demonstrated by the majority opinion in the Puchta case wherein the court in 99 Cal.App.2d at page 289, 221 P.2d at page 747 quotes with approval the following language:

> "'If an owner became responsible, merely because children were attracted, it would burden the ownership of property with a most preposterous and unbearable weight.'"

We believe to categorize is wrong in principle. If the four conditions laid down in section 339 are to be applied to the facts of each case, it is inconsistent to say all situations involving buildings under construction are excluded from the rule. It does not require a very fertile imagination to conceive of a construction case where the facts would meet all four requirements of section 339.

In cases other than those involving buildings under construction, we find the California courts have applied the doctrine of attractive nuisance to many circumstances where machinery, equipment and other "contrivances" are concerned. In such cases, of course, Conditions 1, 2, and 3 of section 339 are applicable as in the case of a building under construction, hence the distinction in the application of the doctrine lies with Condition Number Four. The reasoning of the courts has been that the utility to the possessor of maintaining machinery, equipment, or "contrivances" in a safe condition as compared to the risk of the children involved is slight. Among the many cases wherein the attractive nuisance doctrine was approved we find it applied in Faylor v. Great Eastern Q. & M. Co., 45 Cal. App. 194, 187 P. 101, to unlocked ore cars in an unused and unguarded mining tunnel; Morse v. Douglas, 107 Cal.App. 196, 290 P. 465, to a trailer and vat of boiling tar left unguarded in a city street; Hale v. Pacific Tel. & Tel. Co., 42 Cal.App. 55, 183 P. 280, to dynamite caps stored with other construction paraphernalia in a box on the porch of an unenclosed cottage used for the storage of material needed for a nearby construction project; in Blaylock v. Jensen, 44 Cal. App.2d 850, 113 P.2d 256, to a concealed oil sump, and in Long v. Standard Oil Co., 92 Cal.App.2d 445, 207 P.2d 837 to an artificial hole in the ground partly filled with water.

There is no reason why a condition within or appurtenant to a building under construction which presents a great risk to children but which could be easily remedied or protected against at relatively little cost should not come within the doctrine. We do not believe that Puchta v. Rothman is authority for an inflexible rule that all cases concerning buildings under construction are excluded from the attractive nuisance doctrine. Rather, each case must be judged in the light of its own peculiar facts according to the four conditions laid down by section 339 of the Restatement of Torts. The precise question in the instant case is: Does the fact the machinery and equipment are

located in a building under construction operate to take it out of the attractive nuisance doctrine as a matter of law? There appears to be no logical reason why it should. The other three conditions being present it would not seem to be any more difficult or burdensome to require an owner to make machinery and equipment secure or protect children against such hazards inside a building under construction than machinery and equipment inside a mining tunnel, in a field, in a cottage or on a city street. The rather recent case of Marino v. Valenti, 118 Cal.App.2d 830, 259 P.2d 84 appears to have reached this result, although it is not exactly analogous. In the Marino case children were attracted to a vacant and somewhat dilapidated house. Once inside one of the children, an 11 year old boy, found some dynamite caps which caused the injury. The court held that liability attached under the attractive nuisance doctrine. In the instant case children were attracted to the partially constructed building. Once inside, the plaintiff, a 10 year old boy, found some machinery and equipment. As far as the pleadings in this case are concerned the analogy ends at that point. Plaintiff's allegations concerning the happening of the accident are vague, uncertain and ambiguous. As respondents have aptly pointed out, it cannot be determined where the accident occurred, let alone how it occurred. Therefore, defendant's special demurrer was properly sustained. On the other hand, it cannot be said plaintiff cannot state a cause of action if given an opportunity to amend his complaint. Until plaintiff's complaint is amended and the facts surrounding the occurrence clearly stated, it cannot be determined whether plaintiff's failure to state a cause of action is because of lack of facts or because of a failure to allege the facts. The defendant's demurrer was properly sustained but it should not have been sustained without leave to amend. Wennerholm v. Stanford Univ. School of Medicine, 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358; Kauffman v. Bobo & Wood, 99 Cal. App.2d 322, 323, 221 P.2d 750.

It is our view that the trial court should permit appellant one more opportunity to amend the complaint to state a cause of action.

Judgment reversed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.



148 Cal.App.2d 933

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ernest HOLLAND, Defendant and Appellant.

Cr. 5748.

District Court of Appeal, Second District, Division 3, California.

March 5, 1957.

Defendant was convicted of possession of heroin. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that, where, at time of entry into defendant's room with defendant's consent, one police officer was justified in believing that defendant was then an unlawful user and addicted to the unlawful use of narcotics, defendant's arrest was lawful, and subsequent search which revealed heroin in defendant's room was reasonable and proper.

Judgment affirmed.

1. Municipal Corporations ⇐188

Where three times within period beginning two weeks before and ending one hour before police officers went to defendant's home, police officers had received confidential information that defendant was a narcotics addict and possessed and was selling narcotics, officers had right while in performance of their duties, to call upon

defendant and seek admittance to his room. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 836, subd. 1.

2. Searches and Seizures ⇐7(27)

Where after police officers knocked and identified themselves, defendant opened door to his room and let them in, inference was that defendant consented to the entry even though no express words of invitation were used.

3. Criminal Law ⇐1144

Where, in prosecution for possession of heroin, defendant did not testify, the District Court of Appeal would assume that, in absence of testimony that police officers' entry into defendant's room was forcible or coerced, that entry was made with defendant's permission. West's Ann. Health & Safety Code, § 11500.

4. Poisons ⇐4, 9

Offense of unlawful use or addiction to the unlawful use of narcotics may be committed by a user at any place and at any time so long as he retains the character of an addict and may be proved by any competent evidence of such unlawful use or addiction. West's Ann.Health & Safety Code, § 11721.

5. Arrest ⇐63(4)

Where it could be assumed or inferred that police officers had entered defendant's room with defendant's consent, and one officer, who was qualified to give expert testimony as to narcotics addiction, observed defendant's somnolent condition and contraction of pupils of his eyes, such officer's belief that defendant was then an unlawful user and addicted to unlawful use of narcotics was reasonable and justified. West's Ann.Health & Safety Code, § 11721.

6. Arrest ⇐63(4), 71

Where, at time of entry into defendant's room with defendant's consent, one police officer was justified in believing that defendant was then an unlawful user and addicted to the unlawful use of narcotics, defendant's arrest was lawful, and subsequent search which revealed heroin in defendant's room was reasonable and proper. West's Ann.Health & Safety Code, §§ 11500, 11721; West's Ann.Pen.Code, § 836, subd. 1.

Earl C. Broady, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Raymond M. Momboisse, Lynn Henry Johnson, Deputy Attys. Gen., for respondent.

SHINN, Presiding Justice.

Ernest Holland was accused by information of a violation of section 11500 of the Health and Safety Code, in that he wilfully, unlawfully and feloniously had in his possession a preparation of heroin. He was also accused of having suffered two previous convictions, to wit: a misdemeanor violation of section 11500 of the Health and Safety Code and a violation of Penal Code, section 666, subdivision 3 (petit theft after petit theft), a felony. Defendant pleaded not guilty and waived a jury trial. The case was submitted to the court on the transcript of the preliminary hearing and the proof of the prior convictions. The court found defendant guilty and dismissed the priors in the interests of justice. Probation was denied and Holland was sentenced to state prison for the term prescribed by law. He appeals from the judgment.

Allan Coffey, a Los Angeles police officer assigned to the University Division, was the chief witness for the People. The following is the substance of his testimony. At about 7:45 p. m. on November 20, 1955, Officer Coffey and his partner, Officer Dosti, went to defendant's home at 720 East 42nd Street in Los Angeles. Three times within the preceding two weeks they had received confidential information from an informant that defendant was a narcotics addict, had narcotics in his possession, and was selling narcotics; the last tip was received about an hour before they went to Holland's home. They did not have either a search warrant or a warrant for defendant's arrest.

The officers knocked on the door to defendant's room, which was located in the

cellar at the rear of the house. When a voice inside the room responded to their knocking Officer Coffey asked "Is it Ernest Holland?"; defendant answered "Yes. Who is it?"; the witness replied "It's Coffey, Police Officer." Defendant said "Just a minute" and after a few moments he opened the door about three-quarters of the way and stepped back from the door; the officers entered.

Defendant appeared to be in a nodding or slightly sleepy condition; there was no odor of alcohol on his breath. Officer Coffey checked defendant's eyes with a flashlight. The pupils were pin pointed; when the light was passed in front of defendant's face there was no reaction. Officer Coffey gave testimony on direct and cross-examination as to his experience and knowledge with respect to the objective symptoms of the existence of narcotic influence and was held qualified; it was his opinion that defendant was under the influence of a narcotic at that time. The officers placed Holland under arrest for a violation of the state narcotics act and made a search of his person and the premises. On the backs of defendant's hands they found numerous marks and scars which resembled the marks made by a hypodermic needle. Secreted within an electric light fixture on the ceiling they found some paper bindles which were proved to contain heroin. Defendant told the officers that the heroin was his and that he had used some of it earlier in the evening.

The sole assignment of error to be considered is that the court erred in admitting in evidence the bindles of heroin which were found in defendant's room. Defendant argues, in this connection, that he was arrested without reasonable or probable cause, that the evidence was insufficient to show the commission of a public offense in the presence of the officers, and that the heroin was obtained through an unlawful search and seizure. These related contentions are without merit. The question before us is the lawfulness of the arrest. If Holland's arrest was valid, then a subsequent reasonable search of the premises under his control was lawful and the evidence obtained thereby was not to be excluded. People v. Guy, 145 Cal.App.2d 481, 302 P.2d 657, and cases cited.

Subdivision 1 of section 836 of the Penal Code provides as follows: "A peace officer may make an arrest in obedience to a warrent delivered to him, or may, without a warrant, arrest a person: 1. For a public offense committed or attempted in his presence. * * *" This section has been interpreted to mean that an officer may arrest a suspect without a warrant when circumstances exist which would cause him to entertain a reasonable belief that a crime has been committed in his presence. Coverstone v. Davies, 38 Cal.2d 315, 320–321, 239 P.2d 876.

[1–3] The officers had the right to call upon defendant and to seek admittance to his room while in performance of their duties. People v. Martin, 45 Cal.2d 755, 761, 290 P.2d 855. After they knocked and identified themselves, defendant opened the door and let them in. Although no express words of invitation were used, it was to be inferred from defendant's conduct that he consented to the entry. Holland did not testify at the trial, and in the absence of testimony that the entry was forcible or coerced, we must assume that it was made with his permission. People v. Michael, 45 Cal.2d 751, 754, 290 P.2d 852.

[4] After entering the room, Officer Coffey observed defendant's somnolent condition and the contraction of the pupils of his eyes. These observations, if made by one qualified to give expert testimony, together with the information previously received by the officers, would have warranted a good faith belief that defendant was addicted to the unlawful use of narcotics and was at that time committing a violation of section 11721 of the Health and Safety Code,[1] a misdemeanor. The offense

1. "No person shall unlawfully use or be addicted to the unlawful use of narcotics. No person shall be under the influence of narcotics except when such narcotics

of the unlawful use or addiction to the unlawful use of narcotics may be committed by a user at any place and at any time so long as he retains the character of an addict, and may be proved by any competent evidence of such unlawful use or addiction. People v. Jaurequi, 142 Cal.App.2d 555, 560, 298 P.2d 896. It is not contended by defendant on the appeal that there was insufficient evidence of the qualification of Officer Coffey to give testimony as an expert witness.

[5, 6] We are of the opinion that the circumstances justified a reasonable belief that Holland was at the time an unlawful user and addicted to the unlawful use of narcotics, that the arrest was lawfully made under Penal Code, section 836, subdivision 1, and that the search was reasonable and proper. There was no error in receiving the heroin in evidence.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



149 Cal.App.2d 7

Lillian L. McNULTY, Joseph M. Hamilton, Ruth H. Beacom, Alva H. Howe, and Eula Burnham, Plaintiffs and Respondents,

v.

Curtis A. LLOYD and Neva M. Lloyd, his wife, Defendants and Appellants.

Civ. 8846.

District Court of Appeal, Third District, California.

March 8, 1957.

Action by conditional vendors of certain realty for restitution of the premises. The Superior Court, Del Norte County, Samuel F. Finley, J., entered judgment in favor of vendors and purchasers appealed. The District Court of Appeal, Warne, J. pro tem., held that evidence sustained implied findings that so-called lease agreements entered into by purchasers were in reality contracts of sale in violation of vendors' and purchasers' agreement not to sell any rights or interests in land in question except by agreement of vendors, and that there was no waiver of such agreement by vendors and that vendors were not guilty of laches.

Judgment affirmed.

1. Vendor and Purchaser ⇐3(2)

Whether a contract is a lease or sale is to be determined, not solely from its outward form and technical terms employed, but from intention of parties as disclosed by instrument as a whole.

2. Vendor and Purchaser ⇐299(3)

In action by conditional vendors for restitution of the premises, evidence sustained implied findings that so-called lease agreements entered into by purchasers were in reality contracts of sale in violation of vendors' and purchasers' agreement not to sell any rights or interests in land in question except by agreement of vendors, and that there was no waiver of such agreement by vendors, and that vendors were not guilty of laches.

3. Contracts ⇐318

Statute providing that whenever, by terms of an obligation, a party thereto incurs a forfeiture by reason of his failure to comply with its provisions he may be relieved therefrom upon making full compensation to the other party except in case of a grossly negligent, willful or fraudulent breach of duty, presupposes that party seeking relief is in default, and in order to secure relief under its terms it is necessary for him to plead and prove facts that will justify its application. West's Ann.Civ. Code, § 3275.

have been administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. * * *"

4. Pleading ⇐78

Defense of laches is an affirmative defense which should be pleaded.

5. Equity ⇐70

In order to impute laches to one who seeks relief in equity, it should clearly appear that he either had actual knowledge of the facts or failed to acquire such knowledge after having notice thereof.

6. Equity ⇐67

Laches is a mixed question of law and fact and its availability as a defense must be made to appear from the facts of the controversy.

Laurance I. Dodge, Crescent City, for appellants.

C. A. Degnan, Crescent City, for respondents.

WARNE, Justice pro tem.

This is an appeal by defendants from a judgment in favor of the plaintiffs below, respondents herein, restoring respondents to the possession of certain real property in Del Norte County.

In 1948 respondents entered into a conditional sales contract for the sale of certain land to the Lloyds for a total price of $12,000. No down payment was required. Payments of not less than $20 per month, plus annual interest at the rate of five per cent, were called for. When the total "rental" payments reached $1,200 the Lloyds could, on payment of one-half of the balance due, receive a grant deed to the property, subject to a deed of trust securing payment of the balance. The instrument contained the following provision: "It is also agreed that, during the life of this agreement * * * all the terms and conditions thereof shall bind and inure to the benefit of the parties hereto and their heirs and assigns, except that this * * * Agreement or any rights or interests therein pertaining to the said parties of the second part [the Lloyds] can not be assigned in any wise by said parties of the second part or any sale * * * of their interests except by agreement with the parties of the first part, * * *" In 1949 a supplemental agreement was executed to correct an error in the description of the lands in the first agreement. This second agreement contained the same clause forbidding alienation of the Lloyds' interest without the permission of the respondents.

The Lloyds went into possession in 1948 and then began "leasing" portions of the property. These leases were for specific portions of the property and were for periods of ten years. The leases contained an "option of release" and also of purchase.

On March 7, 1951, plaintiffs served written notice on defendants, terminating said conditional sale agreement, claiming that defendants had breached the agreement by selling certain portions of the property in violation of the express terms thereof. Said notice also demanded that defendants remove all property they owned from the premises within 30 days. Defendants thereafter continued to hold said property, and in August, 1951, plaintiffs filed suit for restitution of the premises. The case was tried without a jury. Judgment was in favor of plaintiffs, restoring them to possession of said lands. Findings were waived. Defendants appeal from the judgment.

In their answer, defendants admit that they entered into certain lease agreements for specific portions of said property. They allege, however, that said lease agreements were made with either the actual or implied consent of the plaintiffs. They also denied that they breached the contract.

We are of the opinion that the facts and circumstances as shown by the evidence are sufficient to sustain the judgment.

[1, 2] Whether a contract is a lease or a sale is to be determined, not solely from its outward form and the technical terms employed, but from the intention of the parties as disclosed by the instrument as a whole. 51 C.J.S., Landlord and Tenant, § 202, p. 808; Mahoney v. City

and County of San Francisco, 201 Cal. 248, 257 P. 49. After entering into the conditional sale agreement wtih respondents, appellants entered into a number of so-called leases wth various persons. The terms of all of the leases were similar in form and contained an option to purchase, and in that event all payments made under the lease were to be applied upon the purchase price. The evidence discloses that in nearly all instances the so-called lessee immediately took possession and started building upon the premises. As an example, one lease with a David Dungey called for a rental of $7.50 a month for ten years for three and one-half acres of land. The lessee had the right, upon satisfactory completion of the lessor's purchase contract with plaintiffs, to exercise an option to purchase the property for $250 per acre, and in the event of purchase all lease payments were to be applied against the purchase price. At the end of ten years the purchase price would be fully paid. These facts were sufficient to sustain the trial court's implied finding that the so-called leases were in reality contracts of sale and were in violation of appellants' agreement with the respondents. Nor does the fact that each lease contained a provision that it was dependent upon appellants' completion of their purchase contract, change the character of the agreement. Appellants in reality were selling the property.

[3] Defendants contend that to uphold the judgment of the trial court would work a forfeiture abhorrent to the law, but they made no such contention before the trial court. It is urged for the first time before this court. If defendants desired relief from their forfeiture, they should have asked for it in the court below under the provisions of section 3275 of the Civil Code which provides: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, * * * by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." This section presupposes that the party seeking relief is in default, and, in order to secure relief under its terms is it necessary for him to plead and prove facts that will justify its application. Barkis v. Scott, 34 Cal.2d 116, 120, 208 P.2d 367, and cases cited therein. None were pleaded and proved in the instant case. Defendants' defense was that the leases were made with the consent, either actual or implied, of the plaintiffs, and that they had not violated any of the provisions of the conditional sale agreement with plaintiffs.

Defendants also claim that if the leases were in violation of the agreement, plaintiffs had waived the breach. The testimony is conflicting upon this issue. However, there is substantial evidence in the record to sustain the trial court's finding that there was no waiver by the plaintiffs. Therefore, this court adopts said finding as true.

[4] It is finally contended that plaintiffs were guilty of laches in asserting their claim that there had been a breach of the contract. This again is an affirmative defense which should have been pleaded by the defendants. Appellants, in their brief, admit that ordinarily such would be the rule but claim that by pleading in their answer that the first lease agreement entered into on or about June 10, 1948, was "actually or impliedly" assented to by the plaintiffs, they had sufficiently raised such issue as a defense in the instant case.

[5, 6] Again, as stated, the evidence was conflicting as to when plaintiffs first learned that defendants were in effect selling the property. The court impliedly found that the respondents were not guilty of laches. In order to impute laches to one who seeks relief in equity, it should clearly appear that he either had actual knowledge of the facts or failed to acquire such knowledge after having notice thereof. (18 Cal.Jur.2d, Sec. 42, p. 214.) Laches is a mixed question of law and fact, Mahar v. Goodspeed, 30 Cal.App.2d 391, 86 P.2d 382 and its availability as a defense

must be made to appear from the facts of the controversy. Borden v. Boyvin, 55 Cal.App.2d 432, 130 P.2d 718; Gedstad v. Ellichman, 124 Cal.App.2d 831, 269 P.2d 661. We conclude that there is no merit in any of appellants' contentions.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



148 Cal.App.2d 800

Application of Laconia BURROUGHS, for a writ of Habeas Corpus.

Cr. 5658.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1957.

Proceeding for a writ of habeas corpus. The District Court of Appeal, Fourt, J., held that the evidence failed to establish the contentions of the petitioner so as to justify the grant of the writ.

Writ denied.

1. Habeas Corpus ⇐85(1)

Evidence justified denial of habeas corpus where petitioner claimed that he was denied due process of law and a fair trial and that he was not properly represented by counsel of his own choice throughout the trial.

2. Habeas Corpus ⇐85(1)

Evidence did not entitle petitioner to habeas corpus on the ground that he was denied a speedy trial where the record established that petitioner waived the statutory time within which the trial should take place.

3. Habeas Corpus ⇐25(1)

Petitioner was not entitled to habeas corpus on the ground that he was taken before the grand jury without counsel and told to testify where he pleaded guilty after a full explanation of the consequences flowing from such a plea.

4. Habeas Corpus ⇐85(1)

Evidence did not entitle petitioner to habeas corpus on the ground that he was induced to plead guilty with thought or promise that he was going to get a county jail sentence, and not a state prison term.

5. Habeas Corpus ⇐25(1)

Where petitioner seeks habeas corpus on ground he was allegedly induced to change his plea to that of guilty because he could get a county jail sentence instead of a state prison term, public defender appointed by the court as attorney for the petitioner is the same, so far as the proceeding is concerned, as privately employed counsel and the fact that petitioner believed after conference with the public defender, that he would get a lighter sentence, was of no avail.

Frederic A. Spindell, Harold J. Ackerman, Los Angeles, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for respondent.

FOURT, Justice.

Laconia Burroughs, the petitioner herein, seeks a writ of habeas corpus. He contends that he is now unlawfully detained in one of the prisons of the state, and that such imprisonment is illegal in that (1) he was denied due process of law, which deprived him of a fair trial; (2) that he was not properly represented by counsel of his own choice throughout the trial; (3) that he was denied a speedy trial as guaranteed by the constitution; (4) that he was taken before the grand jury to testify against his will, and without benefit of counsel; (5) that he was induced to plead guilty and was sentenced for a crime that never occurred, and (6) that there was no probable or reasonable cause for his conviction.

A review of the facts as disclosed by the record before us reveals that an indictment in two counts was returned by the grand jury in the city and county of San Fran-

cisco, on March 17, 1955, wherein petitioner and his co-defendants were charged in count I of said indictment with conspiracy to commit grand theft in violation of section 182 of the Penal Code, and in count II with an attempt to commit grand theft. It was further alleged that the petitioner had suffered three prior convictions and had served a term in a federal penitentiary for each of such convictions; that Echols, a co-defendant, had been previously convicted of violating section 11500 of the Health and Safety Code, and had served a term in prison therefor, and had been convicted of "grand theft and confidence game", a felony, in Arizona, and had served a term in prison therefor; that Parvin, a co-defendant, had been previously convicted of violating the provisions of sections 480 and 192 of the Penal Code, and had served a term in prison therefor.

On March 21, 1955, the petitioner and Echols were in custody and each was in court. They both stated that Pierre Ibos, an attorney practicing in San Francisco, but who was not then present in court, represented them. Mr. Dresow, the Assistant Public Defender, was also in court on their first appearance, and he suggested that the matter go over until March 23, 1955, obviously for the purpose and to the end that Ibos could then be present.

On March 23, 1955, the petitioner and Echols and Ibos were in court. Ibos stated that he had just received the transcript the day before and requested a continuance to March 28, 1955. The petitioner and Echols were then arraigned and pursuant to Ibos' request, the matter was continued to March 28, 1955, for their plea. Bail was set at $6,000 if a personal bond were given, and $3,000, if cash or a surety bond were given.

On March 28, 1955, Dresow was in court and at such time stated that Ibos had called and asked that the matters of the two defendants go over to the 30th of March, 1955, for their plea. On March 30, 1955, the petitioner and Echols and Ibos, their attorney, were present in court and Ibos stated that he intended to make a motion to quash the indictment. He further stated that Echols' wife had died the day before and he wanted the matter to go over until April 4, 1955, and the motion for the continuance was granted.

On April 4, 1955, petitioner, Echols and Ibos, their attorney, were present in court. The judge at that time denied the motion to quash the indictment and Ibos announced that the defendants represented by him were ready to plead. Each defendant plead not guilty to each count and denied the priors as alleged. The assistant district attorney suggested April 27, 1955, as a tentative date for the trial. Ibos stated in substance that since the defendants could not make bail "We would like it earlier, if you could." The assistant district attorney indicated that one of the other defendants, who had not at that time been apprehended, might be caught in the next day or so, and that "We might as well have them altogether." Ibos stated that he understood that one of the other defendants had been apprehended. The court thereupon continued the cause to April 27, 1955.

On April 27, 1955, the petitioner and Echols were in court. Dresow, the Assistant Public Defender, stated that the other two defendants were still fugitives, but that petitioner and Echols were represented by Ibos. Ibos was apparently not present in the courtroom at the time that statement was made but the petitioner and Echols were. Neither of the defendants present made any comment or statement, however. Then Dresow said, "These gentlemen said Mr. Ibos is not representing them. The fact is he is still their attorney of record and he made a formal request of me to continue this case." The assistant district attorney suggested two weeks continuance, "[a]t which time they can straighten out this matter." The cause was then continued to May 11, 1955.

On May 11, 1955, John Golden, in behalf of Leslie Gillen, appeared as the attorney for Joan Rieras (a co-defendant). Golden stated that he had just received the transcript and would like to have the case go over for a few days. Joan Rieras was arraigned and the cause, so far as she was

concerned, was continued one week, to May 18, 1955, for a plea. The defendant Parvin was not present, and his arraignment was continued to May 18, 1955. Petitioner stated to the court, "I have no attorney", and Ibos said that the petitioner was going to ask for the public defender, to which remark the petitioner agreed. The court then stated, "Well, we will keep him over to May the 18." Echols spoke up and stated at that time that Ibos was representing him, to which Ibos agreed. The matters were then continued to May 18, 1955.

On May 18, 1955, William Parvin was still a fugitive. On that date, when the matter first came on to be heard, the attorneys for Joan Rieras were not present. However, later on they did appear, and Joan Rieras was then arraigned and her attorney stated that he intended to make some motions and requested a brief continuance. The court said, "Our problem, so far as *Mr. Ibos' clients* are concerned, is that *they are* in custody and I would like to get the matter to trial as soon as possible." (Emphasis added.) Rieras' attorney indicated that he only wanted two days, whereupon Ibos spoke up and said, "Well, that is all right. Your Honor, I don't want Mr. Gillen to think I am complaining, but I want him to know that *these poor men* are in jail." (Emphasis added.) The entire matter was then continued to May 20, 1955.

On May 20, 1955, Joan Rieras' attorney moved to reduce her bail, and also that she have a separate trial. She pleaded not guilty to each count of the indictment. The judge indicated that he wanted to read the transcript before passing upon the motions. In discussing to what date the matter should be continued, the assistant district attorney stated that "the other two defendants have been in custody and we have been anxious to try them and held the trial pending the return of" Joan Rieras, who had theretofore, when placed on bail, left the jurisdiction and gone back east and remained there as a fugitive, knowing her presence was required here, and was ultimately extradicted to California. The assistant district attorney then stated that he would like to try the entire matter on May 31, 1955. The court set the cause for the 31st day of May, and Ibos answered that such date was agreeable to him.

On May 31, 1955, the defendant Parvin and the other defendants were present in court. Parvin's attorney, Mr. McDonnell, was not present, and Golden, the attorney for Joan Rieras, waived the reading of the indictment for Parvin and requested a continuance. The assistant district attorney suggested that it go over to the 3rd of June, 1955, for the plea of Parvin. The court denied the motion of Joan Rieras for a severance of the trial. Counsel for Rieras then indicated that he had in mind waiving a jury trial and to have a trial by the court, and the assistant district attorney stated that he had discussed it and that the earliest possible date they could try the case with a jury was on June 15, 1955, and that he would be prepared to go ahead at that time. Ibos thereupon announced that "I think *we are* also entitled to a severance, your Honor; it is just as appropriate." (Emphasis added.) Later on McDonnell, the attorney for Parvin, came into the courtroom and stated that he desired to make a motion to quash the indictment, whereupon, all matters were continued to June 3, 1955. Golden, the attorney for Joan Rieras, stated that he knew that the 15th of June would not be a satisfactory trial date for him.

On June 3, 1955, the judge stated that he wanted further time, namely, to June 6, 1955, within which to read the authorities, previously submitted by counsel, and the transcript. There were no objections and *Ibos said, "Oh, surely it is all right with me.* Your Honor, you know I am the last person in the world to complain and I can see myself now tied up about 18 days in this case because Mr. Gillen—he is smiling now; he does the same thing as I do, I know, but these *two men* are now going on their fifth month in custody and I will have to insist on an immediate trial. I don't think I am doing anything that is wrong." (Emphasis added.) The assistant district

attorney announced that he was ready to try the case on the first open date.

There then followed some talk about just what date to which the cause should be continued, the judge saying, "Let's make it Monday, but keep in mind the plight of *Mr. Ibos' clients*", and Ibos replied, *"If it will only take a few days longer that is all right."* (Emphasis added.) The judge then said, "We want to get them to trial", and continued the causes to June 6, 1955.

On June 6, 1955, when the case was called, McDonnell, attorney for Parvin, stated: "I notice *Mr. Ibos is here with his two clients.* Mr. Gillen represents the young lady." (Emphasis added.) There was no comment from Ibos or petitioner to the contrary. The judge denied the motion of Parvin to quash the indictment and he pleaded not guilty to each of the two counts and admitted the prior convictions. McDonnell announced that so far as the Parvin matter was concerned, they were willing to waive a jury. Thereupon the petitioner herein, who had been present at each and every time when the case was previously called for any purpose and had heard it indicated that Ibos was in fact representing him and Echols and had made no comment to the contrary, said, "I don't have an attorney." Ibos immediately said, "Well, in spite of that I was going to ask your Honor today to appoint the Public Defender. Is that all right?" The assistant public defender, who was then in court, stated that he felt he was being imposed upon, that the case had been going on for six weeks or so, and then suddenly they wanted him in the case. He then said, "They have had other counsel all along." The question then arose as to whether petitioner was truly indigent and Ibos spoke up and vouched for his indigency by saying, "He is indigent all right; there is no doubt about that." The petitioner was then sworn and testified as to whether he had any property, and among other things, also said that Ibos had been his attorney in the beginning, but that he had not been his attorney all of the time. He further stated that he had written the judge a letter and "stated to the clerk" that he wanted the court to appoint the public defender as his attorney. The judge said that he did recall receiving a letter, the contents of which were not disclosed. The following then took place:

"Mr. Ibos: If your Honor please, I will tell your Honor this: I have tried to avoid this, causing your Honor and Mr. Dresow extra trouble also, but there are different counsel in this case and all the defendants will require separate counsel because there is going to be a conflict, as I see now, so it is fair to have a separate lawyer.

"The Court: Of course, but the point is whether Mr. Dresow can—

"Mr. Ibos: Oh, he likes it, Judge.

"Mr. Dresow: What are you talking about?

"Mr. Giubbini (Assistant District Attorney): *May the record show, your Honor, that the defendant Burroughs was represented by Mr. Ibos up to and including this morning?*

"Mr. Dresow: *Today.*

"Mr. Giubbini: *It is and has been my understanding all the time.*

"The Court: *All right.* What date can we agree upon?

"Mr. Giubbini: Therein lies the problem. The People are prepared to try this case at whatever date all four counsel agree upon." (Emphasis added.)

Then followed the assertion of Mr. McDonnell that he was very, very busy with other trials, and substantially the same statement by Gillen. The assistant public defender announced that he was ready to go to trial that very day, or the next. All counsel then agreed upon the date of July 6, 1955, and the matter was then set for trial for such date. On July 6, 1955, the defendants were in court, and *with the consent of their respective counsel,* the cause was continued to July 11, 1955, for trial.

On July 11, 1955, the record shows that all of the defendants with their respective attorneys were present in court. The parties and their counsel adjourned to the judge's chambers, and so far as pertinent

here, the record disclosed that the following took place:

"(In Chambers: Present: Irving Reichert, Assistant District Attorney; Pierre Ibos, Attorney for Defendant Echols; the Defendant James Echols; Joseph Kennedy, Deputy Public Defender, Attorney for Defendant Laconia Burroughs; and the Defendant Laconia Burroughs.)

"The Court: Now, who is going to make a statement? Let the record show that we are in Chambers out of the presence of the jury panel, and that present are the defendants Burroughs and Echols with their counsel.

"Mr. Ibos: I will address my client.

"The Court: You represent Mr. Echols?

"Mr. Ibos: Yes. Now, Mr. Echols, we had a little discussion between his Honor and Mr. Kennedy, who represents Mr. Burroughs, and the Judge and the District Attorney have come to the conclusion and decided that the sentence which can be imposed upon an attempt to commit grand theft can be one either in the County Jail or in the State Penitentiary.

"Now, it will be up to his Honor to decide which to do, and if you plead guilty to an attempt to commit grand theft, there is no promise made to you about what kind of a sentence you shall receive.

"The Court will decide what it thinks is fair and just in the matter, but that kind of a sentence can be given—the County Jail or the Penitentiary.

"Now, I advise you to plead guilty under the facts and circumstances and the law in the case. My advice to you is to plead guilty. So you will have to do it, knowing what I have said to you and expecting that only. Is that all right? Did I make it clear, your Honor?

"The Court: Yes, I think it is clear. I know nothing of the facts of this case. This case was transferred from another Department. I know nothing of the pleadings. I will have to get the circumstances from the Probation Report, and I will have to be guided accordingly, and my interpretation of the attempt section is that an attempted grand theft would be punishable either in the State Prison for not more than five years, which would be one-half of the—grand theft carries one to ten, and if he should be sent to the State Prison it would be for half of that, or in other words, my interpretation is one to five.

"It has an alternative which is a year. If he were sent to the County Jail, the maximum would be six months, because it carries one-half of what the normal term carries.

"Mr. Ibos: I understand it. He understands it, and I believe that is the thing he ought to do in the case.

"Mr. Kennedy: Yes, your Honor. I should like to make a statement to Mr. Burroughs. You understand, Mr. Burroughs, in this case we take substantially the same position Mr. Ibos has made to his client, *and there is no promise made to you on our behalf, or any person who is present here, concerning what the sentence in this matter will be.*

"Defendant Burroughs: *Yes, sir.*

"Mr. Kennedy: I have told you that the choice is entirely yours to make, and if you desire to enter a plea to an attempt, you understand *what the sentences can be?*

"Defendant Burroughs: *Yes, sir.*

"Mr. Kennedy: You are acting freely and voluntarily, not any urging on my part, is that correct?

"Defendant Burroughs: Yes, sir.

"The Court: All right.

* * * * * *

"The Court: Do you understand, Mr. Ibos, you are now offering on behalf of your client, Mr. James Echols, to withdraw your former plea to Count II of the Indictment which has to do with the attempted theft?

"Mr. Ibos: Yes, your Honor.

"The Court: All right. The Court will grant your motion.

"Mr. Ibos: I understand the priors are also going to be dismissed.

"Mr. Reichert: That is correct; if Echols pleads to Count II of the Indictment, we will

ask the Court to dismiss the allegations as to the prior.

"The Court: Very well, I will grant your motion then, and Mr. Kennedy, representing Mr. Burroughs, I understand that you likewise move the Court to permit the Defendant Laconia Burroughs to withdraw his former plea of not guilty to Count II of the Indictment, having to do with the attempted grand theft.

"Mr. Kennedy: That is correct, if your Honor please.

"The Court: The respective motions are then granted. Very well, Mr. Clerk, will you take the plea.

"The Clerk: Laconia Burroughs and James Echols, you are each charged in an Indictment filed by the Grand Jury with the crime of felony, to wit, conspiracy to commit grand theft, and attempted grand theft, to each of which you pleaded not guilty. By permission of the Court, you are permitted to withdraw your former plea of not guilty.

"Laconia Burroughs, what is your plea at this time?

"Defendant Burroughs: Guilty.

"The Clerk: And Echols?

"Defendant Echols: Guilty.

"The Clerk: Time waived?

"Mr. Kennedy: Time waived.

"Mr. Ibos: Waive time.

"(Whereupon, the Clerk arraigned the defendants for judgment.)"

"Mr. Kennedy: No legal cause.

"The Court: No legal cause?

"Mr. Ibos: No, your Honor.

"The Court: Very well. I take it you want to make a motion for probation?

"Mr. Ibos: If it can be waived—

"The Court: It can be waived but I'd rather have it in this case, because I have no information before me.

"Mr. Ibos: Thank you, your Honor." (Emphasis added.)

The court then set August 16, 1955 (and continued to August 18, 1955), for the pronouncement of judgment, at which time the defendants and their respective attorneys were present. The representative of the Public Defender's office was present in behalf of the petitioner, and among other things, the following was said:

"Mr. McNamara (Assistant Public Defender): Well, I talked with Mr. Burroughs, and he tells me that his wife is in the east. He came out to Los Angeles to work some months ago and he tells me that this incident arose in a way where he was more or less the victim of circumstances. He seems to be sincere in wanting to return home and undertake his responsibilities. Now, obviously, if he is not eligible for probation, why, I can't direct my remarks with the objective that he be given probation, but I would call your Honor's attention to the fact that the Indictment was returned on March 17th, which is an important day of course, and they have been in custody all that time; that is, Mr. Burroughs has; and I would ask that your Honor take it into consideration. As I say, he seems to be quite sincere in wanting to straighten his affairs out. I was not familiar with the prior record, however, I might say that.

"The Court: Very extensive records. They all have extensive records. One of these men—I don't know whether it is Burroughs or Echols—Burroughs is an old hand at this sort of stuff. Did you wish to say something?

"Mr. Ibos: As far as the Defendant Echols is concerned, at the time this defendant pleaded guilty, we are aware and were aware then and we are now, that he had no reason or right to expect probation, if your Honor please, and does not expect that, but at the time he pleaded guilty, we discussed the law in the matter, and we probably thought that he might be able, by pleading guilty, after he had pleaded guilty, that your Honor might consider for him a County Jail sentence. Now, that was the idea in most of our minds at that time, and if that could be done, that is all he'd expect and he'd be very happy to get that, if he could get that, just a County Jail sentence with a maximum term, your Honor.

"The Court: I should think he would be, but the unfortunate situation here is that the maximum to this offense to which these defendants have pleaded, as I read the law, is six months.

"Mr. McDonnell: I realize that.

"Mr. Ibos: In the County Jail.

"The Court: And I can't see myself, with their extensive records, giving a six months County Jail sentence. After all, this is the old pigeon drop deal of $5000 and it was by the grace of God they—they got it out of the bank but couldn't cash the check."

Thereupon the defendants then appearing were sentenced to the state prison.

The Superintendent of the California Men's Colony State Prison at San Luis Obispo made his return to the writ by setting forth a copy of the judgment and commitment and further by answering the various contentions of petitioner.

[1] We are of the belief that, under the circumstances as here presented, that the writ should be denied. The contention that petitioner was denied due process of law and a fair trial is not borne out by the record. Petitioner was represented by counsel of his own choice, namely Mr. Ibos, or stood by and permitted the court to believe that Ibos was representing him, and certainly Ibos lead the court to believe that he represented Echols and the petitioner up to and including June 6, 1955, when the public defender was appointed.

[2] A speedy trial was not denied the petitioner and the record amply supports the attorney general's theory that petitioner and his various attorneys, by their conduct, waived the statutory time within which a trial should take place, when the petitioner consented to the setting of the trial for July 6, 1955.

[3, 4] The fact, if it be a fact, that petitioner was taken before the grand jury without counsel and told to testify, cannot aid him in this proceeding. The petitioner pleaded guilty after a full explanation of all of the consequences which could flow from such a plea. The petitioner's petition seems to put great emphasis upon the contention that he was induced to plead guilty with the thought or promise that he was going to get a county jail sentence, and not a state prison term. To any one who has had any practice in the criminal courts, it is fairly obvious what took place in this matter. It is easily seen that there was some bargaining going on between the respective parties and their attorneys, and we have no doubt that it might well be true that the petitioner had good reason to believe, from what was told him by his own attorneys, that he could get a county jail sentence instead of going to the state prison with three prior convictions.

[5] It is further clear from the record that no law enforcement officer, or officer of the court, made any statement or pursued any course of conduct which induced the petitioner to change his plea to that of guilty as to count II. The public defender appointed by the court as the attorney for the petitioner is the same, so far as a proceeding of this character is concerned, as privately employed counsel. In re Hough, 24 Cal.2d 522, 150 P.2d 448. The fact that the petitioner might have believed, after his conference with his attorney, that he would get a lighter sentence by pleading guilty to one count, is of no avail to him in this instance.

The writ is denied.

WHITE, P. J., and DORAN, J., concur.

148 Cal.App.2d 906

Robert Harold BONWELL, Petitioner and Respondent,

v.

The JUSTICE COURT FOR the TULARE JUDICIAL DISTRICT, Respondent,

The People of the State of California, Appellant and Real Party in Interest.

Civ. 5363.

District Court of Appeal, Fourth District, California.

March 4, 1957.

Hearing Denied May 1, 1957.

Prohibition proceeding by defendant, who was accused of violating Health and Safety Code provision making it unlawful to visit or be in any room or place where any narcotics are being used or have recently been unlawfully smoked or used, against Justice Court, Tulare Judicial District, in which the prosecution was pending. The Superior Court, Tulare County, Frederick E. Stone, J., granted writ of prohibition, and People, as real party in interest, appealed. The District Court of Appeal, Mussell, J., held that the provision was unconstitutional.

Order granting writ affirmed.

Poisons ⇐2

Health and Safety Code provision making it unlawful to visit or be in any room or place where any narcotics are being used or have recently been unlawfully smoked or used is unconstitutional. West's Ann.Health & Safety Code, § 11556.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for appellant.

Clarence B. Knight, Tulare, for respondent Robert Harold Bonwell.

MUSSELL, Justice.

On March 7, 1956, a complaint charging the defendant Robert Harold Bonwell with a violation of section 11556 of the Health and Safety Code was filed in the Justice Court for the Tulare Judicial District in the County of Tulare. On March 15, 1956, an amended complaint was filed in said court charging that the defendant was unlawfully present in a place where marijuana was being unlawfully used, knowing at such time that marijuana was being unlawfully used in violation of said section 11556 of the Health and Safety Code. Thereafter, a petition for a writ of prohibition was filed in the Superior Court of said county and on May 1, 1956, the writ was granted. The People of the State of California, the real party in interest, appeal from the order granting the writ and the sole question presented on this appeal is whether or not section 11556 of the Health and Safety Code is constitutional. This section reads as follows:

> "*Presence in room or place.* It is unlawful to visit or to be in any room or place where any narcotics are being or have recently been unlawfully smoked or used."

The trial court held that the said section is unconstitutional and we conclude that its holding is correct.

In the Matter of the Application of Worsham on Habeas Corpus, 26 Cal.App. 773, 148 P. 526, the complaint filed therein charged that the defendant did wilfully and unlawfully visit a place within the city of Whittier where intoxicating drinks were delivered, divided and distributed in violation of an ordinance providing in part that:

> " 'Every person who at any time visits or is present at any place within the city of Whittier where spirituous, vinous, malt or mixed liquors, or any alcoholic or intoxicating drinks are sold, kept for sale, offered for sale, furnished, distributed, divided, delivered or given away in violation of this ordinance, shall be deemed guilty of a misdemeanor.' "

The court, in passing upon the validity of the ordinance, said:

"This language is very broad and includes every possible case of visiting such a place as that described. It is identical in principle with an ordinance of the city of Modesto which was under consideration in the case of Ah Jow [In re Ah Jow] in the United States Circuit court for the district of California, reported in 29 F. 181. Referring to words which made any person who visited such room or place as the one described in that case, guilty of a misdemeanor, the court said: 'Under this section it would not be lawful for any person, whether Caucasion citizen, or other inhabitant, to enter such a place or drug store for many of the ordinary and proper purposes of life, as to purchase other goods, to collect bills, or transact any legitimate business. To lawfully prohibit, under penalties, the citizens or inhabitants from entering such a place, innocently, not knowing its character, or for any lawful purpose, and without reference to its object, is, in my judgment, entirely beyond the power of the city of Modesto. It is to prohibit an act which is innocent in itself, and lawful under the general laws of the land, and therefore inconsistent with the laws of the land.'"

We conclude that the code section involved in the instant case is subject to the same criticism as the ordinance in the Worsham case and that the decision therein is a correct statement of the law as applicable to the present case.

Appellant contends that the statute should be interpreted to read as follows:

"It is unlawful to visit or to be in any room or place where any narcotics are being or have recently been unlawfully smoked and used, *with knowledge that said acts have occurred in said room, that is with knowledge of the nature of the room.*"

However, we are not authorized to add the underscored words to the section and thus rewrite the statute. We are here limited to the construction of the plain language of the section as enacted and to the intention therein expressed. As is said in People v. One 1940 Ford V-8 Coupe, 36 Cal.2d 471, 475, 224 P.2d 677, 600:

"In construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language. The court is limited to the intention expressed. Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 365–366, 5 P.2d 882; People v. One 1941 Buick 8, [Four-Door Sedan] 63 Cal.App.2d 661, 667, 147 P.2d 401."

The order granting the writ of prohibition is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



148 Cal.App.2d 871

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert E. MORGAN, Defendant and Appellant.

Cr. 5849.

District Court of Appeal, Second District, Division 3, California.

March 1, 1957.

Rehearing Denied March 13, 1957.

Hearing Denied April 25, 1957.

Defendant was convicted of issuing checks without sufficient funds and of grand theft, and the conviction was affirmed on appeal. The Superior Court terminated stay of execution of the judgment of conviction, ordered that judgment be executed, and denied defendant's motion to vacate judgment, and defendant purported to appeal. Upon motion of the People to dismiss the purported appeal, the District Court of Appeal held that

trial court could not entertain defendant's motion to vacate judgment from which he had previously appealed and which had been affirmed on appeal.

Appeal dismissed.

1. Criminal Law ⇐998

Trial court could not entertain defendant's motion to vacate judgment from which he had previously appealed and which had been affirmed on appeal. West's Ann.Pen.Code, § 1265.

2. Criminal Law ⇐1023(12)

Motion for order vacating order by which trial court vacated stay of execution and ordered that judgment be executed after it had been affirmed on appeal could not present basis for an appeal to the Court of Appeal, since order vacating stay of execution did not affect any substantial right of defendant. West's Ann. Pen.Code, § 1237.

3. Criminal Law ⇐1023(12)

After judgment of conviction became final, all questions of claimed error in order vacating stay of execution and requiring that judgment be executed following affirmation of the judgment on appeal were moot.

Robert E. Morgan, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

PER CURIAM.

The People have moved to dismiss the purported appeal by Robert E. Morgan from a judgment and an order heretofore made by the superior court, which motion is resisted by the defendant. From the record before us we are advised of the following facts. Pursuant to verdicts adjudging defendant guilty of four offenses of issuing checks without sufficient funds and one offense of grand theft judgment was entered on the 11th day of March, 1954, sentencing defendant to state prison. The judgment was affirmed, People v. Morgan, 134 Cal.App.2d 97, 285 P.2d 336, on June 24, 1955. A stay of execution of the judgment pending the appeal was issued by the trial court March 11, 1954. Upon affirmance of the judgment, the trial court, on June 24, 1955, on motion of the district attorney, terminated the stay of execution of the judgment. Defendant was in court upon the hearing of the motion. Upon vacating the stay of execution, the court ordered that "the sheriff is ordered to place in full force and effect the judgment heretofore rendered," and defendant was returned to prison. Under date of July 25, 1956, the defendant gave notice of a motion "to vacate and set aside the judgment in the above entitled matter heretofore made on June 24, 1955," and with the notice he filed a written motion "that an order be issued vacating and setting aside the judgment heretofore entered in the above entitled matter." On August 17, 1956, defendant, through his counsel, presented his motion and the court ordered "Defendant's motion to vacate the judgment is denied." Defendant gave notice of appeal in which he described his appeal as one from "the order denying his motion to vacate the judgment" and he so designated the appeal in a request for an additional record.

[1] The attorney general has moved to dismiss the appeal upon the ground that the superior court was without jurisdiction to entertain defendant's motion for the reason that he had previously appealed from the judgment and the same had been affirmed on appeal. The motion must be granted. The trial court could not entertain a motion to vacate the judgment Pen. Code, § 1265; People v. Ponce, 103 Cal. App.2d 271, 229 P.2d 77.

[2, 3] Defendant says that he did not move the trial court for an order vacating the judgment but only for an order vacating the order of June 24, 1955, by which the court vacated the stay of execution and ordered that the judgment be executed. Even so, he has not presented an appeal to this court. The order of

June 24, 1955, was entered on the same day the judgment was affirmed by Division Two of this court. The order vacating the stay of execution did not affect any substantial right of the defendant, Pen. Code, § 1237; he had no legal right to a continued stay of execution; and, in any event, since the judgment has become final, all questions of claimed error in the order have long since become moot.

The appeal is dismissed.



148 Cal.App.2d 909

C. E. PANCOAST, Plaintiff and Respondent,

v.

George Vernon RUSSELL, Defendant and Appellant.

Civ. 21402.

District Court of Appeal, Second District, Division 1, California.

March 5, 1957.

Rehearing Denied March 28, 1957.

Hearing Denied May 1, 1957.

Action by homeowner against architect for habitual neglect of performance of duties, particularly with respect to inspection and approval of contractor's work, and for breach of written contract by failing to provide general supervision and by abandonment of project without owner's knowledge or consent. Architect cross-complained for balance allegedly due him. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment for owner on complaint and against architect on cross-complaint, and architect appealed. The District Court of Appeal, Doran, J., held that question of amount of owner's damages was for Trial Court as trier of the facts.

Judgment affirmed.

1. Trial ⇐404(1)

Findings are to be liberally construed in support of the judgment.

2. Contracts ⇐354
Negligence ⇐142

In action by homeowner against architect for neglect of duties and breach of written contract by failure to provide general supervision, wherein architect cross-complained for balance allegedly due him, trial court's findings that architect was guilty of neglect and failure to provide proper supervision to owner's damage in sum of $6,000 were adequate to support judgment for homeowner and any inconsistency therein was immaterial in view of fact that evidence was sufficient to support judgment for homeowner on either theory.

3. Appeal and Error ⇐1011(1)

Where findings and judgment are supported by substantial evidence, reviewing court will not attempt to evaluate weight and credibility of evidence received, and conflicts in evidence must be resolved in favor of judgment rendered.

4. Appeal and Error ⇐1010(1)

Where, in action by homeowner against architect for neglecting performance of duties and failure to provide general supervision and abandonment of project without owner's knowledge or consent, there was substantial evidence to support trial court's conclusion that architect had not properly supervised the work, District Court of Appeal could not enter upon a re-trial of such factual issue.

5. Pleading ⇐248(13)

Where, in original complaint in action by homeowner against architect, fraud theory was stressed, and architect was alleged to have permitted substitutions of lumber and material and approved workmanship of inferior quality and to have fraudulently certified to completion of part of the construction, fact that, in amended complaint, owner omitted the fraud charge and relied upon architect's dereliction in inspection and supervision could not be deemed a fatal departure from allegations contained in original complaint.

6. Limitation of Actions ⇐127(2)

Where amendment of pleading is sought after statute of limitations has run, amendment will be deemed filed as of date of original complaint so long as recovery is sought in each complaint upon the same general set of facts, and a mere change in legal theory will not subject the amended complaint to the bar of the statute of limitations.

7. Contracts ⇐196, 205

Where contract called for architect to provide "architect's services" including "general supervision of the construction work", architect's undertaking was not that of an absolute guaranty that satisfactory results would ensue, but term "general supervision" had to mean something other than mere superficial supervision.

8. Appeal and Error ⇐1013

In action by homeowner against architect for habitual neglect of duty particularly with respect to inspection and approval of contractor's work and breach of contract by failure to provide proper general supervision and by abandonment of project without owner's knowledge or consent, question of amount of owner's damages was for trial court as trier of the facts.

9. Damages ⇐191

In action by homeowner against architect for habitual neglect of duties and for breach of written contract by failure to provide proper general supervision and by abandonment of project, evidence sustained court's finding that owner was required to remove slab floors and heating ducts and to install new work because of defective construction.

10. Estoppel ⇐90(1)

Homeowner's payment to contractor with knowledge of defective construction did not constitute waiver of architect's alleged negligence in regard to such construction in view of fact that payment was predicated upon architect's certification with understanding that defects were to be corrected and that subsequent work would be performed in a proper manner.

11. Arbitration and Award ⇐81

Where architect was not party to arbitration proceeding between homeowner and contractor to determine homeowner's damages from faulty construction, and architect and contractor were separate and independent parties in their relationship with homeowner, arbitration award was not res judicata in subsequent action by homeowner against architect for habitual neglect of duties and breach of contract by failure to provide proper general supervision and by abandonment of project, and judgment obtained against architect would not allow homeowner recovery of double compensation.

12. Judgment ⇐715(1)

Identity of issues is a vital element of doctrine of res judicata.

Jerome T. Stewart, Los Angeles, for appellant.

Philip N. Gepner, Los Angeles, for respondent.

Robert E. Burns, San Francisco, for California Council of Architects as amicus curiæ on behalf of appellant George Vernon Russell.

DORAN, Justice.

The respondent Pancoast, desiring to build a house on a ranch near Azusa, contracted with appellant Russell, an architect, to provide "architect's services" including "general supervision of the construction work". The contract further provides that "the architect's fee does not include the cost of * * * superintendence by a full time inspector or Clerk of the Works". The contractor was one H. J. Orchard, suggested by plaintiff's brother and unknown to the appellant architect.

It appears that owner Pancoast who had had surveying and engineering experience, was frequently on the building site inspecting the work as it progressed, and made many complaints both to the contractor and to Architect Russell. These complaints related to the manner of pouring concrete,

installation of heating ducts, carpenter work, etc. The appellant's statement that Dr. Pancoast objected strenuously to about "everything that was done or was not done" does not seem too much of an exaggeration.

By late September, 1951, relations between the parties had deteriorated badly, whereupon appellant summoned members of the Ethics Committee of the Los Angeles Chapter of the American Institute of Architects to consider respondent's objections. After visiting the premises, certain remedial measures were suggested. The heating ducts, subject of one of respondent's serious objections, could not be examined because of the floor slab. Thereafter, the contractor abandoned the job.

On November 10, 1951, as said in appellant's brief, "plaintiff stated that he would refuse any remedy except complete demolition of the building as constructed and complete reconstruction." Dr. Pancoast thereafter filed complaints with the Ethics Committee of the American Institute of Architects, and likewise with the State Board of Architectural Examiners seeking to have appellant's license revoked. These complaints were dismissed. Thereafter, respondent ceased to confer with appellant, demolished the structure and relet the construction contract.

In February or March of 1952, the dispute between respondent and the contractor was submitted to arbitration with the result that the sum of $2,500 was deducted from the sum found to be due the contractor, leaving a balance due of $11,988.14. The appellant architect was not a party to this arbitration. A judgment confirming the arbitration award was affirmed on appeal. Orchard v. Pancoast, 133 Cal.App. 2d 52, 283 P.2d 309.

Respondent Pancoast's original complaint against Architect Russell sets out the contract, charges fraud and deceit on the part of Russell and alleges the giving of a certificate entitling the contractor to receive an initial payment for construction. The complaint further charges that "defendant, over the protests of plaintiff, permitted substitutions of lumber and material, * * and approved workmanship * * * of such inferior quality as to greatly weaken said structure", etc., and that the "Los Angeles Building Department condemned a large portion of the foundations". There was a cross-complaint by defendant Russell seeking to recover a balance due of $1,764.-25.

A First Amended Complaint charges the defendant architect with "habitual neglect in the performance of his duties as such architect", particularly with respect to inspection and approval of the contractor's work. A second count alleges breach of the written contract "by failing to provide proper general supervision and by abandoning said project on November 7, 1951, without plaintiff's knowledge or consent and has never returned to complete the same."

The trial court found that "defendant was guilty of neglect in the performance of his duties as such architect"; that the defendant "carelessly and negligently disregarded" plaintiff's protests and "failed to provide proper general supervision of the work". It was found that Dr. Pancoast, the respondent, had been damaged by the defendant's conduct in the sum of $6,000, and that defendant should take nothing by way of the cross-complaint. Judgment was entered accordingly.

It is the appellant's contention that the findings do not support the judgment and are not supported by the evidence; that the trial court should not have found the defendant negligent in supervision and inspection, or that plaintiff was required to raze a portion of the building or remove part of the slab floor. It is also argued that the plaintiff waived any negligence on the part of the defendant by making payment to the contractor with knowledge of alleged defects. The point is also made that "there is no evidence to support the finding that the plaintiff was damaged in the amount of $6,000.00." It is also contended that "The arbitration award rendered as to the dispute between plaintiff and contractor rendered the judgment of the trial court erroneous in law"; that the cause of action

for any negligence was barred by the statute of limitations; and that the trial court erred in denying relief on defendant's cross-complaint.

A careful survey of record and transcript indicates that all of the appellant's assignments of error are without foundation. Much of appellant's brief is concerned with the proposition that judgment and findings are contrary to appellant's interpretation of the evidence, and that the trial court should have arrived at a contrary conclusion.

[1, 2] As pointed out in respondent's brief, it is the rule that findings are to be liberally construed in support of the judgment. Whatever may be the technical defects in the present findings, they are not fundamental in nature, and when construed as an entirety, furnish adequate support for the judgment rendered. Moreover, as said in Martinez v. Martinez, 41 Cal.2d 704, 263 P.2d 617, 618, any "inconsistency is immaterial since there is sufficient evidence to support a judgment for plaintiff on either theory."

[3] Another fundamental principle brought into play in the instant case is that where findings and judgment are supported by substantial evidence the reviewing court will not attempt to evaluate weight and credibility of the evidence received. Conflicts in the evidence must in such a case be resolved in favor of the judgment rendered. That the record herein does disclose substantial evidence in support of findings and judgment cannot be doubted. While it is true that there is also evidence tending to support a part of appellant's contentions, the existence of such evidence in no manner affects the application of the above rule.

[4] The matter of adequate inspection and supervision on the part of the architect and the interrelated problem of the owner's damages alleged to have resulted therefrom, were disputed questions of fact which the trial court was called upon to solve. Since there is substantial evidence in support of the conclusion that appellant did not properly supervise the work, the appellate court cannot enter upon a re-trial of the factual issues.

[5] While it is true that the original complaint stresses the fraud theory, it also alleges that the appellant "permitted substitutions of lumber and material * * * and approved workmanship * * * of (such) inferior quality", etc. Paragraph V of the original complaint charges that the defendant "wilfully, *carelessly* and fraudulently certified to the completion" of a portion of the construction. (Italics added.) In the amended complaint plaintiff omits the fraud charge and relies upon the architect's dereliction in inspection and supervision. Under the liberal theory of pleading followed in this state, the allegations of the amended complaint cannot be deemed a fatal departure from those in the original.

[6] The rule laid down in Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 717, 128 P.2d 522, 524, 141 A.L.R. 1358, is applicable to the present situation. The Supreme Court there said: "This contention is based on the theory that the fifth amended complaint charging fraud states a new and different cause of action from that for negligence stated in the original complaint. * * * The modern rule, where amendment is sought after the statute of limitation has run, is that the amended complaint will be deemed filed as of the date of the original complaint so long as recovery is sought in each complaint upon the same general set of facts. * * * A mere change in legal theory will not subject the amended complaint to the bar of the statute of limitations".

[7] There can be no serious contention that the architect's undertaking was that of an absolute guaranty that satisfactory results would ensue. On the other hand, the term "general supervision", as used in the instant agreement, must mean something other than mere superficial supervision. Obviously, there can be no real value in supervision unless the same be directed towards securing a workmanlike adherence to specifications and adequate performance

on the part of the contractor. As hereinbefore stated, whether appellant rendered such a service to the owner was one of the primary factual issues in the case.

[8] Defective performance and violations of plans and specifications were repeatedly pointed out to the appellant and, as found by the trial court, there is evidence indicating that "defendant carelessly and negligently disregarded the protests and objections of plaintiff", and that respondent suffered damage as a result of such conduct. The amount of such damage found by the trial court to be $6,000 was, again, a question of fact. As pointed out in the respondent's brief, other methods of computation might have resulted in a far larger judgment. Appellant's contentions in reference to the amount awarded are untenable.

[9] What has heretofore been said in reference to substantial evidence sustaining the trial court's findings, is likewise applicable to appellant's contention that the court was not justified in finding that respondent was "required to remove the slab floors and heating ducts", etc., and to install new work. According to one architect witness, encasement was so poor that the witness could reach in and touch the galvanized iron duct between the spaces left between the pours of cement. Another expert witness testified that the only way to remedy the condition was to "pull up the floor or go overhead". The contention is without merit.

[10] The argument to the effect that respondent's payment to the contractor with knowledge of defective conditions, constitutes a waiver of appellant's alleged negligence, cannot be sustained. What apparently happened was that respondent made a payment to the contractor predicated upon the appellant's certification, with the understanding that certain defects were to be corrected, and that subsequent work should be performed in a proper manner. It is to be noted that this payment was brought about, not by respondent's volition but by the act of the appellant whose duty it was to serve respondent's interest by giving adequate supervision. In all this there is nothing in the nature of a waiver.

[11] Nor is there any merit in appellant's insistence that "The arbitration award rendered as to the dispute between plaintiff and contractor rendered the judgment of the trial court erroneous in law"; that such award was res judicata; and that the present judgment allows respondent to "recover double compensation". The present architect-defendant was not a party to the arbitration proceedings between plaintiff and the contractor. As stated in the respondent's brief, "the liability of the Defendant is not derived from the liability of the contractor Orchard. * * * They have no relationship such as master and servant, principal and agent", etc., but were "separate and independent parties in their relationship with plaintiff".

[12] The issues decided in the plaintiff-contractor arbitration were not identical with those presented in the present action between plaintiff and architect. In Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892, cited by appellant, this identity of issues is mentioned as a vital element of the doctrine of res judicata. As said in Alexander v. Hammarberg, 103 Cal. App.2d 872, 882, 230 P.2d 399, 406, "the issues * * * are not identical * * *. The Rahlves case was for damages for breach of a builder's contract, while the instant case is for negligence of the architect in supervising the work".

The findings and judgment of the trial court are adequate and in accordance with both law and evidence. No reversible error has been shown.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

149 Cal.App.2d 22

Florian F. DAUENHAUER, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF SONOMA, Respondent.

Civ. 9227.

District Court of Appeal, Third District, California.

March 8, 1957.

Action to recover defaulted-rental on a hop-picking machine, damages for other breaches of lease, and repossession of machines. After removal of case to federal court on petition of a cross-defendant, and remand from such court, the Superior Court, Sonoma County, McGoldrick and Comstock, JJ., due to a default judgment entered by its clerk, refused to rule on special demurrers and motion to strike and defendants by petition and order to show cause sought a writ directing such court to consider its pleadings. The District Court of Appeal, Van Dyke, P. J., held that where trial court refused to rule on special demurrers and motion to strike due to a mistaken belief as to validity of a default judgment entered in favor of plaintiff after remand of case from federal district court, a peremptory writ would be issued directed to such court commanding it to proceed to rule upon such pleadings.

Order in accordance with opinion.

1. Removal of Cases ⇐109

Where cause was remanded to state court by federal court, state of suspension of pleadings theretofore existing during period of removal terminated, and party had unexpired time theretofore given him by state court within which to file his pleadings, and in view of fact that such facts appeared on record of state court, clerk of such court was without authority to enter default based on expiration of time to plead, and his attempt to do so would be deemed a nullity. 28 U.S.C.A. § 1446.

2. Mandamus ⇐39

Where court considered, upon merits, general demurrers addressed to amended answer and cross-complaint and determined that demurrers were not well taken, District Court of Appeal would not issue mandate directing court to again rule on such pleading, notwithstanding that a further reason for court's overruling of such pleading was its mistaken belief that entry of default judgment against plaintiff was valid.

3. Mandamus ⇐180

Where trial court refused to rule on special demurrers and motion to strike due to mistaken belief as to validity of default judgment entered in favor of plaintiff after remand of case from federal district court to which the case had been removed, a peremptory writ would be issued directed to such court, commanding it to proceed to rule upon such pleadings, without the usual intermediary step of issuing alternative writ. 28 U.S.C.A. § 1446.

White & White, San Francisco, for petitioner.

Cyrus B. King and Ernest I. Spiegl, San Francisco, for real parties in interest.

VAN DYKE, Presiding Justice.

Heretofore, petitioner filed an action in the respondent court, entitled "Florian F. Dauenhauer, plaintiff, v. W. E. Barber and Betty L. DeVoto, * * * defendants", seeking to recover defaulted cash rentals on a hop-picking machine, damages for other breaches of the lease, and repossession of the machine. Defendants Barber filed their answer, and W. E. Barber filed a cross-complaint. Plaintiff's demurrers to answer and cross-complaint were sustained with leave to amend. Amended pleadings were filed, and the court by order extended the plaintiff's time to plead to the pleadings as amended. The Utah Home Fire Insurance Company, which had been joined as a cross-defendant, filed its petition for removal of the cause to the United States District Court. The cause was removed

during plaintiff's extended leave to further plead. The federal court remanded the cause to the respondent court, and within the unexpired time, not counting the interim of federal control, plaintiff demurred to the amended answer and cross-complaint and moved to strike both pleadings. When he filed these pleadings, plaintiff was unaware that, on the day following the remand and at the request of the cross-complainant, his default had been entered. Plaintiff's demurrers and motions to strike came on for hearing, and at that time cross-complainant called the respondent court's attention to the default and objected to the court's hearing the demurrers and motions on the merits. The question of the propriety of the clerk's entering plaintiff's default for failure to plead in time presents the initial controversy herein, and before going further we will give it our attention.

Under the Removal Act, 28 U.S.C.A. § 72, prior to its amendment, May 24, 1949, 28 U.S.C.A. § 1446, it had often been held that where, after removal, the moving party failed to make out a case for removal, the decision remanding was a decision that the jurisdiction of the federal court had never attached, and the jurisdiction of the state court had never been surrendered; that, therefore, in the interim the state court could proceed, in the absence of objection, and could default a party for failure to answer or otherwise plead within the time permitted by the statutes of the state or the orders of the state court. In effect, the cases held that the moving party took his chances when he attempted to remove a case not in law removable. The amendment, effective May 24, 1949, supra, materially changed the language of the statute, referring to the effect of removal. From the standpoint of jurisdiction, the matter early received the attention of the courts. One of the first cases appearing in the reports is Hopson v. North American Insurance Company, 71 Idaho 461, 233 P.2d 799, 25 A.L.R.2d 1040. After noting the changes in the statute worked by the amendment, the court said, 233 P.2d at page 802:

"By providing in Section 1446 that taking such procedural steps effects the removal of the cause to the Federal Court, which is not found in the earlier Act, Congress has thereby expressly effected the removal of the cause to the Federal Court irrespective of the ultimate determination of the question as to whether or not it is removable; it is not thereafter in the State court for any purpose until and unless the cause is remanded; for that reason the State court is expressly prohibited from proceeding further until and unless it is so remanded; under Sec. 72 the removal was never accomplished unless it was a cause removable; under the present Act removal is accomplished and jurisdiction attaches in the Federal Court even though it may be subsequently determined that it should be and is thereafter remanded. Removability is no longer a criterion which gives or denies validity to the proceedings in the State court while a petition for removal to the Federal Court is pending; any such proceedings in the State court under the present act are not sanctioned; they are prohibited.

* * * * * *

"We hold that under 28 U.S.C.A. § 1446, a case is removed from the jurisdiction of the State court upon a compliance with the procedural steps therein set forth for all purposes until and unless it is subsequently remanded to such State court; that until and unless the case is remanded no valid proceedings can be taken in the State court at any time following the filing of such petition and bond and giving notice thereof to all adverse parties and filing a copy of the petition with the Clerk of the State court; furthermore, that any action so taken in the State court thereafter and prior to remanding the cause to such State court, will have no force or effect."

In Allen v. Hatchett, 91 Ga.App. 571, 86 S.E.2d 662, 665, the court adopted the reasoning of the Idaho court in a case

where the contention was made that, where pending remand and after removal, the time allowed to appear and plead as given by state statute or state court order had elapsed, the case went into default, and the state court erred on remand in allowing defensive pleadings to be filed. The Georgia court said:

> "In the instant case the jurisdiction of the State court was suspended until the case was remanded to it by the Federal court, at which time the State court resumed jurisdiction and the case stood as it did at the time of removal. Therefore, where the case was removed to the Federal court 22 or 23 days after service of process, when the case was remanded to the State court it was not in default, and the court did not err in allowing, on motion, the defendants to pay all costs and file their defensive pleadings instanter." See also, Annotation 25 A.L.R. 2d 1045, citing State ex rel. Allis-Chalmers Mfg. Co. v. Boone Circuit Ct., 227 Ind. 327, 86 N.E.2d 74.

[1] On the authority of the foregoing decisions, we hold that when the cause was remanded to the respondent court by the federal court, the state of suspension theretofore existing terminated, and plaintiff had the unexpired time theretofore given him within which to file his demurrers and motions to strike. Since all this appeared upon the record of respondent court, the clerk was without authority to enter the default, and his attempt to do so was a nullity. Crofton v. Young, 48 Cal.App.2d 452, 457, 119 P.2d 1003.

The act of the clerk in entering the default being void, the demurrers and the motions to strike were properly filed by the clerk, and it was the duty of the court to hear and decide them on the merits. They were brought on for hearing and argued by counsel for petitioner, but at the close of that argument, counsel for cross-complainant called the court's attention to the record of default and contended that the pleadings were filed too late and must be ignored. Counsel then proceeded to argue on the merits, and the entire matter was briefed and submitted to the court for decision. Thereafter, the court filed a document entitled "Order Denying Motions and Overruling Demurrers", and concerning the validity of the default, said: "* * * [T]he effect of the entry of the default was to put the plaintiff out of court and disentitle him to make any motion or demurrer relating to said answer or cross-complaint until such default is set aside in a proper proceeding." However, having so declared, the court continued: "Upon the theory that a general demurrer may be raised at any time, the court has carefully examined the first amended answer and the first amended cross-complaint and each of the separate defenses and grounds of cross-complaint set out therein, and has reached the conclusion that they stand the test of a general demurrer notwithstanding they contain much conclusionary and evidentiary matter." The court then stated: "It is ordered that said motions of plaintiff be denied and said demurrers be overruled upon the ground that they and each of them were not timely and have no standing by reason of the default of plaintiff having been entered previous to the filing of said motions and demurrers."

After the filing of the foregoing document, petitioner, as plaintiff and cross-defendant, moved to set aside and vacate the order denying motions and overruling demurrers and to set aside and vacate the entry of the default. After hearing and submission of these motions, the court filed a document entitled "Opinion and Order". Concerning a contention that the "Order Denying Motions and Overruling Demurrers" was void, the court said: "I cannot agree that the order is void. It was based partly upon the theory that plaintiff and cross-defendant was in default and not timely in the filing of said motions and demurrers, and partly upon the theory that treating said motions and demurrers as attacks upon the general sufficiency of the amended answer to state a good ground of defense, or of the amended

cross-complaint to state a good cause of action, said pleadings meet the test of a general demurrer available to the plaintiff and cross-defendant at any time. * * * It must be apparent from said order of November 1, 1956, [the order overruling demurrers and denying motions to strike] that the court considered that a general demurrer to the first amended answer and the first amended cross-complaint could be raised at any time and reached the conclusion that the first amended answer and the first amended cross-complaint stood the test of a general demurrer and that such general demurrer was intended to be overruled. * * * [T]he effect of the entry of the default upon the amended cross-complaint was to put the cross-defendant out of court so far as said cross-complaint is concerned and to disentitle him to make any motion or demurrer relating to said cross-complaint. * * * Plaintiff and cross-defendant's motions and special demurrers with respect to the amended answer came too late, had no standing whatsoever and the objection of defendant and cross-complainant, W. E. Barber, to the consideration thereof is sustained. * * * The motions to set aside and vacate the order denying motions and overruling demurrers made November 1, 1956, to set aside and vacate entry by the clerk of the default dated October 18, 1956, and to reinstate the plaintiff and cross-defendant's motions and demurrers as submitted * * * are denied. * * *"

[2, 3] It is apparent from the foregoing that, notwithstanding the court considered throughout that the entry of the default was valid, and that, therefore, petitioner's demurrers and motions directed to the amended pleadings were not filed timely, and that, as the court put it, the petitioner was thus out of court with respect to those filings, nonetheless, the court did consider, upon the merits, the general demurrers addressed to the amended answer and cross-complaint and determined that said demurrers were not well taken. Obviously, the parts of the motions to strike which sought to strike the entire pleadings as sham would likewise fall, if the court determined that the pleadings withstood a general demurrer. It is equally apparent, however, that so far as the special demurrers were concerned, and so far as the motions to strike portions of the pleadings were concerned, upon such grounds as that they contained allegations that were mere conclusions and allegations that were not of ultimate fact but were made up of matters of evidence, the court did not consider the merits. This is further illustrated by the court's statement in its opinion that the pleadings did contain much conclusionary and evidentiary matters. Since the court did rule upon the general demurrers and the general motions to strike the entire pleadings, it cannot be said that it refused to perform a duty cast upon it under the law; and this court, therefore, cannot issue mandate directing it to do that which it has already done. From this record, however, it cannot be fairly said that the trial court did not refuse, by reason of its mistaken belief as to the validity of the default, to rule upon the special demurrers and the motions to strike addressed to portions of the pleadings attacked. To that extent, the court refused to perform a duty cast upon it by law, and the mandate of this court should issue, directing it now to do so.

This matter has thus far proceeded upon petition and order to show cause, which order to show cause has been regularly heard upon the calendar of this court after the issues of law presented by the petition had been the subject of written opposition and thorough briefing by respondent court through the medium of the real party in interest. Since it is apparent that only legal issues are presented for determination, and that there is and could be no factual issue to dispose of, and, since the matter has been thoroughly briefed and argued at a full hearing had in open court, it is best that ultimate relief to the extent we have indicated be now granted without proceeding to take the usual intermediary step by issuing an alternative writ. Nothing could be accomplished thereby except further delay in the orderly

progress of the cause. Although such procedure is exceptional, it is nevertheless authorized. 3 Witkin, Calif.Proc., pp. 2550–2551, Sec. 59, Extraordinary Writs, and authorities there cited.

Let a peremptory writ issue directed to respondent court, commanding that it proceed to rule upon the special demurrers and special motions to strike, directed to the amended answer and cross-complaint on file in the cause.

PEEK, J., and WARNE, J. pro tem., concur.



148 Cal.App.2d 684

Leroy Joseph BELL, Petitioner and Appellant,

v.

D. D. WATSON, as Real Estate Commissioner of the State of California, Respondent.

Civ. 17052.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1957.

Mandamus proceeding. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., denied the relief sought, and the petitioner appealed. The District Court of Appeal, Kaufman, J., held that even though there were findings, supported by substantial evidence, which could form basis for determination that licensee had been guilty of conduct which Business and Professions Code made ground for revocation of license, trial court's decision adverse to licensee, in mandamus proceeding brought to set aside decision of the Real Estate Commissioner revoking license, would have to be reversed, and case remanded to Real Estate Commissioner for redetermination of penalty to be assessed, where reviewing court discovered no finding to support determination that licensee had violated Administrative Code section relating to record keeping.

Reversed and remanded to Commissioner, with directions.

1. Brokers ⇐3

In proceeding culminating in revocation of broker's license, evidence would sustain finding that licensee had made false representations upon which clients had relied in purchasing property through licensee, that he had caused real estate purchase agreement to be acknowledged by notary public who was not present when agreement was executed and signed by parties, and that he commingled clients' funds with his own and had failed to properly handle trust funds. West's Ann. Bus. & Prof.Code, §§ 10176(a, b, e, i), 10177(f), 10301(e), 10561(e).

2. Mandamus ⇐187(9)

On appeal from adverse judgment in mandamus proceeding, brought for review of decision of the Real Estate Commissioner revoking broker's license, reviewing court was not required to view evidence in light most favorable to licensee.

3. Brokers ⇐3

In proceeding culminating in revocation of broker's license, findings would support hearing officer's determination that licensee had violated Business and Professions Code subsections proscribing (1) substantial misrepresentation, (2) the making of false promises of character likely to influence, persuade or induce, (3) the commingling of licensee's money or property with that of his clients, and (4) other conduct constituting fraud or dishonest dealing, and that he had violated Administrative Code sections relating to handling of trust funds; but there was no finding to support determination that he had violated Administrative Code section relating to record keeping. West's Ann.Bus. & Prof.Code, §§ 10176(a, b, e, i), 10177(f), 10301(e), 10561(e).

4. Mandamus ⇐187(10)

Even though there were findings, supported by substantial evidence, which could form basis for determination that licensee had been guilty of conduct which Business and Professions Code made ground for revocation of license, trial court's decision adverse to licensee, in mandamus proceeding brought to set aside decision of the Real Estate Commissioner revoking license, would have to be reversed, and case remanded to Real Estate Commissioner for redetermination of penalty to be assessed, where reviewing court discovered no finding to support determination that licensee had violated Administrative Code section relating to record keeping. West's Ann.Bus. & Prof.Code, §§ 10176(a, b, e, i), 10177(f), 10301(e), 10561(e).

Neil Cunningham, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Carl W. Wynkoop, Deputy Atty. Gen., for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court in and for the City and County of San Francisco, denying appellant's petition for a writ of mandate seeking to set aside a decision of the Real Estate Commissioner of the State of California revoking appellant's real estate and opportunity broker's license. Appellant Leroy J. Bell contends that the drastic penalty of revocation of license was too severe a penalty in view of the evidence produced against him, and that certain of the charges are not sustained by the weight of the evidence. Three of the charges he admits were committed.

The Amended and Substituted Accusation was in three counts. Count 1 chared violation of section 10176(a), (b) and (i) and section 10177(f) of the Business and Professions Code, in that false and fraudulent representations were made by appellant to a Mr. and Mrs. Virgil Morse upon which they relied in purchasing property through appellant.

Count 2 charged violation of section 10176(a), (b) and (i) and section 10177 (f) of the Business and Professions Code, in that appellant made false representations to Mr. and Mrs. Carl F. Landon and Mr. and Mrs. William C. Williams upon which they relied in purchasing real property through appellant. It charged him with failing to procure a title insurance policy for which he received $107 from Williams and Landon, and with failing to refund the money. He was further charged with having the agreement for the sale of the property to the above parties acknowledged by the notary public, Robert L. Bell, son of appellant who was not present at the time the agreement was executed.

Count 3 charged violation of section 10176(e) and (i) and section 10177(f) of the Business and Professions Code, and sections 2830, 2831 and 2832 of the Rules and Regulations of the Real Estate Commission as set forth in Title 107, the California Administrative Code. It was alleged that appellant received $500 from Mr. and Mrs. Richard Fontes on or about April 15, 1954 as a deposit on the purchase price of real property which he did not place in a trust fund or escrow account but commingled it with his own money, converting it to his own use, and not accounting for it to the Fontes until about May 25, 1954. Other charges contained in this count were that he received $2,870 as a deposit and part payment for the purchase of real property from Mr. and Mrs. Arthur Pitka and did not place it in a trust or escrow account but commingled it and converted it to his own use; that he received $30 from Joseph Raposa as a deposit and down payment on the purchase of real property which he failed to place in a trust or escrow account but commingled said sum with his own money and converted it to his own use, and that the check which he issued to Raposa in payment of said sum was

dishonored by the bank upon which it was drawn.

As to the first cause of action, the Hearing Officer found that appellant had made false promises to the Morses which he knew to be untrue, that they relied upon said promises; that in arranging for loans appellant failed to disclose to the Morses and concealed from them the fact that a $500 bonus was being charged to them, and that if they had known such facts they would not have signed the note.

As to the Landon and Willaims transaction, it was found that the representations made by appellant were not false but were made for the purpose of influencing and inducing the parties to purchase the property. It was found that appellant was paid $107 by these parties on January 17, 1953, to procure a policy of title insurance which he failed to do, but that he returned the sum to them on or about August 1954. It was also found to be true that appellant had caused the agreement of purchase by the Williams and Landons to have been acknowledged without the notary public being present at the time of the execution of the agreement.

In regard to the third cause of action the Hearing Officer found that on April 15, 1954, appellant received $500 from Mr. and Mrs. Fontes as a deposit and part payment on the purchase of real property at 8740 Almond Lane, Castro Valley, which sum was placed in appellant's real estate trust account, but was withdrawn on April 21, 1954, when the bank closed the account, and the sum was not immediately placed by appellant in a trust or escrow account or in the hands of the sellers of the property, but was commingled with his own money and converted to his own use, and not accounted for to the Fontes until May 25, 1954. It was found in regard to the Pitka transaction that $2,500 of the $2,870 sum deposited with appellant was not placed in a trust or escrow account, but was commingled with his own money and converted to his own use prior to the completion of the transaction and the earning of his commission in the sum of $2,500.

It was further found that appellant while acting as a licensed real estate broker had been collecting $30 per month for Joseph Raposa, and on April 15, 1954, issued a check on his trustee account to Raposa, which check was returned unpaid, marked "account closed", and that subsequently appellant made good to Raposa the check in the sum of $30.

As to the Knopf transaction, it was found not true as to Paragraph VI of the Accusation and as to Paragraph VII, that an error had been made in the closing statement furnished to the Knopfs which appellant had subsequently rectified.

It was found that appellant had obtained a $500 deposit for the purchase of real property in the Kaimar transaction and had failed to place the same in a trustee or escrow account but commingled it with his own money and converted it to his own use, and that he later repaid the sum to Kaimar.

Pursuant to such findings, the Hearing Officer determined that respondent had violated section 10176(a), (b), (e) and (i) of the Business and Professions Code, each of which is grounds for disciplinary action; that he had violated provisions of sections 2830, 2831 and 2832, Rules and Regulations of the Real Estate Commission as contained in Title 10, California Administrative Code, constituting grounds for disciplinary action under section 10176(e) of the Business and Professions Code; that he has acted in a manner that would have warranted the denial of a real estate license, which constitutes grounds for disciplinary action under provisions of section 10177(f) of the Business and Professions Code. It was recommended that appellant's license as a real estate broker be revoked, and this decision was adopted by the Real Estate Commission effective November 1, 1954.

[1] Appellant maintains that the evidence does not sustain the findings on the first two charges concerned with the Morse transaction. The Morses contacted appellant's office, as they wished to buy a home. They had only $750 to offer as a

down payment and wished to finance the purchase with a G. I. loan. They dealt first with appellant's agent Sharts to whom they gave the $750 deposit. They did not secure the home they were first interested in as G. I. financing could not be arranged. Thereafter they contacted appellant and advised him that they wished to secure a home on a G. I. loan, and discussed their financial circumstances with him. Six to eight weeks later, after Morse had demanded a refund of the deposit, appellant informed them that he had a house for them. On March 4, 1952, they signed a deposit receipt for the purchase of this property for $9,250, in which it was stated "This offer subject to suitable financing." When they were ready to close the deal in appellant's office, he informed them that G. I. financing could not be obtained on that property but that other financing could be arranged. Appellant informed the Morses they would be required to assume the first deed of trust G. I. loan, and that a second deed of trust in the amount of $2,650 which was to be paid off at $30 per month and the balance at the end of six months. The Morses objected to this plan as they could not pay off the second loan in the period of six months. But appellant told him "Go ahead and make these payments, and by that time you will have enough equity in your house and I can G I it and everything will be paid off." When Morse was asked if the possibility hadn't occurred to him that he might not be able to get a G. I. loan at this later date, he answered, "No sir. Mr. Bell said he would." Again Bell said, "You can't get a G I right now but you will have enough equity in six months' time." Mrs. Morse testified that her husband told appellant that he didn't have the kind of money it would take to pay off the second loan in February of '53, and appellant said not to worry about it "because after we had been in there for six months we would have enough equity in the house that he would G I it for us. So we signed the papers." Appellant denied that he had made any positive statements about getting the Morses a G. I. loan for the second deed of trust at the end of six months. He testified that he had told them only that he would try, and that he had so tried. He said that the loan company had advised him that probably in six months there might be more money available for G. I. loans, that at that time nobody wanted G. I. money. When asked if he thought that it might be possible to get a G. I. for the purchase price, he answered, "I didn't know. I didn't promise. I didn't sell him the house on that basis." Six months after the Morses purchased the house appellent told them that he couldn't get a G. I. loan for them. The Morses then listed the house for sale with appellant in order that they could pay off the sellers. Neither Mr. nor Mrs. Morse had ever bought a house previous to this transaction with appellant. There was also testimony by the Morses that appellant said he would try to get G. I. financing for them which would seem to conflict with the testimony given by them that he positively promised it by February 1, 1953. From the evidence reviewed above however, it is clear that there is sufficient evidence to support the finding that a promise was made to secure a G. I. loan for the Morses by February 1, 1953. Obviously, the promise was not kept. The Hearing Officer found that said promise was false and that respondent knew it was false. There is nothing in the testimony of the Morses that gives rise to an inference that appellant knew that the promise was false when he made it. The testimony of Mr. Stone, who was at the time of this transaction with the Russell Investment Company which made the loan, was to the effect that he had advised the Morses when they were brought in to him by appellant that the money market might ease in a few months and a G. I. loan might be obtained for them at that time. According to appellant, Stone was his adviser in regard to loans on this property. This advice could at best induce a belief that there might be a chance to obtain such financing. Appellant also testified that he knew that the Veterans' Administration financing does not permit second financing

on an original seller, that the only way that such financing could have been arranged on this property at some future date would have been to have the entire amount paid off. It can be said that appellant's testimony shows, assuming that he made the positive promise, that he made it knowing that it was entirely problematical whether he could produce such—financing, and the positive promise was in that sense false.

The testimony of Mr. and Mrs. Morse is sufficient to support the finding that they were not advised of the $500 bonus charged by the Russell Investment Company for the loan of $2,650 on the promissory note not secured by second deed of trust. Appellant was acting for the Morses in this matter as their agent. Mr. Stone of the Russell Investment Company stated that he did not recall the $500 fee being mentioned in the presence of the Morses, that there was no point in mentioning it to them as the investment company usually collected its fees from the real estate broker. He did remember that the fact that there was a brokerage fee had been mentioned in their presence, but not the amount. Appellant testified that he informed the Morses of the amount of the brokerage fee to be charged, that they said that they had made an offer of $250 less on the house than it was listed for, so it was only costing them $250. The witness Anthony also stated that he heard appellant inform the Morses of the $500 brokerage fee. Appellant who had been in real estate business for six years, had never had a transaction before where a lender had charged a fee for a loan. The note signed by the Morses on April 30, 1952, shows only that the principal thereof is $2,650 with interest at 6½%. The closing statement dated May 23, 1952, furnished to Morse by the Oakland Title Insurance and Guaranty Company shows a total charge of $10,047.-58, and one of the items added to the purchase price of $9,250 was listed under the heading "commission" to "L. U. Bell, $500.00."

The evidence reviewed demonstrates that the above finding is supported by substantial evidence, and even though there is impressive contradictory evidence the question of the weight of such evidence has been resolved by the trial court.

In regard to the Landon and Williams transaction, the record supports the finding that it was not shown by a preponderance of the evidence that appellant's statement that the property could be refinanced after three years so that the payments would be brought down to $56 per month, was false, nor that this was a substantial misrepresentation. It was found to be true that the statements were made to induce the parties to purchase the property, and that they entered into the agreement in reliance thereon. This finding cannot be said to be in any way adverse to appellant.

The finding that the Landons and Williams paid $107 on or about January 17, 1953 to appellant for which he promised to secure a policy of title insurance, which sum he refunded to them in August of 1954 is supported. The finding does not state that he did not secure the policy, but it is admitted in the record that he did not. His counsel said that there would be some technical things that they were going to admit "and this is one of them." Appellant explained that his son collected the money, it went into the account, and he thought that the policy had been issued until it was called to his attention.

The finding that appellant caused a certain agreement for the purchase of real property to be acknowledged by Robert L. Bell, a notary public, and that Robert L. Bell was not present when the agreement was executed and signed by the parties is supported by the testimony of the Landons and the Williams that Robert Bell was not present when they signed the agreement. The document dated February 10, 1953 (6 X 15) shows that it was acknowledged by Robert Bell on February 16, 1953. Appellant argues that no witness testified that appellant had anything to do with notarizing the document. However, the document was in his custody, and when it later appeared containing the acknowledgment, it is a permissible inference that appellant

caused the acknowledgment to be placed thereon by his son.

As to the Fontes' transaction it was found that on April 15, 1954 respondent received a deposit while acting in the capacity of a real estate broker as a deposit on property at 8740 Almond Lane, Castro Valley, which sum was placed in appellant's real estate trustee account, that on April 21, 1954, it was withdrawn by appellant when this account was closed by the bank, that he failed to immediately place said sum in a trust fund account, escrow depositary *or in the hands of the sellers of the property* but commingled it with his own money and converted it to his own use not accounting to the Fontes for it until May 25, 1954. The facts that the amount was received, that it was placed in the bank and that the bank closed the account on April 21, 1954, were admitted by stipulation. The only testimony on this matter was given by appellant who stated that after the bank account was closed he held this money in his safe. He stated that the property on Almond Lane was his own home property. He was to sell a store for the Fontes, and the sale of appellant's house was contingent on the sale of the Fontes' store. Appellant was negotiating with an oil company which was considering buying the store property as a site for a filling station. When this deal fell through he repaid the Fontes their deposit. Since there is no contradiction of the testimony that appellant himself was the seller of the property on which the deposit was made, it appears that the finding that he did not place the sum "in the hands of the sellers of the property" is unsupported. No evidence was offered to contradict the testimony that 8740 Almond Lane was appellant's home property. He gave this address at the beginning of his testimony when he was asked where he lived.

Appellant admits that in regard to the Pitka transaction, he was technically in violation of section 2830 of the Commissioner's rules when he converted $2,500, the amount of his commission on the deal, to his own use prior to the completion of the transaction and the earning of his commission.

The finding that appellant issued a check on his trustee account in the sum of $30 to Joseph Raposa on whose behalf he was collecting on account, that the check was returned unpaid, marked "account closed", and that appellant subsequently made good the amount to Raposa is adequately supported by stipulation and appellant's own testimony.

The finding on the Knopf transaction as to the charge of commingling was in appellant's favor. The charge that he had caused a false closing statement to be issued in this transaction was found to have been merely an error which he subsequently corrected.

As to the final transaction, it was stipulated that appellant received a $500 deposit on certain real estate known as the Clark property, which sum appellant did not place in a trust fund, neutral escrow depositary or in the hands of the seller of the property. Appellant's son Robert testified that the deposit was placed in the general account rather than the trustee account through error. He said that he was not acting under his father's direction in doing this, and that it had been his intention to deposit it in the trustee account.

[2] Appellant cites Manning v. Watson, 108 Cal.App.2d 705, 712, 239 P.2d 688, 692, as authority that the evidence most favorable to appellant must prevail on appeal. This contention apparently results from a misinterpretation of the language in that case. In the cited case the trial court had reversed the decision of the commission on the ground that the evidence did not support the findings of the Hearing Officer. The Read Estate Commissioner is the appellant in that case. The court stated that the only question before it was whether "the evidence, viewed in the light most favorable to respondent sustains the finding of the trial court to the effect that the charges against respondent were not supported by the weight

of the evidence." Although the accused is addressed as "respondent" in the proceedings before the Hearing Officer, the word was not used in that sense in the above opinion, but was used in reference to the party prevailing in the trial court.

[3] The findings reviewed above which are supported by substantial evidence form a basis for the determination by the Hearing Officer that appellant has violated provisions of section 10176(a), (b), (e) and (i) of the Business and Professions Code. That section provides that a real estate license may be temporarily suspended or permanently revoked if the licensee has been guilty of any of the following: "(a) Making any substantial misrepresentation. (b) Making any false promises of a character likely to influence, persuade or induce. * * * (e) Commingling the money or other property of his principal with his own. * * * (i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing." It was determined also that appellant had acted in a manner that would have warranted the denial of an application for a real estate license, an additional ground for suspension or revocation provided for in section 10177(f) Business and Professions Code. It was also properly determined that appellant had violated sections 2830 and 2832 of Title 10 of the California Administrative Code in that in certain instances he did not place funds entrusted to him by his principal, in trust fund accounts in cases where such funds were not immediately placed in escrow or in the hands of principals; that he failed to maintain a trust fund account when required and to deposit trust funds received in said account, which may be construed as commingling in violation of sections 10176 (e), 10301(e) and 10561(e) of the Real Estate Law. Although there was considerable evidence as to the manner in which the records were kept by appellant and his son, no finding was made in regard to the keeping of records. Therefore there is no finding to support a determination that section 2831 of Title 10 was violated. That section is concerned with the manner in which records must be kept, subject to inspection by the Commissioner or his deputies.

[4] In view of the fact that there is no finding to support the determination that section 2831 of Title 10 was violated, and that the finding in regard to the Fontes transaction is not supported by the evidence, the decision of the trial court must be reversed and the case remanded to the Real Estate Commissioner for a redetermination of the penalty to be assessed against appellant. Bonham v. McConnell, 45 Cal.2d 304, 306, 288 P.2d 502; Cooper v. State Board of Medical Examiners, 35 Cal.2d 242, 217 P.2d 630, 18 A.L.R.2d 593.

Judgment reversed as to penalty and cause remanded to the Real Estate Commissioner for a redetermination of penalty to be assessed against appellant.

DOOLING, Acting P. J., and DRAPER, J. pro tem., concur.



148 Cal.App.2d 670

B. H. FREEMAN, d/b/a Freeman Adjustment Bureau, Plaintiff, Respondent and Cross-Appellant,

v.

Bennie LA MORTE and Angelina LaMorte, his wife, Defendants, Appellants and Cross-Respondents.

Civ. 17007.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1957.

Action by assignee of judgment to set aside judgment debtor's conveyance to his wife of his interest in joint tenancy property. The Superior Court, Alameda County, A. T. Shine, J., entered judgment for

debtor and his wife but granted a new trial. The debtor and his wife appealed from order granting new trial and the assignee cross-appealed. The District Court of Appeal, Dooling, Acting Presiding Justice, held that where the joint tenancy property involved had been acquired with proceeds of joint tenancy property that had been purchased with proceeds of wife's property which she had conveyed to herself and debtor as joint tenants, questions whether debtor secured title to joint tenancy interest in wife's original property by way of gift and whether his title thereto became absolute and was not held by him as trustee were for trier of facts.

Order granting new trial affirmed; appeal from judgment dismissed.

1. Husband and Wife ⇐49¾(7)

In judgment creditor's action to set aside debtor's conveyance to his wife of his interest in joint tenancy property which had been acquired with proceeds of property that had been purchased with proceeds of wife's property which she had conveyed to herself and debtor as joint tenants, questions whether debtor had secured title to joint tenancy interest in wife's original property by way of gift and whether his title thereto became absolute and was not held by him as trustee were for trier of facts.

2. Deeds ⇐15

A deed does not require consideration to be valid.

3. Joint Tenancy ⇐6

Where title to property had been taken in names of husband, wife and wife's mother as joint tenants, on death of wife's mother her interest passed equally to the husband and wife as surviving joint tenants.

4. Trusts ⇐44(1)

In judgment creditor's action to set aside debtor's conveyance to his wife of his interest in property which had been acquired in names of debtor, his wife and wife's mother as joint tenants, evidence would support finding that interest which passed to debtor on death of wife's mother was not held in trust for wife, even if original title might have been.

5. Deeds ⇐70(1)

Allegations that spouse had no intention of performing his or her marital obligations when conveyance to such spouse was executed, must be supported by unequivocal evidence that such spouse was moved by fraudulent intent, and subsequent failure to fulfill prenuptial or postnuptial promises, made in good faith, does not of itself constitute actionable fraud for which cancellation of deeds between husband and wife may be had. West's Ann.Civ.Code, § 3439.01.

6. Equity ⇐65(1, 3)

The clean hands doctrine does not entitle court to inquire into general morals of the parties, and to warrant denial of relief unclean hands must relate to the transaction before the court.

7. Judgment ⇐518

Judgment for money obtained by fraud was conclusive of creditor's rights against debtor, and attempt, in action by judgment creditor's assignee to set aside debtor's allegedly fraudulent conveyance, to raise clean hands doctrine based on creditor's alleged meretricious relations with debtor was an attempt to go behind the judgment and relitigate a right which judgment had conclusively established.

8. Fraudulent Conveyances ⇐57(3)

Fact that husband conveyed his interest in joint tenancy property to wife while action was pending against him but before judgment was rendered would not prevent finding that transfer rendered him insolvent. West's Ann.Civ.Code, §§ 3439.01, 3439.02(a), 3439.07.

9. Fraudulent Conveyances ⇐66

Where husband conveyed his interest in joint tenancy property to wife while action was pending against him but before judgment was rendered, transfer could be set aside, if there were actual intent to defraud, even though husband were not

rendered insolvent. West's Ann.Civ.Code, §§ 3439.01, 3439.02(a), 3439.07.

10. Fraudulent Conveyances ⇐263(1)

In action by assignee of judgment to set aside conveyance of debtor's interest in joint tenancy property to wife, complaint alleging conspiracy by debtor and wife to conceal debtor's property and defraud creditors was not insufficient on basis that husband and wife cannot be guilty of conspiracy. West's Ann.Civ.Code, §§ 3439.01, 3439.02(a), 3439.07.

11. Fraudulent Conveyances ⇐269(1)

Although complaint, seeking to set aside debtor's conveyance to wife, alleged conspiracy to conceal debtor's assets and defraud creditors, wrongful conduct rather than conspiracy was gist of action and on proof of wrongful conduct allegation of conspiracy became surplusage. West's Ann.Civ.Code, §§ 3439.01, 3439.02(a), 3439.07.

12. Fraudulent Conveyances ⇐272

If there is actual fraud a creditor can maintain action to set aside transfer without showing that debtor has no other assets to satisfy judgment. West's Ann.Civ.Code, §§ 3439.01, 3439.02(a), 3439.07.

13. Appeal and Error ⇐1145

Affirmance of order granting new trial leaves no final judgment in effect, and cross-appeal from judgment is only operative if order granting new trial is reversed thus reinstating judgment. West's Ann. Rules on Appeal, rule 3(a).

Sea & Hanna, Oakland, for defendants-appellants.

Charles P. Molinari, Joseph L. Casalnuovo, San Francisco, for plaintiff-respondent.

DOOLING, Acting Presiding Justice.

Plaintiff is the assignee of a judgment in favor of Norma Bacigalupi against defendant Bennie LaMorte for $5,000. He brought this action to set aside a conveyance from Bennie LaMorte to his wife Angelina LaMorte as one in fraud of creditors. The court sitting without a jury entered judgment in favor of defendants. The court granted a new trial on the ground of insufficiency of the evidence. Defendants appeal from the order granting a new trial and plaintiff cross-appeals from the judgment.

The complaint is in two counts. The first count alleges that while indebted to plaintiff's assignor defendant Bennie conveyed the property to his wife for the purpose of defrauding, hindering and delaying his creditors. The second count alleges that the transfer was without any fair consideration and left the defendant Bennie insolvent.

Defendants were married in 1941. At that time defendant Angelina owned two parcels of real property. One of these parcels became the residence of the defendants and on June 1, 1942, defendant Angelina conveyed this property to Bennie and herself as joint tenants. She testified that she did this because of love and affection for Bennie. This property was sold and from the proceeds a second was acquired by the parties also as joint tenants. This second property was also sold and the real property here in question was purchased on December 7, 1943. Title to such property was taken in the names of Bennie LaMorte, Angelina LaMorte and Virginia Lippo as joint tenants. Virginia Lippo was Angelina's mother and contributed $5,000 of the purchase price, the balance coming from the proceeds of the sale of the property theretofore held by the defendants in joint tenancy. In 1946 Virginia Lippo died leaving defendants as surviving joint tenants.

Defendant Bennie met plaintiff's assignor in 1944 and engaged in a meretricious sexual relation with her which continued until 1950. In 1950 Mrs. Bacigalupi sued Bennie for $10,000 allegedly obtained from her by fraud. When Angelina learned of Bennie's intimacies with Mrs. Bacigalupi and of her pending action against him she asked her husband to convey his interest

in the property involved to her and he complied.

Defendant Bennie admitted that he did not have sufficient assets in May of 1951 when he transferred his interest in the Rosal property to his wife to pay Mrs. Bacigalupi $5,000. He stated that the transfer in question was made at defendant Angelina's instance, and that she paid him nothing for that property. He testified that he owned no property before his marriage and that he never contributed anything towards the purchase of any of the properties successively owned by his wife and himself. He stated that his wife gave him the Rosal property as a gift and she wanted it back when she found out about Mrs. Bacigalupi.

Defendant Angelina testified that her mother, Virginia Lippo, contributed $5,000 towards the purchase of the Rosal property and became a joint tenant with the understanding that defendants would care for her for the rest of her life and that on her death the property would go to defendants.

The trial court found against plaintiff on the doctrine of "unclean hands" and on the further theory that Bennie obtained title from Angelina without consideration and held his interest in trust for his wife.

[1–4] The trial court could find that under the evidence here presented Bennie secured title to a joint tenancy interest in the first property by way of gift and his title thereto became absolute and was not held by him as trustee. Thompson v. Jones, 167 Cal. 748, 141 P. 366. A deed does not require consideration to be valid. Odone v. Marzocchi, 34 Cal.2d 431, 436, 211 P.2d 297, 212 P.2d 233, 17 A.L.R.2d 1109. Angelina's own testimony negatives an intent that Bennie should hold the property in trust for her. The successive acquisitions of property were procured by using the proceeds of the previous sales and Bennie's joint tenancy interest was continued therein. When the property here in issue was acquired Mrs. Lippo advanced $5,000 of the purchase price and became a joint tenant. On her death her interest passed equally to Bennie and his wife as surviving joint tenants. The evidence would support a finding that this interest acquired from a third party was not held in trust for Angelina, even if the original title might have been.

Defendants argue that Murdock v. Murdock, 49 Cal.App. 775, 194 P. 762, compels the judgment in their favor. In that case the court did say, 49 Cal.App. at page 786, 194 P. at page 767: "even where there have been no false representations or promises by one of the spouses that the marital obligations have always been and would always be faithfully kept, property which has been given by one to the other will be restored to the donor upon discovery by the latter that the donee has been before or after the gift guilty of maintaining meretricious relations with a third party." This was a mere dictum. The court said on the same page: "In the case at bar, however, the element of actual fraud enters."

[5] The proper rule is stated in Bragg v. Bragg, 219 Cal. 715, 721, 28 P.2d 1046, 1048: "Allegations that a spouse had no intention of performing his or her marital obligations * * * when a conveyance to such spouse was executed, must be supported by unequivocal evidence that such spouse was moved by a fraudulent intent. Subsequent failure to fulfill prenuptial or postnuptial promises made in good faith does not of itself constitute actionable fraud for which cancellation of deeds between husband and wife may be had."

[6, 7] It is difficult to follow defendants' argument on the clean hands doctrine. Plaintiff's assignor recovered judgment against Bennie for $5,000 obtained from her by Bennie's fraudulent conduct. Her meretricious relations with Bennie may have afforded him the opportunity to defraud her, but they were no part of the transaction on which she recovered. The clean hands doctrine does not entitle the court to inquire into the general morals of the parties. "To warrant denial of relief the unclean hands must relate to the transaction

before the court." Boericke v. Weise, 68 Cal.App.2d 407, 419, 156 P.2d 781, 788; Hamrick v. Hamrick, 119 Cal.App.2d 839, 847, 260 P.2d 188. It may be added that the judgment against Bennie is conclusive of Mrs. Bacigalupi's right against him and the attempt now to raise the clean hands issue is an attempt to go behind the judgment and relitigate a right which the judgment itself now conclusively establishes. 24 Am.Jur., Fraudulent Conveyances, § 181, p. 311; 37 C.J.S., Fraudulent Conveyances, § 349(b), p. 1182.

[8] Defendants argue that because the Bacigalupi claim had not been reduced to judgment the evidence could not support a finding that the transfer rendered Bennie insolvent. The Fraudulent Conveyance Act furnishes a complete answer to this argument. Section 3439.01 Civil Code provides: " 'Debt' includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

Section 3439.02(a) reads: "A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured."

[9] "It is well settled in this state that the relationship of debtor and creditor arises in tort cases the moment the cause of action accrues." Hansen v. Cramer, 39 Cal.2d 321, 323, 245 P.2d 1059, 1060, 30 A.L.R.2d 1204; McKinney v. Wright, 105 Cal.App. 401, 407, 287 P. 506. Furthermore the transfer could be set aside if there was an actual intent to defraud although Bennie was not rendered insolvent. Fross v. Wotton, 3 Cal.2d 384, 389, 44 P.2d 350; Civ. Code, § 3439.07.

[10, 11] Defendants' argument that the allegation of the complaint alleging a conspiracy by defendants to conceal Bennie's assets and defraud creditors is insufficient because husband and wife cannot be guilty of a conspiracy is captious. The conspiracy is not the gist of a civil action, but the wrongful conduct of the parties. (11 Cal. Jur.2d, Conspiracy, § 47, p. 272.) The wrongful conduct having been proved the allegation of conspiracy becomes surplusage.

[12] If there is actual fraud a creditor can maintain an action to set aside the transfer without a showing that the defendant has no other assets to satisfy his judgment. Heffernan v. Bennett & Armour, 110 Cal.App.2d 564, 584, 243 P.2d 846; 23 Cal.Jur.2d, Fraudulent Conveyances, § 88, pp. 536–537.

The evidence was ample to support the trial judge's conclusion upon reweighing it that it was not sufficient to support the judgment.

[13] The order granting a new trial must be affirmed. This renders plaintiff's cross-appeal from the judgment under Rule 3(a) Rules on Appeal, moot. The affirmance of the order granting a new trial leaves no final judgment in effect. The cross-appeal from the judgment is only operative if the order granting the new trial is reversed thus reinstating the judgment. (Witkin, New California Rules on Appeal, 17 Southern California Law Review, pp. 94–96.)

Order granting new trial affirmed. Appeal from judgment dismissed. Plaintiff to have his costs on both appeals.

KAUFMAN, J., and DRAPER, J. pro tem., concur.

148 Cal.App.2d 736

ECLIPSE FUEL ENGINEERING COMPANY, a corporation, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent,

Thomas H. Beatty, Real Party in Interest.

ECLIPSE FUEL ENGINEERING COMPANY, a corporation, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent,

Francis P. Wakefield, Real Party in Interest.

ECLIPSE FUEL ENGINEERING COMPANY, a corporation, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent,

Larry Joe Reece and Charles Kohn, Real Parties in Interest.

ECLIPSE FUEL ENGINEERING COMPANY, a corporation, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent,

Dennis A. Green, Real Party in Interest.

ECLIPSE FUEL ENGINEERING COMPANY, a corporation, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent,

Ole R. Yecny, Real Party in Interest.

Civ. 16676–16680.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1957.

Five suits brought by different individuals for personal injuries allegedly suffered as a result of boiler explosion. The trial court denied defendant foreign corporation's motions to quash service of summons on it and corporation appealed. The District Court of Appeal, Fred B. Wood, J., held that foreign corporation executing contract whereby sales agency in state was given exclusive franchise for sale of corporation's products within designated area, was so doing business within state as to render it amenable to service of process.

Affirmed.

1. Prohibition ⇐10(1)

Prohibition is a proper remedy if the trial court lacks personal jurisdiction of party.

2. Corporations ⇐668(1)

"Doing business" within state is a constitutional and statutory requirement for effective service of process upon a foreign corporation who is not qualified to do business within the state. West's Ann.Code Civ.Proc., § 411.

3. Corporations ⇐642(1)

"Doing business" within meaning of statute is synonymous with power of state to subject foreign corporations to local process and statutory requirement is the same as that of the due process clause of the Federal Constitution. U.S.C.A.Const. Amend. 14; West's Ann.Code Civ.Proc., § 411.

4. Corporations ⇐642(1)

All that is required to find that foreign corporation is "doing business" in the state so as to make it amenable to process, is that the foreign corporation has certain minimum contacts with the forum so that maintenance of the suit does not offend traditional notions of fair play and justice. U.S.C.A.Const. Amend. 14; West Ann.Code Civ.Proc., § 411.

See publication Words and Phrases, for other judicial constructions and definitions of "Doing Business".

5. Constitutional Law ⇐305

Requirements of due process in determining whether a foreign corporation is doing business in state so as to render it amenable to process of courts may be met by such contacts of the corporation with the

state of the forum as to make it reasonable in context of our federal system, to require the corporation to defend the particular suit which is brought there. U.S.C.A. Const. Amend. 14.

6. Corporations ⇐642(4½)

Foreign corporation not authorized to do business within state but operating under contract with sales agency that had exclusive franchise for sale of corporation's products within designated area was "doing business" within state so as to render it amenable to service of process. U.S.C.A. Const. Amend. 14; West's Ann.Code Civ. Proc., § 411.

7. Corporations ⇐642(4½)

If representation which foreign corporation maintains within the state gives it in a practical sense and to a substantial degree the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, it is clearly "doing business" in the state so as to be amenable to civil process.

8. Corporations ⇐668(13)

An affidavit of service of process upon corporation is prima facie proof that the person named therein as managing agent for the corporation is such. West's Ann. Code Civ.Proc., § 411, subd. 2; West's Ann. Corp.Code, §§ 6500–6504.

9. Corporations ⇐668(4)

Where sales agency owned by individual was operating under fictitious name and had exclusive franchise for sale of foreign corporation's products within designated territory of state, and service of process upon foreign corporation was made by service of summons and complaint upon agent for sales agency and upon owner of sales agency, there was proper service upon foreign corporation. West's Ann.Code Civ.Proc., § 411, subd. 2; West's Ann.Corp.Code, §§ 6500–6504.

10. Corporations ⇐659

Where foreign corporation executed contract with individual operating a sales agency under a fictitious name and by terms of contract agency was given exclusive franchise for sale of corporation's products within designated area of state, and both corporation and agency were listed in telephone book at the same address, foreign corporation could not disavow acts and conduct of its exclusive sales representative in creating appearance of relationship between agency and corporation.

11. Corporations ⇐668(5)

Under statute respecting service upon a foreign corporation through means of service upon general manager in the state, expression "the general manager in the state" does not mean only one general manager functioning throughout the state, but included owner of sales agency having exclusive franchise for sale of corporation's products within designated area of state. West's Ann.Code Civ.Proc., § 411; West's Ann.Corp.Code, § 6500.

See publication Words and Phrases, for other judicial constructions and definitions of "General Manager Within the State".

Lamb, Hoge & Killion, San Francisco, for petitioners.

Boccardo, Blum & Lull, San Jose, for real parties in interest.

FRED B. WOOD, Justice.

In each of five suits brought by different individuals for personal injuries allegedly suffered as the result of a boiler explosion at an industrial plant is Santa Clara County, Eclipse Fuel Engineering Company, a corporation, was joined as one of the defendants, allegedly a distributor that sold the boiler to the owner of this industrial plant.

[1] Eclipse, an Illinois corporation, specially appeared in each of the five cases and moved to quash service of summons upon it. In support of its appeal from the denial of those motions Eclipse claims the court acquired no jurisdiction over it because, it says, it never did business in Cal-

ifornia and, even if it did, process was not properly served.[1]

At the first hearing of this proceeding, it appeared that there was an inadequate record. The parties stipulated that a referee be appointed to take evidence and make findings on certain issues. Honorable Albert C. Wollenberg, Judge of the Superior Court in and for the City and County of San Francisco, appointed as such referee, conducted hearings and has made and filed his findings of fact.

1. Was Eclipse "Doing Business" In California?

[2, 3] "Doing business" in this state is both a constitutional and a statutory requirement for the effective service of process upon a foreign corporation, such as Eclipse, which has not "qualified" to do business in this state. In California the statutory requirement is the same as that of the due process clause of the federal Constitution, Const. Amend. 14; i.e., "doing business" within the meaning of section 411 of the Code of Civil Procedure is synonymous with the power of the state to subject foreign corporations to local process. Kneeland v. Ethicon Suture Laboratories, 118 Cal.App.2d 211, 218–223, 257 P.2d 727.

[4, 5] The test to be used when ascertaining whether a foreign corporation is doing business in this state, in the sense of rendering it amenable to the process of our courts, we find well expressed by Justice W. Turney Fox in Jeter v. Austin Trailer Equipment Co., 122 Cal.App.2d 376, 382, 265 P.2d 130, 134: "In the landmark International Shoe case [International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95], the climate of judicial thinking on this problem, formerly encased in rigid legal formalisms, was profondly revised. The approach taken was based on a realistic appraisal of the considerations involved. The Supreme Court of the United States, speaking through Justice Stone, substituted a qualitative criterion in place of the 'mechanical or quantitative' concepts formerly accepted as determinative. The court there stated that the 'test is not merely * * * whether the activity * * * is a little more or a little less.' International Shoe Co. v. Washington, supra, 326 U.S. at page 319, 66 S.Ct. at page 159. All that is required is that the foreign corporation have 'certain minimum contacts with it (the forum) such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' 326 U.S. at page 316, 66 S.Ct. at page 158. The requirements of due process 'may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection.' 326 U.S. at page 317, 66 S.Ct. at page 158."

[6] Our examination of the record convinces us that the contacts which Eclipse had with this state met those requirements and rendered it amenable to process.

It appears that Eclipse is an Illinois corporation, has its home office in that state, and maintains neither a place of business nor a bank account in California. But it also appears that Eclipse maintains contacts in California through Chester C. Smith. He is engaged in business under the fictitious firm name of "Thermal Engineering and Equipment Company." The firm's sales engineer is Sam A. Lombardo.

Whether those contacts amount to the doing of business in California by Eclipse calls, first, for an examination of the sales agreement between Eclipse and Smith.

This agreement was executed in April, 1949. It was still in effect and the parties

1. Prohibition is a proper remedy if the trial court lacks personal jurisdiction. Jardine v. Superior Court, 1931, 213 Cal. 301, 303, 2 P.2d 756, 79 A.L.R. 291; Frey & Horgan Corp. v. Superior Court, 5 Cal.2d 401, 402, 55 P.2d 203.

were still operating under it when Lombardo's deposition was taken in January, 1955. (The plaintiffs' injuries allegedly occurred in October, 1953.)

The agreement describes Smith as "Chester C. Smith of the Thermal Engineering and Equipment Company, hereinafter referred to as the Representative," states that "the Representative is appointed exclusive Sales Representative for the Company [Eclipse]" in the indicated southern portion of this state. It provides for the sale of the products manufactured by the Boiler Division of Eclipse and destined for shipment to and use in that part of California which lies south of the northern county lines of San Luis Obispo, Kings, Tulare and Inyo Counties. It provides a description of products and states that the "compensation to the Representative shall be only in the form of commissions on goods sold, except in cases where the Representative buys and sells for his own account" and specifies the rates of commissions and the terms upon which the same shall be paid by Eclipse. It also states that the representative "may buy and sell the products covered by this Agreement" and sets forth a "discount schedule which will apply" in such case. The sales prices are fixed by Eclipse.

The representative will give his best endeavors to the business of Eclipse at all times and will not manufacture, handle or sell any machinery, material or equipment "which in any way competes" with the products listed in the sales agreement. He may take on two or three noncompetitive lines, but no more, "subject to the advance approval and authorization, in writing" of Eclipse.

Each party will supply the other with copies of all correspondence pertaining to Eclipse business. Upon termination of the agreement, the representative will "give the Company [Eclipse] all correspondence, records, literature, lists of customers and prospects and such other file records pertaining to the Company's business, as the Representative may have in his possession * * *."

[7] Whether this agreement constitutes the representative an agent or an independent contractor is not pivotally important. As said in Fielding v. Superior Court, 111 Cal.App.2d 490, 494, 244 P.2d 968, 970, the "essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state. Milbank v. Standard Motor Const. Co., 132 Cal.App. 67, 22 P.2d 271; Boote's Hatcheries & Packing Co. v. Superior Court, 91 Cal.App.2d 526, 528, 205 P.2d 31. The technical distinction between an independent contractor and an agent is, for this purpose at least, immaterial, except as it may be evidence one way or the other. Thew Shovel Co. v. Superior Court, 35 Cal.App.2d 183, 95 P.2d 149; Moore Machinery Co. v. Stewart-Warner Corp., D.C., 27 F.Supp. 526." "Every factual situation where the question arises calls for a comparison of the business advantages derived from the methods employed by the corporation, with those it would enjoy if it conducted its business through its own offices or paid agents in the state. If the representation which petitioner maintained in the state gave it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process." Sales Affiliates, Inc., v. Superior Ct., 96 Cal.App.2d 134, 136, 214 P.2d 541, 542.

The agreement in the instant case gives promise of such benefits and advantages to Eclipse, and other evidence indicates that those benefits and advantages have been and are enjoyed by Eclipse. This appears, principally, from the deposition of Sam A. Lombardo.

He testified (in January of 1955) that he has worked for Thermal Engineering and Equipment Company since August, 1952. He is sales engineer. His duty is to sell engineering products. They contact their customers personally. When calling on prospective purchasers they take with

them brochures, a sort of catalog, furnished by Eclipse, descriptive of Eclipse products. Many times a customer knows what equipment he wants. At other times he knows only the end result to be accomplished and "we have to help provide him with the means to achieve the end result" and advise him as to the particular type of equipment for that particular job. Sometimes Thermal maintains the equipment for a customer. It also keeps on hand a stock of spare parts. The witness is also a demonstrator. Service men are employed to do work under supervision. Eclipse usually sends the equipment out unassembled, sometimes already assembled. Eclipse determines which way it is to be. When a customer is dissatisfied he usually calls on the sales person with whom he has been dealing. If a part proves defective "we go back to the supplier [by mail] and present the problem to them * * * and they take care of it," sending out new parts if they feel the claim is justified. There are other firms that handle boilers but Thermal is the only one that distributes Eclipse boilers in Los Angeles. The witness has met Eclipse representatives in California, including upon several occasions the president of Eclipse. In 1953 there was a display of Eclipse products at the Western Metal Show in Los Angeles. Some one was there telling people about the equipment. The witness did not know who paid the rental for that display booth. Upon other occasions he met several representatives of Eclipse here in California. Upon one such occasion in 1954 he met the president of Eclipse. They conversed "about future business in California, certain things he would be interested in our operation." The witness also met the vice president of Eclipse in 1954. Their conversation was essentially the same as with the president. "He was interested in more sales, and we presented the problem of selling, how we sell," and discussed what "type of customers we were contacting and type of customers we should contact." The witness also had met Mr. Scharbau, the secretary-treasurer of Eclipse out here. Lombardo had met several other Eclipse people at Rockford, Illinois, when he visited the Eclipse plant there.

From the testimony of this witness sufficient facts were shown to support an implied finding by the trial court that there was continuity of business activity in this state adequate to meet the requirement of "doing business" here to render Eclipse amenable to the process of our courts. Also, the very fact that the Eclipse-Thermal contract was terminable by either party at any time by giving 30 days' notice, but still continued in operation (in January, 1955), is some indication that the activities conducted under it were of substantial benefit and advantage to Eclipse. For a discussion of the required activities, their character and scope, see Kneeland v. Ethicon Suture Laboratories, supra, 118 Cal. App.2d 211, 257 P.2d 727, and Jeter v. Austin Trailer Equipment Co., supra, 122 Cal. App.2d 376, 265 P.2d 130, and authorities reviewed in each.

It is true that in some of the cases emphasis is given to the volume of business developed by continuous activities in this state, in terms of thousands or millions of dollars a year, percentage of total business done, or by means of other units of measurement. That is well enough when the information is available to the adverse party. Such data emphatically demonstrates that "business" is being done and negatives any possibility that it consists of only a few, occasional, isolated transactions. But that type of proof is not always available to a plaintiff, and one would hardly expect a defendant to come forward and volunteer it. That proof of the actual volume of business resulting from a foreign corporation's activities in the former state is not indispensable is suggested by Judge Learned Hand's observation that "Possibly the maintenance of a regular agency for the solicitation of business will serve without more." Hutchinson v. Chase & Gilbert, 2 Cir., 45 F.2d 139, 141. In Frene v. Louisville Cement Co., 77 U.S.App.D.C. 129, 134 F.2d 511, 515, 146 A.L.R. 926, the court describ-

ed the fundamental principle in terms of "the maintenance within the jurisdiction of a regular, continuous course of business activities, whether or not this includes the final stage of contracting." Continuous activities, "be they as little as one will, satisfy the necessity of that physical 'presence' on which jurisdiction depends in a jurisprudence, territorially limited." French v. Gibbs Corporation, 2 Cir., 189 F. 2d 787, 789.

We do not, of course, wish to overemphasize the importance of "continuity" of business activities. There are situations in which a single transaction within a state may render a foreign corporation or a nonresident amenable to process. See, for example, Kane v. New Jersey, 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222; Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091; Young v. Masci, 289 U.S. 253, 53 S. Ct. 599, 77 L.Ed. 1158. Each of these cases was mentioned and recognized in International Shoe Co. v. Washington, 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95.

2. Was Eclipse Served With Process In Each Of The Five Actions?

In the case of a foreign corporation doing busines in this state, summons is served in the manner provided in sections 6500–6504 of the Corporations Code, Code of Civil Procedure, § 411, subd. 2.

Section 6500 states that "[d]elivery by hand of a copy of any process against a foreign corporation * * * to * * * the general manager in this State * * * [of the corporation] shall constitute valid service on the corporation."[2]

The affidavit of service of summons and complaint in the action involved in our case No. 16676, showed service upon "Eclipse * * * by serving its exclusive manufacturer's agent, Thermal Engineering and Equipment Company, by delivering to and leaving with Sam A. Lombardi, agent for said corporation * * * 5469 San Fernando Rd. * * *" In No. 16678 it was the same except that delivery was to "C. C. Smith." The return in Nos. 16677, 16679 and 16680 read the same as in No. 16676 except that Lombardo was therein referred to as "manager and manufacturer's agent" instead of "agent of said corporation."

[8] Such an affidavit of service of process is prima facie proof that the person named therein as managing agent for a defendant corporation is such. Keener v. Eagle Lake L. & I. Co., 110 Cal. 627, 629–630, 43 P. 14; Golden Gate Con. H. M. Co. v. Superior Ct., 65 Cal. 187, 189, 3 P. 628; Rowe v. Table Mountain Water Company, 10 Cal. 441; Roehl v. Texas Co., 107 Cal. App. 691, 705, 291 P. 255. Wilson v. Spring Hill Quartz-Mining Co., 10 Cal. 445, applied the same rule to a partnership or association, where the sheriff's return stated that he served the summons upon a certain company "by service upon * * * Pendleton, one of the partners and associates."

In the Roehl case the defendant contended that a sheriff's return of service was the weakest kind of proof and should not prevail over its counter-affidavit. The court ruled that "[as] to the affidavits here, so far as they present any conflict on the facts, the determination of the trial court is conclusive upon us [citing cases]", at page 705 of 107 Cal.App., at page 261 of 291 P. and, after some discussion of the record the court said, "[o]n the whole we cannot say there was such an absence of a showing that his character and rank measured up to the definition of a managing agent as to justify us in disturbing the conclusion of the trial court." 107 Cal.App. at page 707, 291 P. at page 262.

[9, 10] In our case, the affidavits of service do not stand alone. We have additional elements of proof. Smith was doing business under the fictitious name and style of "Thermal Engineering and Equipment Company." Eclipse recognized that fact, for its sales agreement with him de-

2. §§ 6501–6504 provide for delivery to the Secretary of State and service by him by registered mail in certain contingencies, including inability to find a person to whom the delivery authorized by § 6500 may be made.

scribes him as "Chester C. Smith of the Thermal Engineering and Equipment Company," "appoints" him its "exclusive sales Representative" in the area in this state assigned to him; and he has listed Eclipse in the Los Angeles telephone directory, with the same address and the same telephone number as listed for Thermal. Added to this is the fact that Sam A. Lombardo testified he works for "Thermal Engineering and Equipment Company" and is Sales Engineer for that company. These facts, instead of controverting the facts stated in the affidavits of service, tend to support them and to give the public and persons dealing with Thermal the appearance of the relationships expressed in the affidavits of service. Smith cannot with good grace deny these relationships after having furnished the semblance of them by the exercise of the privilege granted him by this state to use the fictitious company name of "Thermal Engineering and Equipment Company." Nor does it lie in the mouth of Eclipse to disavow the acts and conduct of its "exclusive sales Representative" in creating the appearance of these relationships. See Milbank v. Standard Motor Const. Co., 132 Cal.App. 67, 71–72, 22 P.2d 271; Roehl v. Texas Co., supra, 107 Cal. App. 691, 707, 291 P. 255.

This seems a fitting case for application of the principles expressed by Justice Louis H. Ward in Oro Navigation Co. v. Superior Court, 82 Cal.App.2d 884, 889, 187 P.2d 444, 447: "The purpose of the various sections dealing with service of summons upon a foreign corporation is to give an aggrieved party a means of bringing a foreign corporation into a proper jurisdictional tribunal and to protect the corporation through the enactment of statutes providing methods and means of security from default judgments. If the corporation does not avail itself of statutory protective provisions and is aware of the filing of an action for damages and service of summons upon an alleged agent, who in turn gives timely notice of such service to the principal, it should not be permitted to take advantage of a technicality, the merit of which must be founded upon its inadvertent neglect or deliberate failure to comply with the law, or upon some changed condition in transferring the main office without notification to the employees."

[11] Perhaps a word should be said about a change in the wording of the applicable statute which was made in 1931 by the amendment of section 411 of the Code of Civil Procedure and the addition of section 406a to the Civil Code, Stats.1931, pages 1836 and 1833, respectively. That resulted in a change from the designation "a managing or business agent * * * within this state", § 411 as it formerly read, to "the general manager in this State", § 406a; now Corporations Code, § 6500. Thermal is exclusive sales representative of Eclipse in the southerly counties indicated in the Eclipse Sales Agreement. There is some evidence tending to show that Eclipse may have exclusive sales representatives ("general managers") in a number of other areas in the state. Does the expression "the general manager in this State" mean only one general manager functioning throughout the state? No. That has been settled by a line of decisions commencing before 1931 and continuing on down after the year of that amendment.

In Roehl v. Texas Co., supra, 107 Cal. App. 691, 704, 291 P. 255, 260, the court formulated the principle and declared the test in these words: "We hold the true rule to be that originally laid down in New York in Palmer v. Pennsylvania Co., supra [35 Hun, N.Y., 369], and reiterated in nearly the same language in Barret v. American Tel. & Tel. Co., supra [56 Hun 430, 10 N.Y.S. 138], and again in Brayton v. New York, L. E. & W. R. Co., supra [72 Hun 602, 25 N.Y.S. 264], that 'every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made,' and that by service on such an agent, as said in the two last-mentioned cases, 'the requirement of the statute is answered.' Whether in any given case the agent in

question is a 'managing agent' within what we have decided the meaning of that expression to be, must depend on the particular facts involved. It is impracticable to lay down a more concrete test of general validity."

That test has continued to be used and applied, notably in these cases: Milbank v. Standard Motor Const. Co., supra, 132 Cal.App. 67, 70–71, 22 P.2d 271; Socony-Vacuum Oil Co. v. Superior Ct., 1939, 35 Cal.App.2d 92, 94, 94 P.2d 1019; Thew Shovel Co. v. Superior Court, 1939, 35 Cal. App.2d 183, 192, 95 P.2d 149; Mills Music, Inc., v. Lampton, 40 Cal.App.2d 354, 360, 104 P.2d 893.

In this case, Thermal, quite clearly, was "general manager" in the area described in the Eclipse-Thermal agreement, significantly different from what the situation well might be if there were a general manager over all of the territory of the state with Thermal functioning under him, as a branch manager in the area assigned to it.

Counsel for Eclipse relies heavily upon Gravely Motor Plow & Cultivator Co. v. H. V. Carter Co., 9 Cir., 193 F.2d 158, but that case has a number of distinguishing characteristics, not the least of which is the fact that there the defendant foreign corporation was not "doing business" in California. Significant, too, was the fact that service was made by delivery of process to an officer of a California subsidiary, with no showing that the subsidiary was an agent or representative of the defendant. Indeed, the court distinguished Clover Leaf Freight Lines v. Pacific Coast Wholesalers Ass'n, 7 Cir., 166 F.2d 626, as one in which a corporation was "the agent of the out-of-state association in doing the latter's business in Illinois and was served with the summons to the association, in compliance with the Illinois law for the serving of corporations." At page 161 of 193 F.2d.

Under these circumstances we see no basis for disturbing the implied findings of the trial court on this issue. Concerning any conflict there may be in the evidence, the determination of the trial court binds us.

The alternative writ is discharged and the application for a peremptory writ is denied in each of the five cases here involved.

PETERS, P. J., and BRAY, J., concur.



149 Cal.App.2d 11

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, Plaintiff,

v.

Renee K. ARAKELIAN, a/k/a Mrs. K. Arakelian; Oliver Lyons; Armenian-American Citizens Club, a corporation; California Home for the Aged, Inc., a corporation, Defendants.

CALIFORNIA HOME FOR THE AGED, Inc., a corporation, Cross-Complainant and Respondent,

v.

Renee K. ARAKELIAN, a/k/a Mrs. K. Arakelian and Oliver Lyons, Cross-Defendants and Appellants.

Civ. 8979.

District Court of Appeal, Third District, California.

March 8, 1957.

Interpleader action, brought by bank holding given to Home for the Aged for purpose of erecting chapel, wherein one of the chief issues was whether donor had intended chapel to be dedicated as a memorial to his wife's father. The Superior Court, Madera County, R. R. Sischo, J., rendered the judgment challenged on appeal. The District Court of Appeal, Schottky, J., held that donor's declarations, whether made before, contemporaneously with, or after making of gift, were admissible to show his intention as to conditions attaching to gift; and held, in view of sharply

conflicting nature of testimony, that it had been reversible error to exclude evidence as to declarations made by donor after making of deposits.

Reversed.

1. Gifts ⇐49(5)

In interpleader action brought by bank to determine right to sums on deposit, evidence sustained finding that funds had been unconditionally given by decedent, during his lifetime, to Home For the Aged for express purpose of erection of chapel.

2. Charities ⇐36

Where funds were given to donee for express purpose of erecting a chapel, funds were not held unconditionally, and could only be used for erection of chapel.

3. Charities ⇐32

In interpleader action brought by bank holding on deposit funds given to Home For the Aged for purpose of erection of chapel, evidence sustained finding that donor had vested Board of Directors of donee Home with control of funds, choice of site, type of chapel, and dedication.

4. Appeal and Error ⇐1056(1)
Evidence ⇐269(2)

In interpleader action brought by bank holding on deposit funds given to Home for the Aged for purpose of erecting chapel, wherein one of the chief issues was whether deceased donor had intended chapel to be dedicated as a memorial to his wife's father, donor's declarations, whether made before, contemporaneously with, or after making of gift, were admissible to show his intention as to conditions attaching to gift; and, in view of sharply conflicting nature of testimony, it was reversible error to exclude evidence as to declarations made by donor after making of deposits.

Samuel B. Stewart, Christopher M. Jenks and Girvan Peck, by Ledger D. Free, Jr., San Francisco, for plaintiff.

Mason A. Bailey, Madera, for cross-complainant and respondent.

Stark & Champlin and Stanley E. Sparrowe and John Wells, Oakland, for appellants.

SCHOTTKY, Justice.

Plaintiff above named commenced an action by complaint in interpleader against Renee K. Arakelian, also known as Mrs. K. Arakelian, Oliver Lyons, Armenian-American Citizens Club, a corporation, and California Home for the Aged, Inc., a corporation. It alleged that the bank had on deposit at its Madera Branch the sum of $46,706.87, and at its Fresno Branch the sum of $21,550.03; that defendants claimed interests and that the bank claimed no interest in the accounts and was willing to pay the sums into court.

Defendants Armenian-American Citizens Club and California Home for the Aged, Inc., filed an answer alleging that K. Arakelian, deceased, made a completed gift of each of said deposits to the Armenian-American Citizens Club as a chapel fund for the California Home for the Aged, Inc., and that said funds are the property of the California Home for the Aged, Inc., for its use in constructing a chapel upon its premises.

Defendant California Home for the Aged, Inc., also cross-complained against defendants Renee K. Arakelian and Oliver Lyons, alleging that the deposits were gifts by K. Arakelian to California Home for the Aged, Inc., as a fund to be used for the construction of a chapel upon its premises; that the only interest of Armenian-American Citizens Club had been as trustee of the deposits for the California Home for the Aged, Inc.; and that it had previously assigned all its right, title and interest to the California Home for the Aged, Inc.

The answer of defendants Renee K. Arakelian and Oliver Lyons alleged that the deposits were gifts in trust for designated charitable purposes made by Mrs. Renee Arakelian and her husband, K. Arakelian;

that Mrs. Arakelian and the other signatories on the bank accounts were trustees of said funds; and that cross-defendants had been at all times willing to perform their duties under said trust and to use the funds to construct said chapel in accordance therewith.

There being no opposition to plaintiff bank's request to pay the money into court, the trial court entered judgment that the bank "be discharged from all liability to any and all defendants in this action with respect to said accounts, subject to the payment of said funds, less plaintiff's costs incurred herein, to the party or parties to whom payment may be directed by this Court;" and proceeded to try the controversy between the remaining parties.

Following a trial before the court without a jury the court found:

"That on January 19, 1950, K. Arakelian, now deceased, signed and delivered to A. Ted Ashjian, Treasurer for the California Home for the Aged, Inc., a corporation, a bank check for the sum of $20,000.00 made payable to the Armenian-American Citizens Club, Chapel Fund. That said check was on the 20th day of January, 1950, deposited in a savings account No. 6326 in the Fulton-Merced Branch of the Bank of America at Fresno, California, in an account entitled 'Armenian-American Citizens Club, Home for the Aged, Chapel Fund.'

"That on the 12th day of December, 1950, K. Arakelian, now deceased, made a bank check in the sum of $44,000.00 payable to the Armenian-American Citizens Club, Chapel Fund for Home for the Armenian Aged, and on the 15th day of December, 1950, caused said check to be deposited in the Bank of America, Madera Branch, in a savings account No. 6025 and entitled 'Armenian-American Citizens Club, Chapel Fund for Home for Armenian Aged.'

"That no part of either of said deposits have been withdrawn and that the respective deposits in the sum of $20,000.00 and $44,000.00, together with the accumulated interest thereon, are now on deposit in the same banks and in the same accounts.

"That both of said checks were made and deposited, and both of said deposits were made and completed with the express knowledge and consent of the cross-defendant, Mrs. K. Arakelian, also known as Renee K. Arakelian, and not otherwise."

The court found further:

"That the Armenian-American Citizens Club, a corporation, first received the funds represented by both bank deposits, for the use and benefit of the California Home for the Aged, Inc., a corporation, and thereafter assigned and transferred all its right, title and interest in said deposits to the California Home for the Aged, Inc., a corporation, for the purpose of building a Chapel upon the real property of the California Home for the Aged, Inc., a corporation, situated at and in the County of Fresno, State of California.

"That both of the bank deposits and all of the funds which are the subject of this action were unconditional and completed gifts made by K. Arakelian in his lifetime, to and for the sole benefit of the California Home for the Aged, Inc., for the express purpose of the erection of a Chapel on the real property of the California Home for the Aged, Inc., a corporation, at and in the County of Fresno, California, and not otherwise."

Judgment was entered in accordance with said findings, it being decreed, among other things, that both deposits were gifts by K. Arakelian "for the express purpose of enabling the board of directors of the California Home for the Aged, Inc., a charitable corporation, to construct a Chapel upon the real property of said Home for the Aged at Fresno, California; that said funds were subsequently transferred by the Armenian-American Citizens

Club, a corporation, to the California Home for the Aged, a corporation," for the express purpose of the construction of said Chapel upon the real property of the California Home for the Aged, at Fresno, California, and that all of said funds, together with all interest accumulations thereto, are the sole and exclusive property of the California Home for the Aged, Inc., a corporation, and are subject to the sole, unconditional, and exclusive right of the Directors of said California Home for the Aged, Inc., as to the use, expenditure, control and management of the same."

Defendants Renee K. Arakelian and Oliver Lyons have appealed from the judgment and outline their principal contentions as follows:

"I. The uncontradicted evidence is that title to the funds in question was not transferred outright and unconditionally to California Home for the Aged, Inc., but was held by the donors in trust for certain charitable purposes.

"II. Regardless of whether title was held by the donors or passed directly to the Home, the judgment that the funds are held unconditionally and without restriction is in error.

"III. The trial court committed prejudicial error in excluding important, relevant evidence."

Before discussing these contentions we shall summarize briefly the evidence, bearing in mind the familiar rule that all conflicts in the evidence must be resolved in favor of respondent.

On December 9, 1949, Mr. Arakelian caused to be made, and later signed, a check for $20,000 payable to Armenian-American Citizens Club for Chapel Fund, Trust Account. This check was delivered to Ted Ashjian, an officer of the Citizens Club, who, together with Paul Paul, also an officer, took the check and opened an account in the bank of America at Fresno, California, entitled "Armenian-American Citizens Club Home for the Aged, Chapel Fund." Paul Paul, Ted Ashjian, and Mrs. Arakelian each signed the signature card by the terms of which all three signatures were required for withdrawal. Mrs. Arakelian testified that she received the passbook that same day, but Ted Ashjian testified that he kept it until Mrs. Arakelian requested it several months later, and that he then turned it over to her. He further testified that he had her sign the signature card because at that time her name was on a commercial account belonging to the club and he thought that as she was the wife of K. Arakelian it would be an act of courtesy to add her name thereto.

On December 2, 1950, K. Arakelian directed his secretary, Lydia Mardiguian, to make a check payable to Armenian-American Citizens Club, Chapel Fund, for Home of Armenian Aged, in the sum of $44,000, which he signed in her presence. On about December 10, 1950, Mrs. Arakelian telephoned Ted Ashjian. She told him that she had some chapel money and requested him to meet her at the Bank of America in Madera the next morning. There Mr. Ashjian asked her how much money she had for the chapel and she replied that she was not going to say anything at all and that she was not going to give it to him until she knew what she was going to get out of it. She refused to divulge any further information, so Mr. Ashjian returned to Fresno. Later he was informed that she had a check for $44,000. Mrs. Arakelian testified that thereafter she and her husband made the deposit in the name of Armenian-American Citizens Club, Chapel Fund for Home for Armenian Aged. On December 16, 1950, Mrs. Arakelian signed a deposit card which reads in part:

"We do hereby certify that at a meeting regularly called and held on Dec. 16 1950 Messrs K. Arakelian Mrs. K. Arakelian Oliver V. Lyons, whose signatures appear on the reverse side hereof, were duly elected or appointed * * * (Trustees or Officers) of the Armenian-American Citizens Club Chapel Fund for Home for Armenian Aged and that * * * they are jointly authorized to withdraw money from, and to issue checks against, any funds

that said organization may have on deposit with said bank, and to endorse and deliver to said bank, on behalf and for credit of this organization, all checks and other instruments payable to it; this authority to continue in force until notice in writing to the contrary, signed by the proper officers of this organization, is filed with * * * the bank. * * *

"Witness our hands and the seal of said Club this 16th day of December, 1950.
"Mrs. K. Arakelian Oliver V. Lyons
"(Title) Director (Title) Director"

During the trial Mrs. Arakelian admitted that she was never a director or officer of the club; that her son, Oliver Lyons, was not a member of the club and that her husband, K. Arakelian, was not a director of the club.

Mrs. Arakelian testified that she and her husband had a joint bank account which was transferred to his account and that thereafter all charity accounts were written from his personal account.

The preliminary ground plans for the erection of the home and the chapel had the approval of K. Arakelian and showed the chapel as a separate unit.

On December 16, 1950, Mrs. Arakelian was appointed by the directors of the home to head the chapel committee. There is some testimony of Mrs. Arakelian and Charles Izmirian that Mrs. Arakelian made certain requests of the directors of the home that she and her committee be given full authority to plan and build a chapel on the ground in memory of her father and the Armenian martyrs. Appellants presented this evidence by introducing the minutes of the board of directors of the home, but there is nothing said therein about a dedication or inscription, and it is evident that the directors would not give her the full authority she requested. All they did was to appoint a chapel committee with power to investigate, prepare and submit plans for the construction of a chapel. There is no evidence that K. Arakelian ever appeared before the board making any separate request. It would appear that K. Arakelian was satisfied, because, as was testified by Mr. Kardashian, Mr. Arakelian told him, "This organization is controlled by a majority."

Mrs. Arakelian insisted on building the chapel her way, on a location of her choice, and on February 19, 1953, by a telegram sent to Paul Paul, proposed that the home sell to her three acres of land upon which she would build the chapel. In this telegram she did not mention any dedication to her father. This request was refused by the directors.

At a meeting of the directors of the home held in September, 1953, Mrs. Arakelian was requested to carry on with the chapel plans. She replied, "Unless I buy that three acres, unless you want to sell that three acres of land to me so that I may build that the way I want, I will not do anything." She was then removed as the head of the chapel committee but was allowed to remain as a member thereof.

Soon thereafter she informed Lydia Mardiguian that if the directors would not go along with her, she would withdraw the money and use it as she wanted and that she might give it to the Armenian Tashnag, which is an Armenian revolutionary organization. Mrs. Arakelian then advised the depositories that the funds must not be withdrawn without her consent.

There was considerable evidence regarding the preparation and approval of the plans for the chapel. Two sets were introduced in evidence. The "short set" was put in evidence by the respondent, and the "long set" was put in evidence by the appellants. The respondent approved the short set on March 22, 1953. In June, 1953, the architect prepared other plans (the long set) which were never approved by the directors. The long set shows on sheet 9, above the main entrance, as follows: "In Memory of Reverend Vartan Arslanian and all the Armenian Martyrs of 1915." The board's copy of the short

set shows that one-half of page 9 had been cut off, leaving the plans without the inscription, the sheet without a page number, and the chapel without a front door. As far as the architect knew, every page in the short set had been approved. Appellants maintain that the inscription must have been cut after the board's approval and before the trial. Respondent maintains that the inscription must have been cut before the board's approval and that therefore they did not approve such an inscription. One of the directors testified that no one made any inquiries at the meeting about any missing part of any page. Another said that no questions about the inscription came up at this meeting. Another could not testify as to whether or not the inscription was on the plans he approved; he did not know or remember. Under the rule that conflicts in the evidence are decided in the respondent's favor, it is fairly inferable that the inscription was removed from the plans before the directors approved and adopted the same.

There was testimony of numerous persons who told of statements by K. Arakelian which showed that his intention in setting up these accounts was to build a chapel in memory of Mrs. Arakelian's father. However, all the directors of the home that testified said that Mr. Arakelian never made such statement to them.

In January, 1953, Mrs. Arakelian signed an agreement with the executor of her husband's estate which provided among other things that regardless of the determination of any taxing authority as to charitable deductions, the "gift of $44,000.00 made by decedent and [Mrs. Arakelian]" would be regarded as completed in her husband's lifetime, and that none of the parties would attempt to recover any portion of it.

[1] Appellants' first contention is that title to funds in question was not transferred outright and unconditionally to the California Home for the Aged, Inc., but was held by the donors in trust for certain charitable purposes. We think the evidence clearly supports the finding of the court that the funds in controversy were "unconditional and completed gifts made by K. Arakelian in his lifetime, to and for the sole benefit of the California Home for the Aged, Inc., for the express purpose of the erection of a Chapel on the real property of the California Home for the Aged, Inc., a corporation, at and in the County of Fresno, California, and not otherwise."

Not only is the intent of K. Arakelian to make a completed gift evidenced by the form and contents of the checks and the bank accounts he set up during his lifetime, but it is also evidenced in writing in his personal income tax returns which were signed by Mrs. Arakelian and in which deductions for both of these contributions were made. There is also the hereinbefore mentioned agreement signed by Mrs. Arakelian which refers to the gift of $44,000 as completed in the lifetime of the donor.

[2] Appellants contend also that "judgment that the funds are held unconditionally and without restriction is in error." However, as clearly appears from the hereinbefore quoted portions of the findings and judgment, the judgment does not so provide but can properly be construed only as decreeing that said funds must be used by respondent California Home for the Aged, Inc., "for the express purpose of the erection of a Chapel on the real property of the California Home for the Aged, Inc."

There is no dispute between the parties as to whether or not the money should be used for the construction of a chapel, but the basic controversy appears to be as to who shall determine what type of chapel shall be built. Appellants summarize this controversy in their opening brief as follows:

> "Mrs. Arakelian claims that certain terms and conditions were attached to the use of the funds, and particularly that the chapel was to be in memory of her father, a priest of the Armenian Church who suffered a martyr's death during Mrs. Arakelian's childhood. The majority of the directors of California Home for the Aged, Inc. claim

that the funds were an outright gift to the corporation, that the donors placed no restrictions on the use of the funds other than that a chapel should be built, and that the directors therefore have the right to build whatever kind of chapel they see fit. The directors propose to ignore the restrictions which appellants claim were conditions of the donation."

[3] Notwithstanding the earnest and able arguments of appellants, we are convinced that the record as now made up supports the conclusion of the trial court that the question of control of the funds, choice of site, type of chapel, and dedication were matters which were for the board of directors of respondent California Home for the Aged, Inc., to decide. We are convinced further that it is fairly inferable from the evidence that K. Arakelian wanted the funds under the control of the directors where a majority could control, for if this were not so he could easily have given the funds directly to his wife, appellant Renee K. Arakelian. However, it is necessary to reverse the judgment appealed from because of the exclusion of evidence next discussed.

Appellants' final contention is that the court committed prejudicial and reversible error in excluding evidence as to statements or declarations of K. Arakelian after the deposits had been made. The last deposit was made on December 16, 1950, and K. Arakelian died on February 24, 1951. Appellants quote the following from the record:

"Mr. Ohanesian: Q. Mrs. Arakelian, do you know whether or not your late husband had any plans relative to the construction of a chapel?

"Mr. Bailey: I object to that question in the form in which it is made, and also it is incompetent, irrelevant, and immaterial.

"The Court: I think that objection is good, because the money has already been given, the transaction is closed. You may not introduce oral evidence of a dead person to show something to the contrary. That is what you are endeavoring to do here, as I see it."

Appellants also complain that the court erroneously struck out certain testimony of Mrs. Sola Keoshian who testified that at a gathering in the Arakelian home Mr. Arakelian was asked: "What jewelry are you going to present as a gift to your wife?" to which he replied that everybody knew that he had a "fixed idea about the Armenian Church to build for her for the Home for the Aged."

Appellants also complain that the court erroneously struck out the following testimony of Onnig Boyajian as to a conversation with K. Arakelian: "I said, 'Mr. Arakelian, I heard you are going to build a chapel.' I said, 'Pardon me to ask when you going to build it?' He said, 'I leave it to my wife, Mrs. Arakelian, she's going to decide and do the work.' "

Both of these conversations occurred after the date of last deposit.

Appellants also complain that the court erred in excluding evidence of decedent K. Arakelian's conduct in response to statements made by Mrs. Arakelian. Mrs. Sola Keoshian testified as to a speech that K. Arakelian made at a dinner party of the Armenian-American Club in 1950, before the second deposit was made. They quote the following from the record:

"A. First of all he [K. Arakelian] mentioned about the $50,000.00 he was giving for the Old Age house, and then he said for the chapel, 'for my wife's husband'—I mean 'father, I want to dedicate a church, but the particular description I can't give anything, so I call my wife to talk about it.'

"Q. What did she say at this meeting?

"A. Mrs. Arakelian started her speech with the Tashnag story—

"Mr. Bailey: We object to that.

"The Court: Wait a minute, now, we are looking for the intent of K. Arakelian, not the intent of what this lady was. We don't want anything like that.

"Mr. Hayden: I would like to submit that her testimony will show that he had stated that this chapel would be built as Mrs. Arakelian wanted it and that thereafter she got up and said how it was to be built, and when she was through talking everybody applauded, including Mr. Arakelian.

"The Court: Yeah, fine, I can't hear it. I am tied down to the man whose intent we are involved with here. I am taking the intent of K. Arakelian, not his wife. I can't hear it."

Appellants also complain that the court committed further error in excluding Mrs. Arakelian's testimony as to her conversation with the Armenian Prelate in New York in the presence of K. Arakelian, and also in excluding evidence of Mrs. Arakelian's intention as shown by Mrs. Keoshian's testimony as to the public speech, supra, and as shown by the following:

"Mr. Ohanesian: Q. Mrs. Arakelian, did you consider or have plans in respect to a memorial?

"Mr. Bailey: The same objection, if the Court please, as to her plans, it would have the same consideration, it's a very vague, indefinite question—

"The Court: I think the objection is still good. Her plans and what she intended to do I don't think has any bearing on this question at all."

[4] We believe that the court was in error in ruling that no declarations of K. Arakelian made after the making of the deposits were admissible in evidence. In view of the unusual manner in which the matter was handled and the fact that there was no writing setting forth the conditions attaching to the gift other than the statement on the checks that the gift was for the Chapel Fund for Home for Armenian Aged, we believe that the declarations of K. Arakelian, who was the donor, made before, contemporaneously with, and after the making of the gift, were admissible to show his intention as to the conditions attaching to the gift. The general rule is stated in Whitlow v. Durst, 20 Cal.2d 523, at page 524, 127 P.2d 530, at page 531:

"When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703; Donohue v. Sweeney, 171 Cal. 388, 153 P. 708; DeCou v. Howell, 190 Cal. 741, 214 P. 444; See [McBaine, Admissibility in California of Declarations of Physical or Mental Condition] 19 Cal.L.Rev. 231, 251. Likewise, in gift cases declarations made by the grantor before, contemporaneously, and subsequent to the alleged gift are admissible though the statements be self-serving. Sprague v. Walton, 145 Cal. 228, 78 P. 645."

See also Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 168 P.2d 946; O'Dea v. Hibernia Savings & Loan Society, 119 Cal. App. 622, 7 P.2d 318.

In the instant case one of the chief issues was whether or not K. Arakelian intended the deposit of the moneys involved as a gift for a chapel dedicated as a memorial to Mrs. Arakelian's father and the Armenian martyrs or whether the gift was for a chapel to be constructed by the directors of the Home for the Armenian Aged as determined by them. The court admitted declarations of K. Arakelian as to his intention made before the deposits, undoubtedly on the theory that they had some bearing on that issue, but held that any such declarations made after the deposits were inadmissible. The declarations K. Arakelian made after the deposits were just as admissible

as to his intention in making the gift as were his declarations made before the deposits.

We have read the record carefully, and in view of the sharply conflicting nature of the testimony we believe that the exclusion of such evidence was prejudicial and requires a reversal of the judgment.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.



148 Cal.App.2d 821

In the Matter of the ESTATE of Mahala M. BOYD, Deceased.

Jane Boyd MUDD, Contestant and Appellant,

v.

Martha B. WHITE, Petitioner and Heir-at-Law and Respondent.

Civ. 21908.

District Court of Appeal, Second District, Division 2, California.

March 1, 1957.

Hearing Denied April 25, 1957.

Proceeding to determine heirship. From an adverse judgment of the Superior Court, Los Angeles County, Clyde C. Triplett, J., heir appealed. The District Court of Appeal, Moore, P. J., held that extrinsic evidence was admissible to determine identity of person referred to as "her" in residuary clause of holographic will written by 81 year old testatrix of limited education.

Affirmed.

1. Wills ⇐457

It is not required that testator writing a holographic will, must be held to the strict use of technical terms and if in fact he uses them his use thereof will not be binding.

2. Wills ⇐487(1)

In cases of holographic wills authored by persons of limited education, court may investigate testator's intention by hearing pertinent testimony.

3. Wills ⇐440, 441

Where an uncertainty appears on the face of the will, testator's intent may be derived not only from will itself but also from circumstances under which it was executed. West's Ann.Prob.Code, § 105.

4. Wills ⇐489(1)

Where holographic will of 81 year old testatrix of limited education referred sparingly to her daughter but repeatedly to "her", testimony was admissible to explain the use of the pronoun as referring to daughter in residuary clause. West's Ann. Prob.Code, § 105.

5. Wills ⇐706

The trial court's interpretation of a will as aided by extrinsic evidence will not be disturbed on appeal unless it is unsupported.

6. Wills ⇐455, 464

A will should be construed as intended by its author, and neither a lack of rhetorical flourish nor failure to observe grammatical rules will govern its interpretation. West's Ann.Prob.Code, § 101.

7. Wills ⇐449

Fact that a will was executed by testatrix raises presumption that she intended to make a complete disposition of her possessions.

8. Wills ⇐587(1)

If a will contains a residuary clause, court must so contrue it as to avoid partial intestacy.

9. Wills ⇐493

Where residuary clause of holographic will written by 81 year old testatrix of limited education referred to "her" reading of entire instrument as well as consideration of extrinsic testimony, supported finding that "her" referred to testatrix' daughter. West's Ann.Prob.Code, §§ 101, 102, 103.

Bailey & McWhinney, Los Angeles, for appellant, by Rufus Bailey, Los Angeles.

Hunter & Liljestrom, Los Angeles, for Martha B. White, Heir-at-Law and respondent, by Harold J. Hunter, Los Angeles.

MOORE, Presiding Justice.

This controversy arose out of a petition filed by the administratrix with will annexed to determine heirship.

The question involved is whether oral testimony is admissible to prove the attending facts and circumstances as to the family relations of the testator in order to determine the objects of the testator's bounty.

Mahala M. Boyd deceased on December 23, 1950 at the age of 83. Her holographic will dated September 4, 1948 was duly admitted to probate. Martha B. White, her daughter, was appointed administratrix with will annexed and appropriate letters were issued to her. The estate was appraised at a sum in excess of $62,000. The decedent also had a son, James F. Boyd, who predeceased his mother, but left two surviving daughters, Margaret Allison Howard, and Jane Boyd Mudd, appellant herein. By reason of the fact that Margaret had not had any share of decedent's estate and was not mentioned in the will, she was awarded one fourth of the residue as a pretermitted heir. Probate Code, § 90. But it was otherwise with Jane Boyd. She was mentioned in the will of her grandmother; was awarded property to a limited extent, and because she was dissatisfied, she filed her response to the petition to determine heirship and claimed to be entitled to the specific bequests made by the will "together with one-fourth of the residue together with the life estate set forth in the remaining one-half of the residue of said estate as set forth in paragraph five of said will."

After trial, findings and conclusions were waived and the court adjudged that under the terms of the will * of decedent, (1) the diamond ring mentioned in paragraph 1 will pass to Morna Knipe; (2) the diamond referred to in paragraph 2 to pass to Helen Boyd; (3) all the furniture in decedent's home at her death, except the love seat and

* "I Mahala M. Boyd being of sound mind and all my mental faculties do here by make my last will and testimony and declare all previous wills void.
1. My diamond ring I am now have in my possition I give to my neice Morna Hickam Knipe as an expression of my love for her and appreciation of all she has meant to me thru the years.
2. My other diamond that Helen Boyd has in her possession and was given to her to wear as long as she was in the family, to surrender to the family when she decided to discontinue all connections with said family of her husband James F. Boyd. This she did less than a year after the death of said James F. Boyd.
3. To my Grand daughter Jane Boyd Mudd I give any of the furtuniture in the house including all my bed room furniture, rug & chairs, also the remains of my silver including my mother's silver tea pot set, the silver forks marked M. M. 1894 are to go to my great grand daughter Mary Ann Mudd.
4. What is left of my insurance policy to be put in a savings accts of Brian David Mudd & Mary Ann Mudd to be equally divided.
5. My traveling case to Dove Allen
[another page]
All the ~~rest~~ remains of my possessions including the house in which I live and already given to her as her own, the diamond held by the aforesaid Helen Boyd. All the family furniture that I have held and cherished all these years including all the furniture pictures rocking chairs & table in her guest room in her home. Also the love seat & two rose back chairs in my living room and the tip top table in her dining room. This furniture I have collected from the Boyd and Meek families thru many years had it all restored, & refinished and done so with money I made by keeping roomers and boarders and money given me by my father and husband for spending money These antiques are to be held thru said Martha Whites life time and at her death to be given to Jane Boyd Mudd beleiving she will appreciate them and keep them in the family thru her children.
~~" Signed Mahala M. Boyd. Sept~~
"Signed
Mahala M. Boyd
Sept. 4th 1948"

two roseback chairs to be distributed to Jane Boyd Mudd; (4) the remains of decedent's silver including her mother's silver tea pot set and the silver forks marked "M. M. 1894" to be distributed to decedent's great grand daughter, Mary Ann Mudd; (5) any proceeds of testatrix' insurance policy referred to in paragraph four of the will to be distributed to Brian David Mudd and Mary Ann Mudd, share and share alike, by depositing same in their savings accounts; (6) decedent's traveling case, mentioned in paragraph five to be distributed to Dove Allen; (7) all the family furniture and antiques of decedent at her death, except that distributed under paragraph three of the will, but including the love seat and two roseback chairs, the furniture, pictures, rocking chair and table which were in the guest room of Martha B. White at decedent's death and the tip-top table in Martha's dining room at decedent's death mentioned in paragraph five of the will to be distributed to Martha B. White for life, with remainder to Jane Boyd Mudd; (8) Margaret Allison to get one-fourth of the entire estate; (9) three fourths of the residue to be distributed to Martha B. White.

Appellant is displeased with such judgment and seeks a reversal on the grounds that the court erred in admitting testimony in that it added to the terms of the will. She contends that while paragraph 5 provides that certain furniture and heirlooms "are to be held thru said Martha White's lifetime and at her death to be given to Jane Boyd Mudd, believing she will appreciate them and keep them in the family thru her children," yet there are no words in the last-quoted sentence of the will designating to whom the property is to be given. This, despite appellant's immediate observation that the same paragraph provides that "these antiques" are to be given to Martha White for her lifetime with remainder to appellant.

[1–3] It must be remembered that the instrument in question is a holographic will, authored by a testatrix of 81 years, without an excess of education. It is not required that in writing her own will she must be held to the strict use of technical terms and if she had used them her use would not be binding. In re Estate of Olsen, 9 Cal.App.2d 374, 378, 50 P.2d 70. But in such cases, the court may investigate her intention by hearing pertinent testimony. In re Estate of Pierce, 32 Cal.2d 265, 274, 196 P.2d 1. When an uncertainty appears on the face of the will, it is fundamental that the testator's intent be derived not only from the will itself but also from the circumstances under which it was executed. Prob.Code, § 105; In re Estate of Pierce, supra, 32 Cal.2d 268, 196 P.2d 1; that is to say, the court should admit evidence of circumstances preceding the execution of the document. Ibid., 32 Cal.2d at page 274, 196 P.2d 1. In re Estate of Monticelli, 107 Cal.App.2d 90, 236 P.2d 661, the court admitted testimony to prove that the testator wrote the word "mother" under the devisee's maiden name, then received evidence that testator had written the same name on a bank signature card as his mother's maiden name. This was followed by documentary proof that a woman of the same name as the devisee had taken the testator when eleven days old from a foundling home and reared him. The judgment for the devisee was affirmed. In Re Estate of Hotaling, 72 Cal.App.2d 848, 857, 165 P.2d 681, the testator bequeathed his St. George Hotel. The court allowed extrinsic evidence as to testator's meaning and intent in order to identify the property specified in the will. The judgment was affirmed. But in Re Estate of Nunes, 123 Cal.App.2d 150, 266 P.2d 574, where the will left a bequest to "Joe E. Nunes, a nephew of mine", one Joe E. Nunes lived on the testator's ranch and was not sanguineously related to the testator. He attempted to prove that testator referred to him as his nephew in conversation with the attorney who drafted the will and that he was the party intended by the clause that bequeathed the property. The rejection of his proof required a reversal of the judgment.

[4] Inasmuch as the instant will referred sparingly to her daughter Martha White but repeatedly to "her", it was legal and sound judgment to admit testimony to explain the use of that pronoun as referring to respondent. When Mrs. Boyd and her husband came to Los Angeles, they bought the property known as 7164 Clinton Street, gave it to respondent and had its title put in respondent's name. Proof of that detail explained the first sentence of page 2 of the will, whereby she bequeathed "the remains of my possessions, including the house in which I live and already given to *her* as *her* own." (Italics added.) Proof that the title to 7164 Clinton Street stands in respondent's name leaves no doubt that "her" in page 2 referred to respondent. Also, the testimony of respondent, and Morna Knipe is conclusive that the family furniture includes "all the furniture pictures rocking chair and table in the guest room" of respondent's home. Also, in testatrix' home "the love seat and two rose back chairs in my living room and the tip top table in *her* dining room" are to be "held thru said Martha Whites life time and at her death to be given to Jane Boyd Mudd." Moreover, the testimony of Martha and Morna established that the family furniture of testatrix, some at 7164 Clinton Street, and some at 7160 in Martha's guest room, was the same furniture and pictures mentioned by the same witnesses in their testimony quoted above. It follows that the pronoun "her" in the phrase "her guest room" could refer to no one other than Martha White and that by testatrix' use of "her" she meant Martha White.

There was no contradiction of the testimony of the two witnesses that the love seat and the two rose back chairs were in testatrix' living room and that the tip-top table was in Martha's dining room. It follows that when testatrix in referring to such items said "and the tip top table in her dining room," she definitely referred to Martha White. She had held the furniture for a long time; had collected it from the "Boyd and Meek families through many years" and evidently cherished the items as favored heirlooms. While by her residuary clause she meant to leave to Martha "the house in which I live and already given to her as her own" and the diamond ring held by Helen Boyd as permanent gifts, the testatrix had a different plan about the "family furniture," the pictures, rocking chair and table in Martha's guest room, the tip-top table in Martha's dining room, the love seat, two rose back chairs in testatrix' living room. These items testatrix clearly intended for Martha to hold and to use during her lifetime but at the latter's death they are to pass to Jane Boyd Mudd as her own property.

[5–8] The foregoing disposes of the issue at bar by resorting to extrinsic evidence. The trial court's interpretation therefore will not be disturbed unless it is unsupported. In re Estate of Hotaling, 72 Cal.App.2d 848, 853, 165 P.2d 681; In re Estate of Lewis, 91 Cal.App.2d 322, 325, 204 P.2d 898. But a favorable construction of the document based solely upon its contents may also be derived. It is fundamental that a will must be construed as intended by its author. Prob.Code, § 101; In re Estate of Rowley, 126 Cal.App.2d 571, 575, 272 P.2d 911; In re Estate of Reith, 144 Cal. 314, 316, 77 P. 942. Neither a lack of rhetorical flourish nor the failure to observe grammatical rules will govern its interpretation. In re Estate of Lewis, 91 Cal. App.2d 322, 325, 204 P.2d 898. The fact that the testatrix made specific gifts and devised "all the remains of my possessions" indicates an intention to dispose of all her property. Also, the very fact of a will raises the presumption that she intended to make a complete disposition of her possessions. Inasmuch as the document contained a residuary clause, a court must so construe it as to avoid partial intestacy. In re Estate of Lefranc, 38 Cal.2d 289, 295, 239 P.2d 617; O'Connor v. Murphy, 147 Cal. 148, 153, 81 P. 406; In re Estate of Ottoveggio, 64 Cal.App.2d 388, 392, 148 P.2d 878. Partial intestacy is not favored. In re Estate of Northcutt, 16 Cal.2d 683, 690, 107 P.2d 607.

[9] Now, in the matter at bar, if a construction of the will be rendered holding that "her" did not refer to Martha White as the residuary legatee of all the "remains" of testatrix' possessions, that would result in a partial intestacy. Appellant contends that the residuary clause does not designate a legatee. No such conclusion can result when the entire document is read as a unit and all parts are so construed as to form a consistent whole. Prob. Code, § 103. To make a consistent whole, terms may be interpolated or transferred. In re Estate of Blalock, 95 Cal.App.2d 463, 470, 213 P.2d 100. That decision is especially pertinent for the reason that the residuary legatee was not mentioned on the same paragraph or page as that which expressed the residuary bequest. Merely by writing a will, the testatrix undertook to dispose of her property and thus must have intended to give her possessions to one or more beneficiaries. If such devisees can be reasonably ascertained from the will, the assets of the estate should be distributed to them as directed by the testatrix. Ibid., 95 Cal.App.2d at page 469, 213 P.2d 100. The language of the last testamentary disposition made by the testatrix in pertinent terms by considering the relationship of the parties and the proximity of their homes to each other sufficiently describes the residuary legatee. She should not be deprived of her inheritance merely because the testatrix did not possess the powers of a philosopher and linguist accurately to inscribe her wishes. From her words, her intention can be ascertained. When decedent's will is thus interpreted by reasonably construing the language of the instrument so as to make a disposition of her estate by devising it to specific legatees, her will is a success. In re Estate of Blalock, supra, 95 Cal.App.2d at page 470, 213 P.2d 100.

Moreover, the words of a will are to receive an interpretation which will give to every phrase some effect, not one which will render its expressions inoperative. Prob.Code, § 102. Surely, it will not be contended that it is necessary to hold that the expressions of the testatrix in devising her residuum are wholly inoperative. The thesis of respondent is that she carries out not only the intention of the testatrix, but gives effect to each and every expression of the will. In re Estate of Northcutt, 16 Cal.2d 683, 688, 107 P.2d 607.

Appellant relies upon a number of decisions which are readily distinguishable. In re Estate of Kelleher, 202 Cal. 124, 259 P. 437, 54 A.L.R. 913; In re Estate of Tompkins, 132 Cal. 173, 64 P. 268; In re Estate of Zilke, 115 Cal.App. 63, 66, 1 P.2d 475; In re Estate of Wattson, 66 Cal. App.2d 743, 745, 153 P.2d 87; In re Estate of De Moulin, 101 Cal.App.2d 221, 225 P.2d 303; In re Estate of Lyons, 36 Cal.App.2d 92, 95, 96 P.2d 1018. In Kelleher, the letter declared on was not a testamentary disposition. Its meaning was unintelligible even when supplemented with extrinsic proof. The Tompkins Estate discloses an attempt to give the words of the will a contrary meaning by use of a letter written six years prior to the date of the will, not for the purpose of explaining an ambiguity in the will. It was a contradiction of the will *offered for probate*.

In Estate of Zilke, supra, the court determined that it was not possible to ascertain the testator's intention from the will itself and that the decree of the trial court was based upon speculation as to the testator's intention. Also, no extrinsic evidence was offered to explain the ambiguity. The terms of the will alone did not disclose the testator's intention. The Estate of De Moulin is not pertinent. In the instant will, there is not a total failure to name a beneficiary. Six are named: Morna Knipe, Jane Boyd Mudd, Mary Ann Mudd, Brian David Mudd, Dove Allen, Martha White.

The judgment is affirmed.

MOORE, P. J., and FOX and ASHBURN, JJ., concur.

48 Cal.2d 78

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas L. JOHNSTON, Defendant and Appellant.

Cr. 5922.

Supreme Court of California,
In Bank.
March 1, 1957.

Rehearing Denied March 27, 1957.

Defendant was charged with murder in the first degree. From a judgment of conviction and an order denying a motion for new trial in the Superior Court, Sacramento County, Raymond T. Coughlin, J., the defendant appealed. The Supreme Court, Schauer, J., held that the evidence sustained conviction and that rulings on instruction were not erroneous or were not prejudicial.

Judgment and order affirmed.

1. Criminal Law ⇐556

In murder prosecution, people were not bound by extrajudicial statements of defendant introduced in evidence by the people, where the statements were not all uncontradicted evidence in the defendant's favor.

2. Criminal Law ⇐656(1)

In murder prosecution, statements of the trial court with respect to testimony of court-appointed psychiatrist to examine the defendant were not improper as interfering with the jury's determination of the facts. West's Ann.Pen.Code, § 1027; West's Ann. Code Civ.Proc., § 2042.

3. Criminal Law ⇐1186(4)

In murder prosecution, excluding photographs of defendant taken one or two hours after the killing was not prejudicial, where the jury could not have drawn pertinent inferences as to the defendant's state of mind at the time of killing from the photographs. West's Ann.Const. art. 6, § 4½.

4. Criminal Law ⇐1186(4)

In murder prosecution, instructions that any difficulty experienced in drawing distinction between murder of the first and second degrees is more apparent than real was not prejudicial error. West's Ann. Pen.Code, §§ 187–189; West's Ann.Const. art. 6, § 4½.

5. Homicide ⇐285, 286(3)

In murder prosecution, formal instructions of the court including adaptation of the legislative definition of murder and respecting deliberation and premeditation were not erroneous.

6. Criminal Law ⇐823(4)

In murder prosecution, instructions, though seeming to intimate that at the very time of killing defendant might then formulate the deliberate intent to kill, did not, when considered with the correct formal instructions, constitute prejudicial error. West's Ann.Const. art. 6, § 4½.

7. Criminal Law ⇐1170(1)

In murder prosecution, defendant was not prejudiced by the judge's refusal to allow psychiatrists to give direct opinions as to whether defendant did in fact form the relevant state of mind to kill.

8. Homicide ⇐286(1)

In murder prosecution, instruction that pertinent evidence concerned mental and nervous condition of defendant at time of the homicide was not erroneous on the ground that defendant's mental condition was not an issue at such stage of the trial, but the issue was what was defendant's "state of mind" in the alleged commission of the acts charged.

9. Homicide ⇐307(1)

In murder prosecution, instruction respecting the differences between degrees of murder was not erroneous on the ground that the trial judge did not explain all the differences between the essential elements of the several degrees of homicide.

10. Homicide ⇐286(3)

In murder prosecution, where judge instructed concerning the deliberate and clear intent to take life which must be formed upon a pre-existing reflection and not upon passion or provocation "or other circumstances" sufficient to preclude pre-

meditation, instruction was not erroneous on the ground that the court did not tell the jury what the "other circumstances" might be.

11. Criminal Law ⇐829(18)

In murder prosecution, refusal of requested instruction respecting reasonable doubt was not error where substance thereof was covered by the given instruction.

12. Homicide ⇐253(1)

Evidence sustained conviction of murder in the first degree. West's Ann.Pen. Code, § 1239(b).

Robert A. Zarick, C. K. Curtright, Sacramento, Leo R. Friedman, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., and J. Francis O'Shea, Dist. Atty., Sacramento, for respondent.

SCHAUER, Justice.

Defendant appeals (Pen.Code, § 1239, par. (b)) from a judgment pursuant to a jury verdict which found him guilty of murder in the first degree and expressly fixed the penalty at death, and from an order denying his motion for new trial. He contends that the evidence shows only murder of the second degree and that this court should reduce the degree (Pen.Code, § 1260), or, in the alternative, that if the evidence be considered sufficient to show murder of the first degree then claimed prejudicial errors in the exclusion of evidence, comments of the trial judge, and the giving and refusal of instructions as to state of mind require reversal. The entire record clearly shows the intelligently accomplished purpose of court and all counsel to accord defendant a completely fair trial. On such a record our review can lead only to affirmance.

On the afternoon of February 5, 1956, defendant (an apprentice embalmer 24 years of age) was in a motion picture theater. He saw his victim (a boy seven years of age) leave the theater through an aisle opposite the aisle near which defendant was sitting. Defendant, leaving his jacket on the seat beside him, went to the men's room. There he heard in a booth sounds which seemed to be made by a small person. Defendant had a knife in his pocket. He decided to wait for this person to emerge from the booth and "If this person was * * * small enough where I thought I could handle him, take and cut this person, for the purpose of scaring him." Defendant took the knife from his pocket. When the child emerged from the booth defendant "grabbed him around the mouth and carried him" into another booth, shut the door, and cut the boy superficially under the right eye "To scare him and get his reaction to what it would be." (The testimony of the autopsy surgeon shows that the child was cut superficially under both eyes.) The boy screamed and "to quiet him down, I cut his throat on the right side." The assistant manager of the theater, having heard the scream, rushed into the rest room. The child "slipped from my grasp, and it was almost immediately after that, practically simultaneously, that I cut his throat on the left side." Defendant started to leave the booth and saw the assistant manager. When the assistant manager saw the defendant, knife still in hand, he ran from the rest room. Defendant then went to the lobby. There he was detained by the assistant manager and manager until the police arrived in answer to a telephone call and took defendant into custody.

The foregoing account of the killing is taken primarily from defendant's testimony at the trial. It is materially the same as defendant's statements to a deputy district attorney shortly after the killing and to another deputy district attorney on February 6, the day after the killing.

Defendant was examined by Dr. Toller at the request of the prosecution, by Dr. Kelley, Dr. Miller, and Dr. Rapaport, appointed by the court (defendant had entered a plea of not guilty by reason of insanity [see Pen.Code, § 1027] but withdrew it during the course of trial), and by Dr. Catton for the defense. Each of these psychiatrists

testified. Dr. Catton, the first psychiatrist to take the stand, testified, "I believe that at the time of the commission of this act with which he stands charged that there was serious interference with certain aspects of the processes of deliberation, premeditation and the things leading up to and including the formation of intent to kill"; the other psychiatrists testified that in their opinions defendant, on the day of the killing, had capacity to deliberate and premeditate and to form the specific intent to kill. Each psychiatrist gave the reasons for his opinion.

Defendant urges that his undisputed testimony and statements to the deputy district attorneys show that no sufficient interval for deliberation and premeditation elapsed between the time that he cut the boy slightly, with no purpose to kill, and the time that he cut the boy's throat to silence his screams. The jury, however, could disbelieve the evidence that defendant's original purpose as he waited for the boy with open knife was merely to cut him slightly, and could believe, from other evidence, that defendant's purpose was a lustful intent to kill. And there was evidence upon which the jury could predicate a determination that this intent was formed willfully, deliberately, and after premeditation.

Portions of defendant's testimony and his statements to the deputy district attorneys are to the following effect: Defendant saw the boy leave the theater. Defendant almost immediately thereafter left the theatre, looked about the lobby and saw that the boy was not there, concluded that the boy had gone to the men's room, and himself went to the men's room. From the sounds which defendant then heard, he concluded that the boy was in the booth. The jury were not required to believe defendant's testimony that he decided to cut the boy slightly when defendant heard him in the booth; they could determine that defendant followed the boy from the theater to the men's room with the formed purpose of cutting him fatally. According to one of defendant's statements to a deputy district attorney defendant left his seat in the theater "about half a minute or so, maybe more," after he saw the boy walk down the aisle, and in response to the question "Did you expect to see him in the toilet?" answered "Yes, I expected to."

It is defendant's position that, despite the foregoing extrajudicial statements and the testimony of defendant, the People are bound by portions of the extrajudicial statements of defendant, introduced in evidence by the People, such as the following: Defendant cut the boy "Mainly to see what would happen, I guess. * * * to see what the reaction would be.

"Question: When did it enter your mind to do that? Answer: After I had gone into the head. * * *

"Question: Tell me, did the little boy have anything to do with your going to the restroom? Answer: No. * * * I would have gone up anyway if he hadn't gone out. * * * I thought to grab this kid as he came out and my original intention was to just cut him a little bit and scare him but—

"Question: (Interposing) Any reason for that? Answer: No. * * * [O]ther than just scare him was my original intention. Then I got panicky and killed him."

[1] Defendant urges that "where the prosecution introduces evidence favorable to the accused and does not controvert such evidence, the prosecution is bound by such uncontradicted evidence" (citing People v. Coppla (1950), 100 Cal.App.2d 766, 769, 224 P.2d 828; People v. Toledo (1948), 85 Cal.App.2d 577, 581, 193 P.2d 953). But here the statements of defendant presented by the People were not all uncontradicted evidence in his favor. Rather, the very statements of defendant on which defendant now relies contained, among other evidence, evidence on which, as already indicated, the jury could predicate a determination (based on the evidence in the case as a whole, rather than the isolated statements of defendant which he contends show lack of deliberation and premeditation) that defendant followed his victim from the theater with a formulated intent to injure him fatally.

Defendant urges that comments of the trial judge concerning the three court-appointed psychiatrists prejudiced defendant by informing the jury that these three experts were vouched for by the judge, that one of them had been produced at the trial at inconvenience to the expert, and that their testimony was entitled to great credence. The circumstances in which this claimed prejudicial error occurred were as follows:

Before defendant called Dr. Catton to the stand, defense counsel examined defendant's father as to events in defendant's life which, according to defense theory, would tend to show, with the aid of expert testimony, that defendant was unable to entertain "malice aforethought" or to form a willful, deliberate, and premeditated intent to kill. The trial judge said, "None of us have any control of what a psychiatrist may base his opinion on but I feel that if this evidence is being admitted I must keep this Jury mindful of the fact that you undoubtedly will hear from an expert * * * [T]he Court has appointed three experts in this case that are available to counsel at any time they want them, they will be here tomorrow morning— * * * [T]hese experts can take into consideration the testimony that is introduced here with regard to the certain parts of the history of this defendant, and here is what the purpose of it is: Duly qualified—I will give you this instruction now and I will give it to you again at the end of the trial—they may give their opinions on questions in controversy at a trial. * * * [T]he first question apparently that is in question at the present time in this case is the question as to whether or not this defendant premeditated and deliberated and formulated the intent to kill before the homicide was committed or at the time of the homicide. Now, as I say duly qualified experts may give their opinion on * * * questions in controversy at a trial and I have before stated * * * the chief question that is before you now. Now, to assist the Jury in deciding such questions the Jury may consider the opinion with the reasons stated therefor if any by the expert who gives the opinion. The Jury is not bound to accept the opinion of any expert as conclusive. They should give to it the weight to which they shall find it to be entitled. The Jury may, however, disregard any such opinion if it should be found by them to be unreasonable."

After Dr. Catton had testified, and while defendant was putting on other parts of his case, Dr. Kelley entered the courtroom. The trial judge read to the jury a portion of section 1027 of the Penal Code (appointment of alienists when defendant pleads not guilty by reason of insanity), and said, "of course, the question of legal insanity is not questioned in this trial, but the question of the state of mind is, and I have appointed as the alienists in this case Dr. Walter Rapaport, Superintendent of the Department of Mental Hygiene of the State of California and Dr. Kelley who is an instructor in psychiatry at the University of California I understand, and Dr. Theodore Miller who is the Medical Superintendent of the Hospital at Napa, the State Hospital there. * * *"

The judge asked Dr. Kelley the following questions which he answered affirmatively: "realizing that I brought you here from some distance, it is your desire to testify now instead of later, is that it? * * * it would interfere with your program if you do not now testify? * * * you came here at my special suggestion to be here today?"

The judge said to counsel, "I am not going to put him on myself. I am submitting him to you gentlemen if you want to put him on." Defense counsel said, "I have not had an opportunity to discuss with Dr. Kelley his * * * examination, and I * * * never put a witness on the stand without first discussing what his testimony is." The prosecuting attorney said, "I am going to put him on if there is any question about it. * * * I haven't talked to Dr. Kelley either as to what his testimony is. * * * [But] I want to put him on."

The judge in the exercise of his power to control the order of proof (Code Civ.

Proc., § 2042) then permitted the prosecuting attorney to produce Dr. Kelley as a witness for the People.

Defense counsel completed his presentation of defendant's case, rested, and the People in rebuttal presented Dr. Toller, Dr. Miller, and Dr. Rapaport.

In support of his contention that the trial judge, by his comments and conduct above described, in effect warranted the testimony of the three court-appointed psychiatrists, defendant relies upon such statements as that in People v. Choynski (1892), 95 Cal. 640, 643–644, 30 P. 791, (quoted from People v. Williams (1860), 17 Cal. 142, 147; accord, People v. Conboy (1910), 15 Cal.App. 97, 101, 113 P. 703): "The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court * * *. A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts."

Defendant argues, further, that the asserted overemphasis of the trial judge on the credence which should be given the court-appointed psychiatrists was not corrected by the following instructions:

"Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable. * * *

"You are not bound to decide in conformity with declarations of any number of witnesses, which do not produce conviction in your minds, against a less number or * * * other evidence satisfying your minds. * * *

"You are the exclusive judges of the weight, value and effect of the evidence and of the credibility of the witnesses. * * *"

Defendant relies upon the following proposition quoted in People v. Mason (1946), 72 Cal.App.2d 699, 711, 165 P.2d 481: "General statements in the charge to the effect that the jury are at liberty to disregard the court's views as to the defendant's guilt or innocence, and to base their verdict on their own conclusions from the evidence, do not cure the fault in the charge of a lack of impartiality in submitting the evidence to the jury, or justify the court in making one-sided recitals of evidence, or in furnishing arguments in behalf of only one side of issues, as to which the evidence is conflicting."

[2] There can be no quarrel with the above quoted propositions relied on by defendant. But here the trial judge did not in any respect interfere with the jury's determination of the facts. He simply stated that three psychiatrists had been appointed by the court, and that Dr. Kelley, at the judge's request, had come from some distance. It does not appear that these statements could have been understood by the jury as an indication that the testimony of the court-appointed doctors was entitled to special credence or was to be weighed by any rules other than those quoted above as applicable to all witnesses alike. As a practical matter the fact as to whether an expert witness has been called by a party or appointed by the court will almost inevitably appear in the course of direct or cross examination, if not by the mere order of interrogation by counsel. That such fact may be considered by the jury in weighing the testimony of an expert is inherent in the law of evidence.

[3] Defendant contends that the trial judge erroneously excluded from evidence photographs of defendant taken one or two hours after the killing. Defendant's employer testified, concerning these pictures,

that from them it appeared to him that defendant was nervous and excited. He also testified that "The photographs are not normal"; this latter statement was stricken on motion of the prosecution. As defendant says, evidence relevant to his state of mind at the time of the killing was crucial; however, it does not appear that the jury could have drawn pertinent inferences as to defendant's state of mind at the time of the killing from photographs of him taken an hour or two thereafter. Certainly exclusion of the photographs was not prejudicial error. (Cal.Const., art. VI, § 4½.)

Defendant contends that instructions of the trial judge during the course of the trial gave the jury a wrong conception of their duty as to determining whether defendant killed willfully, deliberately, and after premeditation; that such instructions emphasized assertedly erroneous portions of the formal instructions and confused the jury as to correct portions of the formal instructions.

[4] The formal instructions include adaptations of sections 187 through 189 of the Penal Code (the legislative definition of murder). The jury were then told that it is only as to the "wilfully, deliberate and premeditated killings mentioned in the statute * * * that any difficulty is experienced in drawing the distinction between murder of the first and second degree, and this difficulty is more apparent than real." Defendant understandably criticizes the last quoted clause of the instruction; the law may now be clear but the application of it to varying circumstances often presents difficult questions; however, it does not appear that telling the jury that "this difficulty is more apparent than real" was prejudicial error.

The formal instructions on the subject of murder continue:

"The unlawful killing must be accompanied with and be preceded by a deliberate and clear intent to take life in order to constitute murder of the first degree and such intent to kill must be the result of deliberate premeditation. It must be formed upon a preexisting reflection and not upon a sudden heat of passion or provocation or other circumstance sufficient to preclude deliberation and premeditation. It is necessary that the act of killing be preceded by and the result of a concurrence of will, deliberation and premeditation on the part of the slayer and if such is the case, the killing is murder of the first degree.

"Neither the statute nor the courts have undertaken to measure in units of time, the length of time during which the thought must be pondered before it can ripen into an intent which is truly deliberate and premeditated. The time would vary with different individuals and under different circumstances. The true test is not the duration of time as much as it is whether or not there has been reflection and the formation of a deliberate premeditated and preconceived intent to kill, prior to the killing. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

"The word 'deliberate' referred to in these instructions has been defined as follows: 'Formed, arrived at or determined upon; a result of careful thought and weighing of considerations carried on coolly and steadily, especially according to a preconceived design.' The word 'deliberation' has been defined to mean 'careful consideration and examination of the reasons for and against a choice or measure.'

"The word 'premeditate' as used in these instructions means 'think on and revolve in the mind beforehand; to contrive and design previously.'

"The deliberation and premeditation above referred to and which is essential to sustain the verdict of murder in the first degree must precede formation of the intent to kill, and such intent must be a result of and based upon such deliberation and premeditation.

"Murder in the second degree may be defined, for the purpose of this case, as the

unlawful killing of a human being intentionally with malice aforethought and without the deliberation, premeditation and preconceived intent to kill essential to the crime of murder in the first degree, as the terms have been defined to you. Murder in the second degree also includes the unlawful killing of a human being with malice aforethought in the perpetration of or attempt to perpetrate any felony other than those mentioned in the definition of murder of the first degree, which I have given you."

"You are instructed that an essential element of murder by means of lying in wait is that the person lying in wait must do so with the intent to commit acts which are likely to cause death and which show a conscious disregard of human life. If the defendant lay in wait merely to inflict bodily harm not likely to cause death, with no conscious disregard of human life, it is insufficient to convict the defendant of first degree murder on the theory of lying in wait.

"However, if the defendant lay in wait with intent to commit acts likely to cause death and which showed a conscious disregard of human life, in the commission of murder, the crime would be murder of the first degree."

"Murder which is perpetrated by means of torture is declared by the law to be murder of the first degree, and if you shall find that the defendant committed that crime, you will have no choice but to designate the offense as murder in the first degree. An essential element of murder by torture is that the acts of torture must be the cause of death of the victim. Another essential element of murder by torture is that the person who committed the acts, which caused another human being to suffer pain and to die, does so with the intent that such other person shall suffer pain from those acts. Therefore if you shall find that the defendant committed the acts of torture with the intent to cause the deceased to suffer pain, but that such acts of torture themselves were not the cause of death, the evidence would be insufficient to convict the defendant of murder on the theory of torture."

[5] The foregoing formal instructions, in general substance, embody the essential principles enunciated in People v. Holt (1944), 25 Cal.2d 59, 83–87, 153 P.2d 21; People v. Thomas (1945), 25 Cal.2d 880, 901, 903, 156 P.2d 7; People v. Bender (1945), 27 Cal.2d 164, 177, 179, 163 P.2d 8; People v. Valentine (1946), 28 Cal.2d 121, 131–132, 134–135, 169 P.2d 1; People v. Tubby (1949), 34 Cal.2d 72, 76–78, 207 P.2d 51; and People v. Carmen (1951), 36 Cal. 2d 768, 777, 228 P.2d 281; see also People v. Daugherty (1953), 40 Cal.2d 876, 901–902, 256 P.2d 911.

[6] The following instructions given from time to time during the course of the testimony, although undesirable in possibly seeming to intimate that at the "very time of the killing" the defendant might then "formulate the deliberate intent to kill," do not, when considered with the correct formal instructions, appear prejudicial:[1]

"The mental state that you are concerned with in this case is that mental capacity at the time of the commission of the homicide to deliberate on the part of the defendant; to premeditate, deliberate and formulate a deliberate intent to kill * * *, with malice aforethought. Now, the mental state is material as it existed at the very time of the killing. This evidence is admitted — this last evidence — but any evidence pertaining as to mental state is only for you to consider as it affects * * * the ability of the defendant to deliberate and to formulate the deliberate intent to kill. This is admitted for the purpose of your answering the question in your own minds and in your verdict, did he, at the time of the killing, formulate the deliberate intent to kill, and then kill."

1. In this connection it is to be noted that defense counsel did not argue to the jury that the killing was only manslaughter, nor does he seriously present such an argument on appeal; he did not request instructions as to manslaughter; and it does not appear that the evidence could reasonably be construed as showing the crime of manslaughter in the usual legal significance of that term.

"Now, ladies and gentlemen of the jury, you are the ones who determine whether or not he did formulate the intent to kill. The Doctor has testified that he had the capacity to do it, but you are the ones to determine whether or not he did do it. So you will absolutely disregard his answer to the question, 'Did you form an opinion as to whether he actually did formulate an intent to kill, or could you tell that?' The Court instructs you that you will not consider that question nor the answer thereto. You yourselves must determine the question as to whether or not he formulated the intent to kill."

[7] Defendant complains also that the judge improperly emphasized his assertedly erroneous exclusion of competent evidence of defendant's relevant state of mind by the instruction that "you will not consider that question ["Did you form an opinion as to whether he actually did formulate an intent to kill * * *?"] nor the answer thereto ["My opinion was that he did form an intent to kill"]." The ruling of the trial judge apparently was based on his determination that the expert should not testify to an ultimate issue of fact. While there is in this state no absolute rule that an expert cannot so testify (People v. Cole (1956), 47 Cal.2d 99, 301 P.2d 854; People v. Martinez (1952), 38 Cal.2d 556, 564, 241 P. 2d 224; People v. Wilson (1944), 25 Cal.2d 341, 349, 153 P.2d 720), no prejudice to defendant appears from the judge's refusal to allow the psychiatrists to give direct opinions as to whether defendant did in fact form the relevant state of mind.

As defendant points out, it is apparent from the record that during the trial the judge and counsel had in mind the proposition, stated in People v. Wells (1949), 33 Cal.2d 330, 347, 202 P.2d 53, that "at the trial upon a not guilty plea evidence, competent in character, which tends to show that a defendant, at the time he committed the overt act, either possessed or did not possess the specific essential mental state (as of malice aforethought, deliberate intent, etc.) is admissible," except that evidence as to legal sanity or insanity is not admissible under our system of bifurcated trial. But nothing appears in the conduct of the prosecution or of the trial judge which could, upon any theory urged, have prejudiced defendant in connection with this proposition.

[8] In this regard defendant objects to the instruction that the pertinent evidence concerned "the mental and nervous condition of the defendant at the time of the alleged commission of the crime charged." According to defendant, his *"mental condition"* was not in issue at this stage of the trial, for he was presumed sane; rather, defendant says, "The issue was, what was defendant's *state of mind* in the alleged commission of the acts charged." (Italics of defendant.) Defendant's attempted distinction between "mental condition" and "state of mind" appears overly subtle. There is nothing in the reference to "mental and nervous condition" in this instruction, and nothing in the other instructions, which could reasonably have misled the jury as to the matters which they had to determine.

[9] Defendant complains of the following instruction: "This evidence as to capacity or lack of capacity to deliberate and premeditate in the formation of a specific intent to kill is for your consideration in the determination of the degree of murder, in the event that you find that murder was committed by the defendant, and for no other purpose." This instruction does not, as defendant contends, restrict the jury's consideration of evidence of defendant's *"mental condition* * * * to the *degree* of the crime, 'and for no other purpose.'" (Italics of defendant.) The instruction refers to the difference between degrees of murder "in the event you find murder was committed by the defendant" and is designed to preclude a finding of murder in the first degree (i.e., that defendant's murderous intent was formed after deliberation and premeditation) unless the jury found that he had the capacity to premeditate and deliberate. Mani

festly, the trial judge could not, in a single instruction, explain all the differences between and the essential elements of the several classes and degrees of homicide.

[10] As stated, the judge instructed the jury, concerning the "deliberate and clear intent to take life" which, on one theory of the law, is an essential element of a finding of first degree murder, that "It must be formed upon a preexisting reflection and not upon a sudden heat of passion or provocation *or other circumstance* sufficient to preclude deliberation and premeditation." (Italics added.) Defendant complains that the judge did not tell the jury what such "other circumstance" might be. However, it appears clear that the jury, from their common knowledge and from the testimony of the psychiatrists, would have in mind the sort of "circumstance" relevant to the state of mind of this defendant.

[11] Defendant complains of the refusal of his requested instruction that "if the prosecution should fail to prove beyond a reasonable doubt any material element of murder of the first degree, but have proved beyond a reasonable doubt the material elements of murder of the second degree, it shall be your duty to return a verdict of guilty of murder of the second degree." The substance of this refused instruction was covered by the following instruction which was given: "If you find beyond a reasonable doubt that the defendant is guilty of the crime of murder, but entertain a reasonable doubt as to whether it is murder of the first degree or murder of the second degree, then it would be your duty to return a verdict of murder of the second degree. * * * However, you must be convinced beyond a reasonable doubt before you can find him guilty of any offense."

[12] For the reasons above stated, in the light of the record viewed as a whole, the judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

149 Cal.App.2d 167

PEOPLE of the State of California, Plaintiff and Respondent,

v.

CHONG WING LOUIE, Defendant and Appellant.

Cr. 3332.

District Court of Appeal, First District, Division 2, California.

March 14, 1957.

Prosecution for possession of an opium derivative. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., sitting without a jury found defendant guilty. The defendant appealed from judgment of conviction and from order denying new trial. The District Court of Appeal, Brazil, J. pro tem., held that where officer had heard from undisclosed source that someone was using dope in defendant's room in rooming house, officer entered rooming house by use of a key which had been obtained from owner for such purpose on previous occasion, officer actually smelled opium coming from defendant's room immediately before going in and saw narcotic paraphernalia on dresser by looking through open door search without warrant was reasonable.

Affirmed.

1. Criminal Law ⇐1159(4)

In prosecution for possession of an opium derivative, testimony of officer that he smelled opium coming from defendant's room before officer entered was not inherently improbable or unbelievable and trial court's finding on issue of credibility of testimony was controlling on appeal. West's Ann.Health and Safety Code, § 11500.

2. Criminal Law ⇐394

Searches and Seizures ⇐3(1)

Where officer had heard from undisclosed source that someone was using dope in defendant's room in rooming house, officer entered rooming house by use of a key which had been obtained from owner

for such purpose on previous occasion, officer actually smelled opium coming from defendant's room immediately before going in and saw narcotic paraphernalia on dresser by looking through open door, search without warrant was reasonable and evidence obtained during the search was admissible in prosecution for possession of opium derivative. West's Ann.Health and Safety Code, § 11500; West's Ann.Pen. Code, § 995.

Edward T. Mancuso, Public Defender, Abraham M. Dresow, Chief Deputy, City & County of San Francisco, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Marvin J. Christiansen, Deputy Atty. Gen., for respondent.

BRAZIL, Justice pro tem.

The defendant was found guilty of possession of a preparation of yen shee, an opium derivative, in violation of Section 11500 of the Health and Safety Code, by the court sitting without a jury, the same having been personally waived by the defendant.

He now appeals from the judgment of conviction and the order denying a new trial on the ground that the court was in error in overruling his objections to the admission of evidence; claiming it to have been obtained as the result of an unlawful search of his room. In the conclusion of his brief, appellant makes a mild claim that despite the officer's testimony on the subject, he ought not to be believed because one can't smell yen shee from a distance.

Sometime during the late evening of July 24, 1956, Officer Christiansen of the Narcotics Detail of the San Francisco Police Department, picked up an office memorandum about "a user of dope in room 42 at 66 Clay Street." The complaint was anonymous, and that is about all the information the officer had when he and four others from the department set out for the rooming house on Clay Street. They had a key to the outside door of the building which had been obtained from the owner on a previous case involving the same premises. They had no search warrant for the room or building before obtaining the evidence, to the admission of which defendant has objected.

The officer testified that he had been with the narcotics detail about three years; that he had smelled opium being smoked approximately three or four dozen times; and that he had seen narcotic paraphernalia in hundreds of cases. As he approached room 42, the occupancy and control of which by the defendant is admitted, the witness testified, "I smelled the odor of opium emanating from room 42". The door to the room was ajar about six inches, through which opening he saw syringes, burnt spoon, with needles, commonly used by addicts shooting narcotics intravenously. Thereupon, they entered the room, a small one about five feet by eight feet, and found a packet of black substance in the top dresser drawer, which later turned out to contain twenty-three grams of yen shee.

While the defendant was not in the room when the officers entered, he had been seen by the witness just before that, in an adjacent room, a common kitchen, cooking rice on a gas stove. After entering the defendant's room and finding the yen shee, the officers looked for him in the kitchen, but he had gone without even stopping to turn off the gas under the rice which by then had started to burn. The officers arrested him about an hour later when they saw him behind some fruit cases at the corner of Clay and Front, a short distance from his home. He had a key in his pocket to room 42; and in response to inquiry told the police he lived there.

[1] To take the last point first, there appears on reading the transcript, to be no conflict in the testimony of witness Bergmans, a chemist, and Officer Christiansen about the odor of yen shee or opium. Even if there were, it would be of no avail to the appellant, for the officer testified positively that he smelled opium coming from the room before he entered, and that yen

shee, which is the residue of smoked opium, and opium smell alike. The trial court's finding on this issue is controlling here, for there is certainly nothing inherently improbable or unbelievable about this testimony.

[2] Now as to the issue on the presence or absence of reasonableness of the search which turned up the evidence to which defendant objected, there can be little doubt that the trial court was correct in its ruling.

If the officers had acted solely on the anonymous information they had when they left the police station for the Clay Street rooming house, the search would surely have been unreasonable. Quoting from Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36, 38 on this subject we find: "Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency, * * * an arrest may not be based solely on such information."

The entry of the rooming house at the street level by the police must necessarily have been by and with the consent of the owner, they having gotten a key from him for such purpose on a previous occasion; and so was lawful. In at least two cases involving a search of defendant's room in a private home without a warrant and in defendant's absence, the Supreme Court held such conduct to be lawful where the officers, acting in good faith, relied on the apparent authority of the homeowner to justify the search with the homeowner's consent. People v. Gorg, 45 Cal.2d 776, 291 P.2d 469; People v. Caritativo, 46 Cal.2d 68, 292 P.2d 513. In this case the officers relied on the consent only to gain admission to the main building; and relied on information later obtained to justify entry into defendant's room.

There is no distinction, helpful to the appellant, between this case and that of People v. Bock Leung Chew, 142 Cal. App.2d 400, 298 P.2d 118, (hearing denied by the Supreme Court) wherein the trial court's order granting a motion under the provisions of Penal Code, § 995 was reversed. There and here the defendant lived in a room and smelled opium, whereupon he entered without a warrant and found some yen shee. In both cases the information possessed by the officers before smelling opium would have been insufficient to justify an entry, search or arrest.

In this case we have the additional element of an anonymous tip, and the presence of narcotic paraphernalia on the dresser actually seen by the witness on looking through an open door before he ever made any attempt to enter the room. The officer's conduct was reasonable under the circumstances when we find that (1) he had heard from an undisclosed source someone was using dope in room 42; (2) he actually smelled opium coming from the room immediately before going in; and in like manner (3) he saw narcotic equipment there on the dresser.

Appellant relies mainly on People v. Thymiakas, 140 Cal.App.2d 940, 296 P.2d 4, claiming the law and facts to be the same. This is true only up to a certain point and that point is somewhere in time after entry into the rooming house and before coming near to room 42. In the Thymiakas case the officers neither smelled nor saw anything that would lead a reasonable person to believe that a violation of the law was taking place in the room. They went to the door of the room and with a key they had gotten from the manager, unlocked the door which failed to open because of the night chain. Thereupon, the officers banged on the door, announced they were officers and demanded entrance. The door, not being opened, they forced their way in, in a matter of a few seconds from the time they unlocked the door. The cases are dissimilar.

No error appearing in the record, the order denying appellant's motion for a new trial and the judgment are, and each is affirmed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.

148 Cal.App.2d 747

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Flulcher GRIMES, a/k/a Flutcher GRimes, Defendant and Appellant.

Cr. 3243.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1957.

Rehearing Denied March 28, 1957.

Hearing Denied April 25, 1957.

Prosecution for lewd or lascivious acts upon body of a child under fourteen years, and for copulation with the mouth. The Superior Court, Alameda County, Chris B. Fox, J., entered judgment of conviction for copulation with the mouth, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that combined effect of instruction on corroborating evidence informing jury it could consider circumstantial evidence, entire conduct of accused as a witness and at other times than at trial, along with other evidence in the case, and failure of court to advise jury that limited function of certain questions propounded to defendant's character witnesses as to whether they had heard of specific acts and a statement made by defendant in connection with an association he had with a sailor, constituted prejudicial error.

Reversed.

1. Criminal Law ⇐380

In prosecution for copulation with the mouth, questions propounded to defendant's character witnesses on their cross-examination as to whether they had heard of specific acts and a statement made by defendant in connection with an association he had with a sailor, after witnesses denied knowing defendant was arrested with such sailor, were not objectionable on theory of not being material upon trait of character of defendant, but were objectionable on ground of impropriety of bringing details as to alleged relationship to jury's attention after witnesses' denial of knowledge of association in question. West's Ann.Pen.Code, § 288a.

2. Criminal Law ⇐698(1)

Failure to make a timely and sufficient objection is of no moment where a grave matter of public policy is involved since counsel for the defense in a criminal proceeding does not bear the entire burden of protecting the constitutional rights of their clients.

3. Criminal Law ⇐824(1)

In a criminal case the trial judge is required to instruct the jury of his own motion upon the law relating to the facts of the case and upon matters vital to a proper consideration of the evidence.

4. Criminal Law ⇐511(1)

In a criminal proceeding, corroborating evidence must do more than raise a suspicion of guilty but must in some degree implicate the defendant, and to be sufficient to sustain a conviction the evidence must relate to some act or fact which is an element of the offense.

5. Criminal Law ⇐1172(2), 1173(2)

In prosecution for copulation with the mouth, combined effect of instruction on corroborating evidence informing jury it could consider circumstantial evidence, entire conduct of accused as a witness and at other times than at trial, along with other evidence in the case, and failure of court to advise jury of limited function of certain questions propounded to defendant's character witnesses as to whether they had heard of specific acts and a statement made by defendant in connection with an association he had with a sailor, constituted prejudicial error. West's Ann.Pen.Code, § 288a.

6. Indictment and Information ⇐161(5)

Where amendment to an information charging copulation by the mouth added a charge under statute proscribing lewd or lascivious acts upon body of a child under 14 years, and amendment was made on first day of trial, but two weeks prior thereto prosecutor had orally informed defendant's counsel of his intention to amend, and both counts involved same transaction and same proof, only difference being that original charge involved an accomplice question and additional charge did not, allowance of

such amendment was proper and did not constitute an abuse of discretion under the circumstances. West's Ann.Pen.Code, §§ 288, 288a.

Richard M. Frisk, Richmond, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Dist. Atty., San Francisco, J. F. Coakley, Dist. Atty., of Alameda County, Charles Zook Sutton, Deputy Dist. Atty., Oakland, for respondent.

FRED B. WOOD, Justice.

Charged with violations of sections 288 and 288a of the Penal Code defendant was found guilty of the latter, not guilty of the former. He assigns a number of errors of law in support of his appeal.

[1] (1) *Was the asking of certain questions of defendant's character witnesses prejudicial misconduct on the part of the prosecutor?*

Three of defendant's witnesses testified that his reputation for chastity, virtue and morality is good.

Upon cross-examination, defendant's first character witness was asked the following questions: (1) Have you heard that he [defendant] was arrested with a sailor on June 3rd this year and was seen by officers going into the bushes at 2:30 in the morning at Aquatic Park, have you heard that? (2) And did you also hear, that when they came out of the bushes that the sailor, the young sailor and the defendant they went into the defendant's car and sat there for several hours, had you heard that? (3) Now, did you also hear, that when the defendant was arrested he was with this sailor and the sailor's pants were unzipped, did you hear that? (4) And did you also hear that the sailor told the police officers that he was propositioning him for a blow job, did you hear that?

Each of the other two character witnesses was asked substantially the same questions, in the same order. Each of the three answered "No" to each of the four questions.

The only objection which defendant's counsel[1] interposed was that the questions did not touch upon the trait of character here involved. In the case of the first witness, he made this objection to questions (1) and (2), not to (3) or (4); in the case of the second witness, he objected only to questions (1), (2) and (3), not to (4); in the case of the fourth witness, he interposed this objection to each of the four questions.

We think the objection was not good. Each question appears to have a bearing upon one of the traits involved.

The vice of this line of questioning was that of going into the details of the hypothetical report concerning defendant and the sailor and of continuing with further questions on the subject, with each witness, after getting a negative answer to the first question, thus improperly bringing such matters to the jury's attention, with emphasis by repetition. See People v. Burwell, 44 Cal.2d 16, 35, 279 P.2d 744 (what is proper cross-examination in the absence of a showing of bad faith); People v. Gin Shue, 58 Cal.App.2d 625, 634, 137 P.2d 742, 747 (the "prosecution is confined to the answer given by the witness, and can inquire no further into the matter"); People v. Neal, 85 Cal.App.2d 765, 769–771, 194 P.2d 57, 59 (improper "to include in the question the alleged details.") No objection on these grounds was made. Nor did defendant's counsel, at the trial, object that these questions were asked in bad faith and without a factual basis. See People v. White, 43 Cal.2d 740, 744, 278 P.2d 9 (challenge as to prosecutor's good faith and asserted lack of factual basis for the questions; heard and determined outside the presence of the jury).

[2] Defendant's present counsel urges that the deputy prosecutor's persistent and detailed interrogation of these character witnesses was so flagrant a flaunting of long established principles of the law as to con-

1. He is represented by different counsel upon this appeal.

stitute prejudicial misconduct despite the failure of defendant's then counsel to interpose appropriate objections. That is a point which appears to have great merit. "The failure to make a timely and sufficient objection is of no moment where a grave matter of public policy is involved. Counsel for the defense do not bear the entire burden of protecting the constitutional rights of their client." People v. Rodriguez, 58 Cal.App.2d 415, 421, 136 P.2d 626, 629. See also People v. Asavis, 22 Cal.App.2d 492, 499–500, 71 P.2d 307. However, it is not necessary to decide this question in view of our conclusion that upon other grounds, presently to be discussed, the judgment must be reversed. We are confident that upon a new trial, if one is had, the prosecution will not again go beyond the limits prescribed by law for the interrogation of character witnesses.

(2) *Did the court err in not informing the jury of the limited function of the questions which the prosecutor put to defendant's character witnesses?*

We refer to the four questions, above discussed, which the prosecutor asked of each of defendant's three character witnesses.

Defendant's counsel failed to request an instruction on this subject. Was the court under a duty to give such an instruction in the absence of a request therefor? We think so, under the circumstances of this case.

[3] In a criminal case, "the trial judge is required to instruct the jury of his own motion upon the law relating to the facts of the case and upon matters vital to a proper consideration of the evidence. People v. Putnam, 20 Cal.2d 885, 890, 129 P.2d 367; see also People v. Bender, 27 Cal.2d 164, 176, 163 P.2d 8; People v. Warren, 16 Cal.2d 103, 116, 104 P.2d 1024; People v. Scofield, 203 Cal. 703, 709, 265 P. 914." People v. Buffum, 40 Cal.2d 709, 724, 256 P.2d 317, 325.

In People v. Bentley, 131 Cal.App.2d 687, 281 P.2d 1, this principle was specifically applied to the need of a jury for advice as to the limited purpose and use of questions put to a character witness concerning reports of other offenses or of misconduct inconsistent with the possession of a good reputation: "* * * it is highly important that the jurors understand that the purpose of the inquiry is merely to test the worth of the opinions the witnesses have expressed as to the reputation of the accused. Such questioning by the prosecutor carries an implication that such rumors have been in existence and would naturally cause the accused to be suspect of grievous wrongdoing or perhaps of other crimes. It is necessary that the jurors should put out of their minds all questions as to the truth of the rumors or charges, and yet they cannot know the limited purpose of the cross-examination unless it is explained to them.

"The defendant did not request such an instruction and none was given. One should have been given of the court's own motion. It was especially necessary because of the course of the trial after defendant had denied the accusations with relation to other children but we think a cautionary instruction should be given in every case in which such cross-examination is permitted." 131 Cal.App.2d at pages 691–692, 281 P.2d at page 3.[2]

The need for such an instruction in the instant case was more than usually compelling, especially because of the improperly repetitive and detailed nature of the questions; emphasized by one of the instructions on evidence corroborative of an accomplice's testimony, an instruction which came very close to telling the jury they might consider as evidence in the case the reports of misconduct suggested by these questions.

2. Respondent invokes People v. White, supra, 43 Cal.2d 740, 278 P.2d 9, on this point. But the court in that case did not hold it was proper for the trial court not to instruct on this subject. Instead, it said: "Under the circumstances defendant would appear to have suffered no prejudice." 43 Cal.2d at page 745, 278 P.2d at page 12.

(3) *Were the instructions upon corroboration of the testimony of an accomplice misleading?*

In respect to the count which charged a violation of section 288a of the Penal Code, the jury was given the question whether the prosecuting witness was an accomplice, as well as the question whether the defendant was guilty or innocent of the crime charged.

Concerning the need for evidence corroborating the testimony of an accomplice, the jury was instructed in the terms of CALJIC No. 822 as it appears in the permanent volume of that work, supplemented by the paragraph which appears on page 200 of the 1953 Pocket Supplement. The latter reads as follows, as given in this case: "The corroborating evidence required by the law may be circumstantial as well as direct, and the entire conduct of the accused, himself, both as a witness in his own behalf and at times other than at the trial as shown by the evidence, along with all other evidence in the case may be looked to for corroborative circumstances."

This quoted paragraph, in the absence of advice concerning the limited purpose of the questions asked concerning reports of the conduct of defendant and the sailor, well could have misled the jury to believe that the facts seemingly implied by those questions could be considered by the jury in determining the guilt of the accused.

The references to "circumstantial" evidence, the "entire conduct" of the accused on the witness stand and at other times than at the trial, "along with all other evidence in the case" (in the absence of an instruction as to the limited evidentiary value of the questions asked of the character witnesses) well could lead a layman to believe that the "reported" conduct of defendant and the sailor was evidence in the case, to be weighed with the rest of the evidence in determining the guilt or innocence of the defendant.

[4] The People say that this instruction was a correct statement of the law, a standard instruction, and "obviously directed toward the appellant's testimony in his own behalf, his demeanor as a witness, and the inconsistent statements he had given the police at the time of his arrest." It was not "obviously" thus limited in scope, purpose and application, as we have seen. Moreover, if the "demeanor" of the defendant as a witness is sufficient corroboration, the corroboration requirement could hardly ever fail to be satisfied. We should not forget that corroborating evidence must do more than raise a suspicion of guilt. It must in some degree implicate the defendant and, to be sufficient the "evidence 'must relate to some act or fact which is an element of the offense.'" People v. Santo, 43 Cal.2d 319, 327, 273 P.2d 249, 253.

The conduct of the defendant as indicated by the evidence in this case revealed only that the defendant had meetings and conversations with the prosecuting witness. It did not reveal, for example, any contradictory statements by the defendant that would have any significant bearing upon corroboration, as we read the record.

We note in passing that the instruction under discussion was formulated in response to a statement appearing in People v. Brickman, 119 Cal.App.2d 253, 259 P.2d 917. See editorial note in CALJIC, 1953 Pocket Supplement, p. 200. The Brickman case involved a violation of the narcotics law, possession of marijuana. The defendant said to the officers, "'What will I get,'" then denied that the "'stuff'" was his, and later said to a co-suspect "'I am sorry * * *. It is all my fault. I did it. I am responsible for the whole thing * * * It is all my stuff * * *'" at pages 256 and 257 of 119 Cal.App.2d, at page 920 of 259 P.2d, to mention a few of his out-of-court statements. Concerning their value as corroboration, the court said: "The above mentioned extra-judicial declarations of appellant, tending as they did to connect him with the commission of the crime charged, constituted sufficient corroboration to sustain the conviction," assuming but not deciding that certain witnesses were accomplices. 119 Cal.App.2d at page 262, 259 P.2d at page 923.

Later on in the opinion, discussing the sufficiency of the evidence to support the judgment, the court among other things said:

"In the case now before us, the record reflects that appellant admitted to the police officers that he had purchased the marijuana, that he had planned to resell it, and that he had placed it in Castle's trousers because there was no other place to hide it. He also stated that the reason the marijuana was still in the house was that 'it wasn't moving very fast'.

"When these statements are considered with other evidence in the case, and looking at all the evidence in a light most favorable to the prosecution, as we must do on appeal in a criminal case, People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Kristy, 111 Cal.App.2d 695, 698, 245 P.2d 547, the conclusion seems inevitable that appellant had possession of the marijuana and that such possession had not been abandoned." 119 Cal.App.2d at page 263, 259 P.2d at page 924.

We observe that there the court was applying the law to the particular facts of that case, by no means undertaking to write an instruction for general use. The instructions given and refused were not in the record upon that appeal and accordingly were not considered. Their correctness was assumed.

However, we are not especially concerned with the correctness of the instructions on corroborative evidence in relation to the purpose for which they were given. The jury found that the prosecuting witness was not an accomplice and the defendant does not challenge that finding.

[5] We are concerned with the portion of those instructions which we have quoted and its impact upon the jury in respect to other aspects of the case and the likelihood of its misleading them to make an improper use of the suggestions given them by the series of questions which the prosecutor put to defendant's character witnesses. See People v. Rogers, 22 Cal.2d 787, 806–807, 141 P.2d 722, and People v. Smittcamp, 70 Cal.App.2d 741, 745–749, 161 P.2d 983.

The combined effect of this instruction and the failure to advise the jury of the limited scope of those questions as evidence is such that we can not say that but for these a different verdict would have been improbable.

[6] (4) *Was it error for the trial court to permit the prosecution to amend the information by adding a charge under section 288 of the Penal Code?*

The original information charged only a violation of section 288a of the code.

The amendment was made on the first day of the trial, but two weeks prior thereto the prosecutor had orally informed defendant's counsel of his intention to amend. Both counts involved the same transaction and the same proof, the difference being that section 288a involved the accomplice question and section 288 did not.

Allowance of such an amendment has ample legal sanction. People v. Evans, 39 Cal.2d 242, 249, 246 P.2d 636; Parks v. Superior Court, 38 Cal.2d 609, 611–613, 241 P.2d 521. Nor was there any abuse of discretion under the circumstances of this case.

The judgment and the order denying a new trial are reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

Matter of the ESTATE of Gordon E. BEHR, Deceased.

Fatima Saziye BEHR et al., Contestants and Appellants,

v.

BANK OF AMERICA NATIONAL TRUST and SAVINGS ASSOCIATION et al., Petitioners and Respondents,

Louis C. Behr et al., Contestants and Respondents.

Civ. 21869.

District Court of Appeal, Second District, Division 1, California.

March 12, 1957.

Rehearing Denied April 8, 1957.

Hearing Denied May 8, 1957.

Proceeding in the matter of the estate of deceased testator. The Superior Court of Los Angeles County, Harold W. Schweitzer, J., entered order settling the executor's third and final account and overruling objections thereto, denying widow's claim to community property, awarding fees to executor and attorneys, and ordering such fees to be charged against the interest of the widow, and the widow and others appealed. The District Court of Appeal, Doran, J., held that where record disclosed evidence that there had been some inaction and negligence on part of executor with respect to wholly-owned estate corporation, and testator's widow was legally entitled to question executor's conduct, and there was no substantial evidence of bad faith on part of widow in doing so, it was improper to charge extraordinary attorney's fees, which were awarded to executor, against the interest of the widow, and the fees should have been charged solely against the estate.

Judgment modified and, as modified, affirmed.

Fourt, J., dissented.

1. Appeal and Error ⇐989

A reviewing court will not attempt to weigh evidence where record contains substantial evidence, whether contradicted or uncontradicted, in support of findings.

2. Domicile ⇐10

In proceeding in probate court for settlement of executor's account, evidence sustained finding that deceased testator was not a resident of California and that therefore property in question was not community property.

3. Executors and Administrators ⇐506(3)

In proceeding for settlement of executor's final account, evidence sustained finding that executor's inaction with respect to wholly-owned estate corporation was with knowledge and consent of the parties in interest and that estate of deceased testator suffered no loss from conduct of executor.

4. Executors and Administrators ⇐216(2), 510(10)

Allowance of extraordinary fees to executor's attorney is a matter of discretion with the trial court and is not to be interfered with on appeal except for abuse.

5. Executors and Administrators ⇐216(2)

Record failed to disclose any abuse of discretion on part of Probate Court in allowing extraordinary fees to executor's attorney in proceeding for settlement of executor's final account.

6. Executors and Administrators ⇐511(2)

Where record diclosed evidence in proceeding for settlement of executor's final account that there had been some inaction and negligence on part of executor with respect to wholly-owned estate corporation, and testator's widow was legally entitled to question executor's conduct, and there was no substantial evidence of bad faith on part of widow in doing so, it was improper to charge extraordinary attorney's fees against the interest of the widow, and the fees should have been charged solely against the estate.

Max Fink, Emmet G. Lavery, Jr., Los Angeles, for appellants.

G. L. Berrey, Los Angeles, for respondents Bank of America, etc., and G. L. Berrey.

Wright, Wright, Green & Wright, Loyd Wright, Herschel B. Green, Los Angeles, for respondents Louis C. Behr et al.

DORAN, Justice.

The appeal herein is from orders of the Probate Court settling the executor's Third and Final Account and overruling objections thereto; denying the widow's claim to community property, and holding that decedent was a resident of Colorado and not California; awarding fees to executor and attorneys for services in defending against the objections, and ordering such fees to be charged against the interest of the widow-objector.

The record discloses that the testator, Gordon E. Behr, died December 21, 1951, in Madrid, Spain, leaving a will which had been made in Tokyo, Japan in which testator is described as "Gordon E. Behr of Tokyo, Japan", and naming the Bank of America as executor. The will left 40% of the estate to the widow, Fatima Saziye Behr; 40% to Louis and Mabel Behr, testator's parents; 10% to Isabel Price Behr, a former wife; and 10% to George T. Walker, a friend. The testator left no issue.

[1] At the outset, it may be observed that many of the appellants' contentions assail the findings of the trial court on the ground that the same are not sustained by the evidence. As pointed out in respondents' briefs, it is fundamental that an appellate tribunal will not attempt to weigh the evidence where the record contains substantial evidence in support of the findings. This rule applies whether such evidence is contradicted or uncontradicted.

The above stated rule is particularly applicable to appellants' contentions contesting findings to the effect that testator was not a resident of California, and that the property in question was not community property. The voluminous record indicates that much evidence was presented to the trial court on these issues.

[2] It is true that the decedent had resided in California with a first wife who secured a California divorce in 1949, at which time the decedent was living in Tokyo. Gordon E. Behr, deceased, married Fatima Saziye Behr, the widow, in 1950, and until decedent's death on December 21, 1951, Gordon and Fatima lived in various parts of the world where Mr. Behr was required to be in connection with an export-import business. From the mass of evidence presented, the trial court found that the decedent was not a resident of California at the time of death and that the property was not of a community nature. That these findings are sustained by substantial evidence, cannot be doubted.

One of appellants' most important points is based upon alleged "failure on the part of the Bank (executor) to preserve a wholly-owned estate corporation, G. E. Behr and Co. Inc., which was the principal asset of the estate". Notwithstanding the Bank's possession of all the outstanding stock and of all relevant financial data, appellant claims that "The said estate corporation and its assets became entirely lost to the estate by reason of the negligence of the Bank". In this connection it is also alleged that, "with full knowledge that one Monro has usurped and converted the assets of the corporation, and without order of Court Bank paid from the estate and to Monro the sum of $12,075.32 as a purported compromise of claims which did not in fact exist".

The trial court found that "the Executor was informed that the corporation was mismanaged and that the Executor took no action and exercised no rights as a stockholder with reference thereto". However, it was also found that "It is not true that as a result of any conduct of the management of the corporation, any of the assets * * * have been lost or have disappeared or that the shares of stock have been rendered valueless or have been reduced in value in any amount". The court further found that although "the Executor was negligent in failing to take steps for the care, preservation and management" of the

corporation, "it is not true that loss resulted from such inaction", and also found that the executor's inaction "was with the full knowledge, approval and consent of each of the legatees", resulting in an estoppel.

[3] Although there is evidence of the executor's inaction and negligence in respect to the corporation in question, the record discloses substantial evidence in support of the trial court's finding that the Bank's conduct was with the knowledge and consent of the parties in interest, and that the estate suffered no loss from that conduct. At best, the record reveals a conflict in the evidence in respect to these matters and under the rule hereinbefore mentioned, the findings of the trial court may not be disturbed. Nor is any reversible error discovered in respect to the trial court's rulings concerning the admission and exclusion of evidence.

The appellants also complain that "The services rendered by an executor and its counsel for the purpose of obtaining absolution and exoneration by the court in connection with its misconduct of the affairs of an estate cannot be charged against a single legatee". The trial court found that "all of the services of the Executor and its attorneys in connection with the defense against the Objections were occasioned by the Objector, Fatima Saziye Behr, who * * * is estopped to question the Executor's administration of the G. E. Behr & Co., Inc. stock; that the objections of said legatee were not taken in good faith; that all of the compensation for extraordinary services of the Executor and its attorneys in connection with the said Objections, * * * to wit, the total sum of $18,850.00 shall be allowed out of the estate and shall be charged against the interest of the Objector, Fatima Saziye Behr"..

[4, 5] As said in Re Estate of Raphael, 128 Cal.App.2d 92, 98, 274 P.2d 880, 884, "'The allowance of extraordinary fees is a matter of discretion with the trial court and is not to be interfered with on appeal except for abuse. * * *' In re Estate of Scherer, 58 Cal.App.2d 133, 142, 136 P.2d 103, 109". In the instant case, a review of the record fails to disclose any abuse of discretion in respect to the amount of fees allowed.

[6] However, in the present case the trial court's order that "the total sum of $18,850.00 (extraordinary fees) shall be allowed out of the estate and *shall be charged against the interest of the Objector, Fatima Saziye Behr*", (italics added), on the theory that the objector was "estopped to question the Executor's administration of the G. E. Behr & Co., Inc. stock; that the Objections of said legatee were not taken in good faith", cannot be justified under either the law or the evidence.

As hereinbefore indicated, the record does disclose evidence to the effect that there was some executor's inaction and negligence in respect to the corporation in question. It follows that the objector was legally entitled to question such conduct, and that unless there is clear evidence of bad faith in so doing, such an objector should not be penalized therefor. A survey of the record herein fails to reveal substantial evidence of bad faith; therefore, neither equity nor justice require that the objector's interest be made subject to the burden of paying the entire amount of fees for extraordinary services rendered by the executor and its attorneys.

The judgment is therefore modified to provide that such fees be charged solely against the estate, and as so modified, is affirmed. The parties will bear their respective costs on appeal.

WHITE, P. J., concurs.

FOURT, J., dissents.

149 Cal.App.2d 133

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Louis GUERRERA, Defendant and Appellant.

Cr. 5788.

District Court of Appeal, Second District, Division 1, California.

March 13, 1957.

Defendant was convicted of illegal possession of heroin after two prior felony convictions. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., rendered judgment, and defendant appealed. The District Court of Appeal, Fourt, J., held that police officers had reasonable grounds to believe that defendant had committed a felony and hence were entitled to break down door of his apartment and search without warrant entire premises under his control, and that heroin found as a result of search was not illegally obtained.

Judgment affirmed.

1. Arrest ⇐63(4)

A valid arrest may be made solely by reason of information communicated to police officer by a single reliable informant.

2. Constitutional Law ⇐266
Criminal Law ⇐394

In prosecution in state court for a state crime, neither Fourth nor Fourteenth Amendment to federal Constitution precludes admission of illegally obtained evidence. U.S.C.A.Const. Amends. 4, 14.

3. Searches and Seizures ⇐7(20)

Where officer was informed by confidential informant, whom he had known for several weeks and who on several previous occasions had given reliable information to officers, that named person was peddling and using narcotics from his apartment and had a large quantity of narcotics either on his person or concealed in apartment, and officers saw a known narcotic user leave apartment, officers had reasonable grounds to believe that named person had committed a felony and were entitled to break down door of his apartment and search without a warrant entire premises then under his control and heroin found as a result of search was not illegally obtained. West's Ann.Health & Safety Code, § 11500; West's Ann.Const. art. 1, § 19.

4. Criminal Law ⇐989

Defendant was bound by actions taken in his behalf by public defender at trial on charge of illegal possession of heroin, including negative reply to inquiry as to whether defendant had any legal cause to show why sentence should not be pronounced, and defendant could not contend on appeal from conviction that trial court erred in not specifically addressing such inquiry to defendant, particularly where defendant himself answered in the affirmative to inquiry as to whether he wished to be sentenced that morning. West's Ann. Health & Safety Code, § 11500.

Louis Guerrera, in pro. per.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction of the crime of violation of section 11500 of the Health and Safety Code.

The defendant was charged in an information filed June 14, 1956, in Los Angeles county, with having in his possession, on or about May 26, 1956, a preparation of heroin, and further it was alleged that he had previously been convicted of two prior felony convictions and served a term in the state prison therefor. The defendant was represented by the public defender at the arraignment and entered his plea of not guilty to the charge and denied the prior convictions. All parties concerned stipulated to waive a trial by jury and to submit the plaintiff's case in chief on the testimony set forth in the transcript of the preliminary hearing and plaintiff's exhibit 1 for identification. At the first part of the hearing in the trial court, the defend-

ant admitted the priors as alleged. Each side then produced additional evidence and the judge found the defendant guilty as charged in the information and sentenced him to the state prison.

The facts are substantially as follows: A police officer received information from a confidential informant who had, on at least four previous occasions, given information to the officer and had proved to be credible on those occasions. Further, the officer had known the informant for about six weeks and had seen him on practically every working day. The officer received the information about 9:30 o'clock p. m., to the effect that the defendant, a male Mexican known as Topo or Louie, was peddling and using narcotics from his apartment at 2526 East First Street, Los Angeles, and that he had a large quantity of narcotics which he carried in a finger stall and was located either on his person or behind a piece of oil cloth tacked back of the kitchen stove. The officer who had received the information from the informant, and another officer and the informant drove to the address named at about 10:00 o'clock p. m., on May 26, 1956. The informant pointed out the entrance door to the facility where the defendant resided and then left. The officers observed the place for about ten to fifteen minutes, during which time they saw a person leave the building whom they recognized as a drug addict who had previously served time for narcotic violations. The two officers then approached the entrance door to the apartment, and pounded on the door and announced in a loud voice, "Police officers. Open the door." There was no response to their pounding. They then heard sounds coming from within the apartment, indicating motion and activity therein, and in about three to ten seconds later the second officer broke the door down and the officers entered. The facility consisted of two small rooms, a bedroom and a kitchen. The defendant was found in the bedroom and was searched, but no narcotics were found on him. The first officer then went to the kitchen and searched, and behind a piece of oil cloth about eighteen inches square, back of the stove, found a finger stall containing forty-two capsules filled with a white powder. There was also found a plastic container in which there was a bottle cap, an eye dropper and a hypodermic needle. The defendant stated that none of the items were his. At the police station the defendant, when asked "* * * how much stuff he was using," stated freely and voluntarily to an officer, "Not much". The officer then asked him when he had his last "fix", and Guerrera answered, "Not for two days." The defendant also stated that he had been living in the apartment for about a week and that he lived alone. His arms contained fresh needle marks on the upper portion of his right elbow and a track about an inch long on his wrist. The capsules were marked, and later an expert chemist examined the contents of fifteen of the capsules selected at random and each of the selected capsules contained heroin.

The defendant contends that the evidence introduced against him was inadmissible in that it was a product of an illegal search and seizure under the fourth amendment of the Constitution of the United States, and under Article I, section 19 of the Constitution of the State of California, and People v. Cahan, 44 Cal.2d 434, 282 P. 2d 905. We are of the opinion that under the facts and circumstances of this case, there is no merit to any of the contentions of the defendant.

[1] On the question of probable cause to make an arrest, the reliability of the informant and the reasonableness of the information supplied is what counts the most with the officer in making up his mind what to do. A valid arrest may be made solely by reason of the information communicated by a single reliable informant. Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222; People v. Gonzales, 141 Cal.App. 2d 604, 606, 297 P.2d 50.

In the case before us, the information theretofore supplied by the informant had been credible, and in addition the officers saw a known narcotic user leave the building in which the defendant maintained his

apartment. People v. Montes, 146 Cal.App. 2d 530, 303 P.2d 1064.

[2, 3] The fourteenth amendment of the United States Constitution does not prohibit the use of such evidence, even assuming it was illegally obtained, and we hold it was not so illegally secured. Wolf v. People of State of Colorado, 338 U.S. 25, 31, 69 S.Ct. 1359, 93 L.Ed. 1782; People v. Cahan, supra, 44 Cal.2d 434, 441, 282 P.2d 905.

The officers had good and reasonable grounds to believe that the defendant had committed a felony and accordingly they had a right to search the entire premises then under the control of the defendant. People v. Dixon, 46 Cal.2d 456, 459, 296 P.2d 557.

As to the breaking of the door of the defendant's apartment, under the circumstances in this case, the officers were well within their rights and no civil rights of the defendant were violated. To have delayed might very well, in this instance, have provided the defendant with sufficient time within which to have destroyed the evidence, and, in our opinion, it was not improper for them to break down the door and enter as they did. People v. Maddox, 46 Cal.2d 301, 306, 294 P.2d 6.

[4] The defendant also complains that the court erred in not specifically asking him if he had any reason why sentence should not be pronounced. The record discloses that the defendant was represented by Stanley Brill, a skilled representative in the Public Defender's office. When the court inquired, "Have you any legal cause to show why sentence should not now be pronounced?" Brill replied, "No, there isn't, your Honor." It is clear that the defendant is now bound by the actions taken in his behalf by his attorney. Furthermore, the defendant was asked if he wanted to be sentenced that morning, and he replied, "Yes."

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

149 Cal.App.2d 88

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Emil HUDAK, Defendant and Appellant.

Cr. 5742.

District Court of Appeal, Second District, Division 1, California.

March 12, 1957.

Defendant was convicted under a count which charged occupancy of an apartment for purpose of recording and registering bets. From a judgment of the Superior Court, Los Angeles County, Allen T. Lynch, J., and from an order denying a motion for new trial, defendant appealed. The District Court of Appeal, White, P. J., held, inter alia, that the evidence warranted a finding that defendant occupied a place with papers and paraphernalia for purpose of registering bets.

Affirmed.

1. Arrest ⇐63(4)

To constitute a probable or reasonable cause such as will justify an officer in arresting or prosecuting a person upon criminal charge, there must exist such state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that person is guilty.

2. Arrest ⇐63(4)

Criminal Law ⇐395

Under facts, officers had reasonable cause to believe that defendant was committing a felony in occupying an apartment for purpose of recording and registering bets and hence "National Daily Reporter" and slip of white paper which were first seen burning on top of stove by officers in apartment where defendant was arrested were not improperly admitted on ground that they were obtained by unlawful search and seizure. West's Ann. Pen.Code, § 337a.

3. Arrest ⇐63(4)

Although information provided by anonymous informant is relevant on issue

of reasonable cause, in absence of some pressing emergency, an arrest may not be based solely on such information. West's Ann.Pen.Code, § 836, subd. 3.

4. Arrest ⇐68

Under evidence, forcible entry into apartment where officers had reasonable cause to believe bets were being recorded, after demand for admittance and refusal was not unlawful. West's Ann.Pen.Code, § 836, subd. 3.

5. Criminal Law ⇐395

Where after effecting lawful entry to apartment to make arrest of person therein for conducting bookmaking, officers observed a gas burner lighted and a "National Daily Reporter" and a long piece of white paper burning on top of it, officers did not conduct a search in obtaining such articles and hence they were properly admitted in bookmaking prosecution. West's Ann.Pen.Code, § 836, subd. 3.

6. Gaming ⇐98(5)

Evidence warranted finding that defendant occupied a place with papers and paraphernalia for purpose of registering bets. West's Ann.Pen.Code, § 337a, subd. 2.

John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged in three counts with violations of Penal Code, Section 337a. Count I alleged a violation of Subd. 1 of the foregoing statute in that defendant was engaged in "pool selling and bookmaking". Count II alleged a violation of Subd. 2 in that defendant kept and occupied an apartment for the purpose of recording and registering bets. In Count III defendant was accused of a violation of Subd. 4 in that he recorded and registered bets. The information also alleged a prior conviction of the crime of receiving stolen property, a felony.

Following the entry of not guilty pleas as to each count and denial of the prior conviction, the cause proceeded to trial before the court sitting without a jury resulting in the conviction of defendant on Count II, and his acquittal on Counts I and III. The allegation of a prior conviction was found to be true. Defendant's motion for a new trial was denied, proceedings were suspended, and defendant granted conditional probation. From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

We regard the following as a fair epitome of the factual background surrounding this prosecution. On the afternoon of February 18, 1956, at approximately 2 o'clock, Bruce Keesling, a deputy sheriff of Los Angeles County, attached to the vice detail, engaged in a telephone conversation with a person whom he had previously seen and talked to, but who was not a paid informer nor someone pursuant to whose previous conversations the deputy sheriff had made any arrests for bookmaking. The telephone number LUdlow 91441 was received from the informer. The informer stated he knew the telephone number that one could telephone bets in to, how to telephone them in, who to pay, and how to get the payoff, and therefore, in the expressed opinion of Deputy Sheriff Keesling, he was "on the inside" with the bookmakers.

Deputy Sheriff Keesling took the telephone number LUdlow 91441 to the telephone company and "ran it through the company's records".

He and Sergeant Johnson then went to Apartment D at 3538 East 56th Street in Maywood. Deputy Sheriff Keesling used the telephone in Apartment D to dial LUdlow 91441. Deputy Sheriff Keesling had been told where the telephone answering that number was located. A male answered at the other end, saying, "Yes." Deputy Sheriff Keesling said, "This is Buck. I want five and five on Placer in the

seventh at Santa Anita." The person at the other end of the telephone said, "Is that all you've got?" and the deputy sheriff said, "Yes," and hung up.

After he hung up the telephone, Deputy Sheriff Keesling and Sergeant Johnson went to the door of Apartment E at the same address. Sergeant Johnson said, "This is the Sheriff's office, you are under arrest for bookmaking. Open the door." The door was not opened. After about one minute of waiting, the officers entered by breaking down the door. As they entered the door, they saw the defendant standing at the stove in the kitchen. A gas burner was going and a National Daily Reporter and a long piece of white paper were burning on top of the burner.

Deputy Sheriff Keesling found a telephone with the number LUdlow 91441 in Apartment E. In his opinion, he had heard the defendant's voice two or three minutes before they entered the apartment, when he made the telephone call to LUdlow 91441.

Deputy Sheriff Keesling had a conversation with the defendant on the premises at that time. He asked defendant how much he was taking in every day, and the latter said that it was between six and seven hundred dollars. The deputy sheriff asked if the betting markers were in his handwriting, and the defendant said that they were. When the deputy sheriff asked the defendant who he worked for, the latter said that he did not know the person's name, but that this person paid him $75 a week and brought him to and from that location. Deputy Sheriff Keesling also asked him what the last wager was that he had received over the telephone, and the defendant said that he believed it was a five and five dollar bet on Placer. When the deputy sheriff asked him where he had written that down, the defendant said it had probably burned off.

Following a stipulation that Officer Keesling "was an expert in matters pertaining to bookmaking and bookmaking paraphernalia", the latter testified that he examined the notations on the long piece of white paper which had been burning on the stove and that they represented wagers on horses racing at Santa Anita racetrack on the day here in question. Officer Keesling was the sole witness for the prosecution and defendant offered no testimony in his own behalf.

As his first ground for reversal appellant urges that the National Daily Reporter and the slip of white paper which were first seen burning on top of the stove by the officers in the apartment where he was arrested were obtained by an unlawful search and seizure and therefore, were inadmissible in evidence. Appellant earnestly argues that prior to entering his apartment the officers did not have sufficient information to give them reasonable cause to believe that he was committing a felony in the apartment or had committed a felony therein.

[1–4] There is now a substantial agreement in the decisions of the courts as to what constitutes probable cause or reasonable cause such as will justify an officer in arresting or prosecuting a person upon a criminal charge. Appellant concedes that as clear and comprehensive a statement of the rule as can be found is that enunciated in People v. Kilvington, 104 Cal. 86, 92, 37 P. 799, 801, wherein it is stated that there must exist such a state of facts, " 'as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty' ". Weighed in the crucible of this rule, we are persuaded that under the facts of this case it must be held that the officers had reasonable cause to believe that appellant was committing a felony. It is now settled law that although information provided by an anonymous informant is relevant on the issue of reasonable cause, nevertheless, in the absence of some pressing emergency, an arrest may not be based solely on such information, Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36. We are, however, satisfied that under the facts and circumstances here present,

the court was justified in its conclusion that reliance on the information was reasonable, People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535. We have herein narrated in detail the facts and circumstances upon which the officers acted and it is unnecessary to here repeat them. Suffice it to say that the receipt of the telephone number, checking it through the telephone company, the call placed by dialing the number in question, the conversation had when the call was answered, together with other circumstances set forth in the above evidentiary narative, all point to the logical conclusion that Officer Keesling had sufficient grounds for reasonably believing that the apartment occupied by appellant was a bookmaking establishment. People v. Brown, 147 Cal.App.2d 352, 305 P.2d 126. It therefore follows that the forcible entry into the apartment after demand for admittance and refusal was not unlawful, People v. Miller, 143 Cal.App.2d 558, 299 P.2d 1010; Penal Code, Sec. 836, subd. 3.

[5] After having effected what we have concluded was a lawful entry to the apartment to make the arrest of the person therein, the officers observed appellant standing alongside the stove in the kitchen. A gas burner was lighted and a National Daily Reporter and a long piece of white paper were burning on top of it. The officers were not required to blind themselves to what was in plain sight and certainly it cannot be said that in the instant case they conducted a search to unearth the foregoing articles which were readily visible and accessible to the officers, People v. Roberts, 47 Cal.2d 374, 303 P.2d 721. Under the circumstances here present, we are satisfied the court did not err in admitting the National Daily Reporter and the white paper into evidence.

Finally, appellant challenges the sufficiency of the evidence to support the finding that he did "keep and occupy an apartment" in violation of Penal Code, Section 337a, Subd. 2. Appellant urges that "There has been no effort here to show defendant rented the apartment, how long he remained in the apartment on the date of arrest or any other date, nor that any of the furniture, clothing or telephone belonged to the defendant. No attempt was made to inquire of the manager or owner of the premises who rented the same, paid rent or was seen in the establishment."

[6] When consideration is given to the evidentiary features of this case, including as they do the conversation between Officer Keesling when he dialed LUdlow 91441 on the telephone, the presence of the National Daily Reporter and the piece of white paper with notations thereon representing wagers on horses running on the date here in question, the further conversation with appellant after his arrest concerning the betting markers being in his handwriting, that he was receiving $75 per week from his employer who took him daily to and from his place of operations, we are persuaded that the conclusion of the trial judge that appellant occupied a place with papers and paraphernalia for the purpose of registering bets was justified. People v. Barnhart, 66 Cal.App.2d 714, 721, 153 P.2d 214; People v. Newman, 24 Cal.2d 168, 174, 148 P.2d 4, 152 A.L.R. 365.

We have examined the cases of People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707; People v. King, 111 Cal.App.2d 201, 244 P.2d 20; and People v. Simon, 66 Cal. App.2d 860, 153 P.2d 420, relied upon by appellant. However, we find the factual situation involved in these cases easily distinguishable from the facts presented in the case at bar.

The judgment and the order denying defendant's motion for a new trial are and each is affirmed.

DORAN and FOURT, JJ., concur.

148 Cal.App.2d 966

Philip F. JOHNSTON and Merle F. Johnston, Petitioners,

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, et al., Respondents.

Civ. 22229.

District Court of Appeal, Second District, Division 2, California.

March 8, 1957.

Rehearing Denied April 3, 1957.

Hearing Denied May 1, 1957.

Proceeding in certiorari to review order of Superior Court finding that city and its officials were not in contempt for violation of injunctive provisions of judgment of the Superior Court. The District Court of Appeal, Richards, J. pro tem., held that where owners' property was zoned residential, was rezoned as commercial, but rezoning was defeated in referendum election which trial court held to be void, and court's judgment restrained city from interfering with use of property for commercial uses, injunctive provisions were mandatory and were stayed by city's pending appeal of judgment, and trial court was without jurisdiction in contempt proceedings against city for alleged interference with use of property for commercial purposes, except to discharge alleged contemnors.

Order of trial court affirmed.

1. Appeal and Error ⇐460(2)

A prohibitory injunction is not stayed by an appeal therefrom, while an injunction mandatory in character is automatically stayed by appeal.

2. Injunction ⇐5

An injunction is "prohibitory" which merely has the effect of preserving subject of litigation in status quo, while, in general, an injunction is "mandatory" if it has effect of compelling performance of a substantive act and necessarily contemplates change in relative position or rights of parties at time injunction is granted or decree entered.

See publication Words and Phrases, for other judicial constructions and definitions of "Mandatory Injunction" and "Prohibitory Injunction".

3. Injunction ⇐5

If injunction compels party affirmatively to surrender position which he holds and which, upon facts alleged by him, he is entitled to hold, it is mandatory.

4. Appeal and Error ⇐460(2)

Where owners' property, zoned as residential was rezoned as commercial, but rezoning was defeated in referendum election which trial court declared to be void, and court's judgment restrained city from interfering with use of property for commercial uses, injunctive provisions were mandatory and were stayed by city's pending appeal of judgment, and trial court was without jurisdiction in contempt proceeding against city for alleged interference with use of property for commercial purposes except to discharge alleged contemnors.

Harry R. Roberts, Pomona, for petitioners.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

William G. Bergman, Jr., City Atty., Claremont; Burke, Williams & Sorensen and Royal M. Sorensen, Santa Monica, for real parties in interest and respondents.

RICHARDS, Justice pro tem.

This is a proceeding in certiorari to review an order of respondent court finding the defendants not in contempt for violation of the injunctive provisions of a judgment of respondent court.

Petitioners are new and used-car dealers and are the owners of certain real property in the City of Claremont. On April 17, 1951, the property in question was zoned by Ordinance No. 441 as R–1, single family residence, and on December 14, 1954, it was re-zoned by Ordinance No. 513 as C–2, commercial use, which includes automobile sales and service. A referendum election on May 3, 1955 resulted in the defeat of

Ordinance No. 513. Thereafter petitioners filed their action in respondent court against the City of Claremont, its five councilmen, city attorney, and three building inspectors, and a judgment in favor of petitioners was entered on March 27, 1955, declaring the referendum proceeding void and decreeing that the petitioners were entitled to use their property for the conduct of an automobile dealership business pursuant to Ordinance No. 513. The injunctive provisions of the judgment are: "That so long as said Ordinance No. 513 of defendant City of Claremont remains in force and effect, plaintiffs, * * * shall have a clear legal right to the issuance * * * of a permit or permits to erect and maintain such building or buildings as requested in said application or applications so presented." And further, "that so long as said Ordinance No. 513 of defendant City of Claremont remains in force and effect, the * * * defendants * * * are hereby forever restrained and enjoined from interfering in any manner with plaintiffs, * * * in using said Boulevard Frontage for an automobile dealership or using the same for any other commercial uses as authorized and permitted in a C–2 Zone".

Defendants appealed from the judgment and the appeal is now pending. After the judgment was entered, petitioners paid the permit fee and made several unsuccessful demands for the issuance of a building permit. On June 27, 1956, and without a building permit having been issued, the petitioners began the construction of a commercial building on the property in accordance with the plans previously approved by the City. On July 3, 1956, upon the complaint of one of the building inspectors, a complaint was issued against the petitioner Philip F. Johnston charging him with a misdemeanor in erecting a building upon the property without first having obtained a permit, and the trial is still pending. On July 9, 1956, the City of Claremont filed an action against the petitioners to enjoin them from erecting the commercial building upon the property until a permit had been obtained. Demurrers to the complaint were sustained and upon failure to amend a judgment of dismissal was entered. On July 26, 1956, the defendants applied for a writ of supersedeas to stay the enforcement of the judgment now before us. This application was denied without opinion.

The contempt proceeding was instituted by the filing of an affidavit made by petitioner Philip F. Johnston which charged that the defendants had violated the injunction by their refusal to issue a building permit; by the filing of the misdemeanor proceeding; by the filing of the injunction action against the petitioners and by the filing of the application for a writ of supersedeas. Upon this affidavit the superior court issued an order directing the defendants to show cause why they should not be punished for contempt of court because of the acts assertedly committed in violation of the injunction.

Upon the hearing of the order to show cause the only evidence offered consisted of a certified copy of the judgment roll in the injunction action brought by the defendant City of Claremont; the complaint in the misdemeanor proceeding; a copy of the approved plot plan submitted to the building inspector, and a certified copy of the general zoning ordinance of the City of Claremont. The court thereafter filed its "Memorandum of Opinion" and found "that the defendants are not in contempt of court, and they are ordered discharged." It appears that although the court did not refuse to hear the contempt proceeding on its merits, it did not pass on the merits of the proceeding and made its order discharging the alleged contemnors solely on the ground that the injunctive provisions of the judgment were mandatory in character and therefore stayed by the pending appeal. By this proceeding, petitioner seeks to annul that order upon the ground that the respondent court having jurisdiction refused to exercise its jurisdiction in the determination of the contempt proceeding. Taylor v. Superior Court, 20 Cal.2d 244, 246, 125 P.2d 1.

[1] It is well settled that a prohibitory injunction is not stayed by an appeal therefrom, while an injunction mandatory in character is automatically stayed by appeal. Food & Grocery Bureau v. Garfield, 18 Cal.2d 174, 176, 114 P.2d 579; Byington v. Superior Court, 14 Cal.2d 68, 70, 92 P.2d 896; Ohaver v. Fenech, 206 Cal. 118, 121, 273 P. 555. The only question which we are called to pass upon is whether the injunctive provisions of the judgment upon which the alleged contempt was predicated are mandatory or prohibitory in character.

At the time the decree herein was granted, Ordinance No. 513, zoning the petitioners' property for commercial purposes, stood repealed by the referendum proceedings and the petitioners' property was therefore subject to Ordinance No. 441 limiting the use thereof to residential purposes. The decree under consideration declared that the referendum proceedings were void and that the petitioners had the right under Ordinance No. 513 to the issuance of a permit to erect a building within the authorized uses of a C–2 zone and restrained the defendants from interfering with the petitioners in the use of their property within the authorized uses of a C–2 zone. Thus it appears that the decree did not have the effect of merely preserving the subject of the litigation in statu quo but that it effected a change in the relative position and rights of the parties by compelling the defendants to surrender their position that the use of the property was limited by Ordinance No. 441 to residential purposes and compelled the defendants to accord to the plaintiffs, under Ordinance No. 513, the rights of an owner of property within a C–2 zone to use his property for commercial purposes which included the right to permit upon compliance with existing ordinances and the right not to be interfered with in the commercial use of his property.

[2, 3] An injunction is prohibitory which merely has the effect of preserving the subject of the litigation in statu quo, while, in general, an injunction is mandatory if it has the effect of compelling the performance of a substantive act and necessarily contemplates a change in the relative position or rights of the parties at the time the injunction is granted or the decree entered. Hence if the injunction compels a party affirmatively to surrender a position which he holds and which upon the facts alleged by him he is entitled to hold, it is mandatory, City of Pasadena v. City of Alhambra, 75 Cal.App.2d 91, 95, 170 P.2d 499; Ambrose v. Alioto, 62 Cal.App. 2d 680, 685, 145 P.2d 32; Pomin v. Superior Court, 44 Cal.App.2d 206, 209, 112 P.2d 17.

In Stewart v. Superior Court, 100 Cal. 543, 35 P. 156, 563, certiorari was sought to annul an order of contempt based on a judgment which ordered the defendants to refrain from interfering with the plaintiff in making a connection of his water pipe with the water pipe line of the defendants and from interfering with a specified flow of water from defendants' pipe line. After an appeal had been filed, the plaintiffs connected their water line to that of the defendants and the defendants thereupon broke the connection and for this act were adjudged guilty of contempt. In annulling the contempt order, the court said 100 Cal. at page 547, 35 P. at page 158, "An injunction, though restrictive in form, if it have the effect to compel the performance of a substantive act, is mandatory, and necessarily contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted, or the decree is entered."

In Byington v. Superior Court, 14 Cal. 2d 68, 92 P.2d 896, a proceeding in certiorari to review an order of the trial court adjudging petitioners guilty of contempt, the judgment decreed that the defendant city had a prescriptive right to store a specified amount of water and enjoined it from storing water in excess of such amount. The alleged contempt consisted of storage of water in excess of the amount allowed under the decree. In annulling a finding of contempt, the court said in 14 Cal.2d at page 73, 92 P.2d at page 898, "We are of the view, therefore, that in so far as the injunctive decree of the respondent

court undertook to and did preclude the exercise by the city of its appropriative rights in and to the excess waters of the Tuolumne River it was affirmative or mandatory in character, within the meaning of the authorities, and was therefore automatically stayed by the appeal therefrom and the action of the city and petitioners, pending the appeal, in diverting and storing excess waters to the capacity of the enlarged reservoir was not contemptuous and the order characterizing and punishing it as such was in excess of the respondent court's power and jurisdiction and must be annulled."

[4] We conclude that the injunctive provisions of the judgment are mandatory in character and thus stayed by the pending appeal and that the respondent court was without jurisdiction in the contempt proceeding other than to discharge the alleged contemnors.

The order is affirmed.

FOX, Acting P. J., and ASHBURN, J., concur.

Hearing denied; SCHAUER, J., dissenting.



149 Cal.App.2d 175

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Carl E. BROWN, Defendant and Appellant.

Cr. 3301.

District Court of Appeal, First District, Division 2, California.

March 15, 1957.

Proceeding on motion to set aside judgment of conviction entered by the Superior Court, City and County of San Francisco, H. A. Van der Zee, J. The District Court of Appeal denied motion from the bench without opinion. On petition for rehearing, the District Court of Appeal held that filing of a written opinion at time it denied the motion was not required.

Petition denied.

1. Courts ⇐104

Upon motion to set aside judgment of conviction previously affirmed by the District Court of Appeal, such court was not required to file a written opinion at time it denied the motion. West's Ann.Const. art. 6, § 24; West's Ann.Pen.Code, § 1265.

2. Courts ⇐104

In dismissing an appeal, the court determines that the "cause" is not properly before it, and, therefore, practice of the Supreme Court and the District Court of Appeal of granting motions to dismiss appeals from the bench without written opinion is justified. West's Ann.Const. art. 6, § 24; West's Ann.Pen.Code, § 1265.

Charles R. Garry, George Olshausen, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of California, Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., of the City and County of San Francisco, Norman Elkington, Asst. Dist. Atty., San Francisco, for respondent.

PER CURIAM.

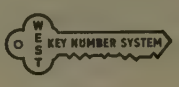
Petitioner moved this court under Penal Code, § 1265 to set aside the judgment of conviction previously affirmed by this court in People v. Brown, 131 Cal.App.2d 643, 281 P.2d 319. We denied the motion from the bench without opinion. At the same time we granted a motion to dismiss an appeal from a similar order made by the Superior Court.

[1] On petition for rehearing of these orders, petitioner Brown argues that this court was required by Art. VI, sec. 24, California Constitution, to file a written opinion. In Funeral Directors Ass'n v. Board of Funeral Directors, 22 Cal.2d 104, 136 P.2d 785, the Supreme Court held that

this constitutional provision does not require a written decision when the court denies an original application for a writ. Here petitioner proceeded by motion instead of by petition. His choice of the method of application should not affect the rule announced in the cited case.

[2] It has been the accepted practice for both the Supreme Court and the District Courts of Appeal to grant motions to dismiss appeals from the bench without written opinion. The justification for this procedure is that in dismissing an appeal the court determines that the "cause" is not properly before it.

Petition for rehearings of both orders denied.



148 Cal.App.2d 840

John H. WARE and Harriet Ware, Plaintiffs and Respondents,

v.

Guy N. STAFFORD, Defendant and Appellant.

Civ. 22074.

District Court of Appeal, Second District, Division 2, California.

March 1, 1957.

Rehearing Denied March 27, 1957.

Hearing Denied April 25, 1957.

Suit to cancel an oil lease previously granted to lessee and to quiet title of the lands in lessors. The Superior Court, Los Angeles County, Philip H. Richards, J., entered judgment for lessors, and lessee appealed. The District Court of Appeal, Moore, P. J., held that lessors were not obligated to allege that the lessee had not remedied the purported default or that after failure to remedy, a forfeiture was declared, and were not obliged to allege the performance of condition subsequent or anticipate and negate any defense which might have been available to lessee, and therefore, trial court did not err in refusing to grant lessee judgment on the pleadings.

Judgment affirmed.

1. Mines and Minerals ⇐78(7)
Pleading ⇐345(1.4)

Where oil lease obligated lessee to undertake operations to clean out and place in production an abandoned well but lessee had failed to comply with lease, and lessors had not prevented lessee from compliance, lessors were not required to allege that lessee had not remedied the purported default, or that after failure to remedy, a forfeiture was declared, and therefore lessee was not entitled to judgment on pleadings.

2. Landlord and Tenant ⇐63(1)

No lessee may deny the title of his lessor.

3. Property ⇐9

Lessors' title at the time they signed oil lease was presumed to have continued. West's Ann.Code Civ.Proc., § 1963, subd. 32.

4. Mines and Minerals ⇐78(1)

Under an oil lease obligating lessee to place in production an abandoned well within a six month period, "production" meant production as that term is used in oil-field practice which is paying or commercial production, and therefore, where only 30 barrels of oil were "bailed out", it was not production in the sense used in the lease and lease was properly cancelled.

5. Mines and Minerals ⇐78(4)

Under lease obligating lessee to place well in production within a six month period, where lessee had failed to place well on production within that time, lessee became a tenant by sufferance and no notice of termination of the lease was required.

6. Mines and Minerals ⇐78(4)

Where oil lease obligated lessee to place well in production within a six month period and lessee had been twice served with notice of his failure to comply with terms of lease, lessors' title was quieted by lessors' pursuit of notice method.

7. Landlord and Tenant ⇐27

A written lease cannot be defeated by mere talk.

8. Mines and Minerals ⇐78(7)

In action to cancel an oil lease, finding that there was no oral agreement suspending every condition of the lease was justified.

Guy N. Stafford, in pro. per.

R. R. Colby, Los Angeles, for respondents.

MOORE, Presiding Justice.

This appeal is from a judgment cancelling an oil lease previously granted to appellant and quieting title of the lands in respondents.

The lease was executed April 15, 1948, covering lots 19, 20, 21, block 18 of Athens in Los Angeles County. It obligated lessee to "undertake operations to clean out and place on production the abandoned well heretofore drilled on lot 19 or 20." After such well shall have been placed on production "he shall thereafter produce said well in conformity with good oilfield practice and the laws of * * * California * * * In event production is obtained from said well and the lands, the duration of the leasehold shall be 20 years from and after the date hereof. * * * If no production is obtained from said well within a period of six months from the effective date of the permits" to clean out and place the abandoned well on production as required by the lease, "then this indenture shall terminate and all rights and obligations of the persons hereto shall cease and be at an end * * *." Lessee was obligated to pay one-sixth royalty and was required to "keep a full and complete report of the production and the receipts thereof * * * for each calendar month's production * * *. In the event of a breach of any of the terms or provisions of this lease by the Lessee, before Lessor may terminate the lease for such reasons, he shall be obligated to serve a notice on Lessee, specifically stating the purported breach * * * and demand such breach be remedied. Upon failure of Lessee so to do within 60 days after receipt of such notice, this lease may be terminated at the election of Lessor by such notice, and thereupon all rights of the Lessee shall be at an end under the terms of this lease. This paragraph relates to breaches occurring after production is obtained. * * *

"All notices by the lessor to lessee shall be sent by registered mail addressed to 839½ West 83rd Street, Los Angeles 44, California. * * *

"Upon the termination of this lease for any reason, Lessee shall quietly and peaceably surrender possession of the lands and shall deliver a good and sufficient quitclaim to the recorder of Los Angeles County for recordation * * * and shall remove all his personal property from said lands, and thereupon all rights of the parties hereto shall cease as to this lease and all right of Lessee in or to said lands be at an end."

On September 19, 1953, respondents forwarded by registered mail to appellant a notice in writing that appellant had "failed to live up to the terms of the oil lease" and that they were "serving notice on you * * * that if these conditions are not corrected within 60 days that this lease is void and of no further effect."

On September 17, 1954, respondents forwarded to appellant at his address their Notice that he "did not exercise reasonable diligence in efforts to place the said well * * * on production * * * did not produce from said well or any other in connection with the lease in conformity with good oil-field practice * * * as required by the terms of said lease; but wholly failed to do so.

"That no production has been obtained by you from said well or from any other on said lease as per the terms thereof, to prevent the termination thereof."

This notice was accompanied by two demands, to wit, (1) a demand that appellant "place said well on production in conformity with good oil-field practice and the laws" of California "on or before Decem-

ber 1, 1954; and notice is hereby given that, unless you do so, the * * * Lessor hereby elects and hereby declares that by this notice the lease will be terminated, and all your rights thereunder shall be at an end as provided under the terms of the lease." (2) "(And in case of such termination of said lease, demand is hereby made that you comply with all the provisions as required in * * * said lease.)"

Appellant having failed to comply, respondents subsequently filed their complaint alleging that appellant had wholly failed to perform his agreement as required by the lease in that he had not exercised "reasonable diligence in his efforts to place said well on production" as required by the lease and never did place it or any other one on production; that no production was obtained from said well within six months; that no royalty was ever paid to or for the plaintiffs; that said lease has expired and defendant has no right thereunder; that by the terms of the lease the "indenture shall terminate and all rights and obligations of the persons hereto shall cease and be at an end." The plaintiffs were and still are the owners of lots 19, 20, 21.

Appellant pleaded a general denial to both counts and alleged that an oral agreement had been entered into in May 1954 to the effect that the lease of April 15, 1948 was in good standing; that appellant had six months within which to place the oil well on steady production; that such oral agreement was reduced to writing but respondents did not sign it and did not comply with it.

Also, he pleaded that respondents were estopped under the terms of the oral agreement to claim that the oil lease had been terminated and that the commencement of this action was premature.

At the trial, the court heard all the relevant evidence offered by appellant, all his explanations and excuses and made findings in favor of respondents on all their allegations and against appellant that appellant had not acted with diligence in attempting to recover oil and gas from the leased lands, had not obtained production within a period of six months from the effective date of the permits to clean out and place the abandoned well on production and had not kept a full and complete report of the production or the receipts thereof, and also found all other allegations of the complaint to be true.

The court adjudged respondents to be owners of the leased lands and entitled to possession thereof; annulled the lease of April 15, 1948, and adjudged that appellant had no right, title or interest in such lands.

[1] Appellant now contends that the court erred to his detriment in refusing to grant him judgment on the pleadings. Such ruling was correct. After the case had been tried, it was made clearly to appear that appellant had failed to comply with the terms of the lease, that respondents had performed all covenants on their part to be performed and had not prevented appellant from compliance with his obligations and they were not estopped to terminate the lease by anything they had done.

Appellant complains that his motion should have been granted because there was "no allegation that the defendant had not remedied the purported default, or that after failure to remedy, a forfeiture was declared, another condition precedent to suit and jurisdiction." It was not incumbent upon plaintiffs to allege that appellant had not remedied the breach. There was no way to remedy a breach except by waiver or by a supplemental agreement. Respondents did not waive the breaches of appellant and the court found that they did not make a new agreement, reinstating the lease after he had failed to perform as provided by that document. Respondents were not obliged to allege the performance of conditions subsequent or to anticipate and negate any defense which might have been available to appellant. Licht v. Gallatin, 84 Cal.App. 240, 245, 257 P. 914; Arnold v. American Ins. Co., 148 Cal. 660, 668, 84 P. 182, 25 L.R.A.,N.S., 6.

[2, 3] Appellant contends that the findings and judgment are contrary to the evidence in that there was no evidence that

respondents owned the lands they had leased; no evidence that respondents still owned the property, no evidence that the lease had been terminated by notice and that appellant had not remedied the asserted default. Such contention is to assert an ignorance of the findings and the evidence supporting them. The breaches are meticulously alleged, notices thereof to appellant were twice served and his failure to comply with respondents' demand is as conspicuous as appellant himself. No lessee may deny the title of his lessor. The title respondents had at the time they signed the lease is presumed to have continued. Code Civ.Proc. § 1963, subd. 32.

[4–6] Appellant contends that respondents made no proof of their claim that there was no production within the six-month period. Why not? The only semblance of production during that period was appellant's assertion that 30 barrels were "bailed out." But that was not *production* in the sense used in the lease. Production meant production as that term is used in oil-field practice which is paying or commercial production. The purpose of an oil and gas lease is to recover and save those hydrocarbon substances from the ground leased in such amounts as would pay royalties to the lessor and make profits for the lessee. Appellant makes no claim now that he ever recovered any such production. Finally, no notice of termination was actually necessary. At the end of the six-month period by reason of his failure to place the well on production, appellant became a tenant by sufferance. Moon v. Marker, 26 Cal. App.2d 33, 37, 78 P.2d 460. But, inasmuch as the parties have argued on the basis that notice to appellant was a necessary step to terminate his lease, we have shown that respondents' title was quieted by their pursuit of the notice method.

[7, 8] Appellant insists that the court erred in failing to find that the oral agreement suspended every condition of the lease until December 1, 1954. There was no oral agreement. A written lease cannot be defeated by mere talk. Appellant testified that John H. Ware stated that the lease would remain in good standing until December 1, 1954, but that gentleman testified that he did not so state, and the court adopted Mr. Ware's testimony.

Affirmed.

FOX and ASHBURN, JJ., concur.



148 Cal.App.2d 952

In the Matter of the ESTATE of Lillian INMAN, a/k/a Lillian Grundy Inman, Lillian M. Grundy, Lillian Grundy and Lillian Inman, deceased.

E. P. INMAN, Appellant,

v.

F. M. GRUNDY, Georgia Helen Gemme and Susan Ann Henperly, Respondents.

Civ. 17032.

District Court of Appeal, First District, Division 2, California.

March 7, 1957.

Proceeding involving determination of heirship. The Superior Court, Alameda County, Richard H. Chamberlain, J., entered a decree adverse to surviving spouse and he appealed. The District Court of Appeal, held, inter alia, that evidence was insufficient to sustain finding that automobile registered in deceased's name was her separate property rather than community property of decedent and surviving spouse.

Reversed in part and affirmed in part.

1. Husband and Wife ⇐249

A partnership agreement between spouses does not have the effect of changing property contributed by one of such partners into community property, and during the existence of such partnership the property will be subject to special rules

as to partnership property differing from rules governing community property.

2. Husband and Wife ⇐42

After termination of a partnership agreement between spouses such as by death of one of the spouses, the property contributed will, in the absence of special agreement, revert to its former condition.

3. Husband and Wife ⇐14(4)

Where husband by a gift deed granted his deceased wife a one-half interest in certain realty, such conveyance, in the absence of contrary agreement, caused them to hold the ranch as tenants in common, and not as community property. West's Ann.Civ.Code, § 162.

4. Appeal and Error ⇐1010(1)

Question of whether or not statutory presumption that real or personal property acquired by married woman by instrument in writing is her separate property has been overcome by evidence is a question of fact for trial court whose holding in such respect is conclusive on appeal, unless manifestly without support in the evidence. West's Ann.Civ.Code, § 164.

5. Husband and Wife ⇐264

In proceeding involving heirship to certain property, evidence sustained verdict that certain realty conveyed by deed from former owners to deceased wife as her separate property, was her separate property rather than community property of deceased wife and her husband. West's Ann.Civ.Code, § 164.

6. Evidence ⇐594
Witnesses ⇐315, 316, 363(1)

Trier of facts may reject testimony even of an uncontradicted witness, provided that he does not act arbitrarily, and that the interest of the witness and that the result of the case, the manner in which he testifies, or contradictions appearing in the evidence may justify such rejection.

7. Husband and Wife ⇐256, 266

Where deed which conveyed realty to wife described it as her separate property with express consent of husband who participated in transaction, such deed definitely established the character of the realty as wife's separate property and the intent to make a gift would, if necessary, be assumed.

8. Husband and Wife ⇐49½(8), 264

In proceeding involving heirship to certain property of deceased wife, evidence sustained finding that ring received by husband from his mother was given to wife as a gift and constituted her separate property rather than community property of deceased wife and husband.

9. Husband and Wife ⇐262(1)

A certificate of registration of automobile is not "instrument in writing" by which a person acquires title within meaning of statute providing that realty or personalty acquired by married woman by instrument in writing is presumed to be her separate property. West's Ann.Civ.Code, § 164.

See publication Words and Phrases, for other judicial constructions and definitions of "Instrument in Writing".

10. Husband and Wife ⇐262(1, 2)

Where statutory presumption that personal property acquired by married woman by instrument in writing is her separate property does not apply, implication is that property held in wife's name is community property, and burden is on wife to prove that property acquired during marriage became her separate property by gift or otherwise. West's Ann.Civ.Code, § 164.

11. Husband and Wife ⇐264

In proceeding involving determination of heirship, evidence was insufficient to sustain finding that automobile registered in deceased's name was her separate property rather than community property of decedent and surviving spouse.

12. Husband and Wife ⇐258, 266

Improvements and expenditures to realty owned separately by wife, made by husband from community funds, do not give rise to a lien and are presumed to be gifts.

13. Husband and Wife ⇐266

In proceeding for determination of heirship, evidence failed to rebut presumption that expenditures made by husband for improvement of realty constituting separate property of wife, made from community funds, was a gift.

Richard F. McCarthy, Oakland, for appellant.

Brown & Smith, Jacqueline Taber, Oakland, for respondents.

PER CURIAM.

This is an appeal from a decree determining heirship. Lillian Inman died intestate and without issue on July 30, 1954, leaving surviving her and entitled to succession her husband, one brother and two sisters. It was the position of the brother and sisters that all the estate was the separate property of decedent and that each of them under section 223 of the Probate Code was entitled to one-sixth, and the husband to one-half of it all, whereas it was the position of the husband that all the estate, with the exception of a piece of real property at 6233 Leona Street in Oakland, hereinafter called the Leona Street property, acquired by decedent before her marriage, was community property to which he alone was entitled. With respect to the Leona Street property he claimed over and above his undivided one-half portion a lien for the reimbursement of $4,000 allegedly expended by him from community funds in the investment and improvement of said property. The court recognized the one-sixth interest of the brother and each sister in all the estate except the furniture and furnishings contained in the inventory, as to which the sole ownership of the husband was recognized and did not grant the husband the lien for reimbursement claimed with respect to the Leona Street property. The husband appeals.

The items still disputed on appeal are the following:

(a) A diamond ring, appraised at $175, which the mother of the husband had left to him at her death.

(b) A 1940 LaSalle automobile appraised at $120, registered in the name of Lillian Grundy, decedent's maiden name, when they bought it in 1940.

(c) A piece of real property at 240 MacArthur Boulevard in Oakland appraised at $18,500, acquired in 1942 by a deed from the former owners to Lillian Grundy Inman, a married woman, as her separate property, with a statement in the body of the deed that Mr. Inman joins in the deed in order that it may be her separate property. It will herein further be referred to as the MacArthur property.

(d) Seven United States Savings Bonds, Series G, in the amount of $1,000 each, appraised at $7,000, stipulated to have all been purchased on May 24, 1947 in the name of Mrs. Lillian Grundy Inman.

(e) The claimed lien of $4,000 on the Leona Street property, which property was appraised at $6,000.

[1–3] The only witnesses at the trial were the husband and Mr. Read, a public accountant, who prepared the income tax returns of the spouses in accordance with data provided by decedent. Many exhibits were received into evidence. In general, the husband testified that they did not divide their property, each maintaining his or her separate property, but they were supposed to be partners, he furnishing all the property and she attending to the business. It is appellant's contention that said allegedly uncontradicted evidence proves that they intended all their property to be community property. However, a partnership agreement between spouses does not have the effect of changing property contributed by a partner into community property. During the existence of the partnership the property will be subject to the special rules as to partnership property (See 20 Cal.Jur. 716 et seq.) which differ from those governing community property. After termination of the partnership (e.g. by death of one of the spouses) the property contributed

will in the absence of special agreement revert to its former condition. Moreover, there is other evidence and circumstances in the case which would justify the trial court in disbelieving the husband's above statements. His testimony and the exhibits showed in part that the source of the assets of the spouses was mainly a 209 acre ranch in Livermore, given to him by his mother in 1925 prior to his marriage. His operation of the ranch was generally not successful and money for living expenses and further real property operations was mainly obtained by encumbering the ranch or selling parts of it, the first sale in 1933 when 50 acres were sold. By a gift deed of July 8, 1926 he granted decedent a one-half interest in said ranch property. Since then all documents with respect to the ranch mention both spouses as owners. Property acquired by the wife by gift, from the husband or from others, is her separate property, Civil Code, § 162. The conveyance as a gift of an undivided half of the husband's separate property to the wife caused them in the absence of contrary agreement, to hold the ranch as tenants in common (13 Cal.Jur.2d 307), not as community property.

The purchase of the LaSalle automobile and the down payment on the MacArthur property were made with funds obtained by the sale in 1940 of 109 acres of the ranch for more than $18,000. The MacArthur property was bought because decedent wished to have a big house to take in roomers; she was going to pay off the purchase price. The husband first testified that he did not remember whether there was any discussion between him and his wife as to how the title to the property would be taken. After a noon recess he testified that there had been such a discussion; the wife wanted it in her name because she was going to run the rooming business; he agreed but on condition that it would still be community property and he have a half interest in it. Mrs. Inman consented to his having a half interest.

The purchase of the Government Bonds was made in 1947 after the sale of the last 50 acres of the ranch for $24,000. For $18,000 of said price bonds were bought, nine in the name of the husband, nine in the name of the wife. Twice when funds were needed each sold one bond so that each had seven left. The husband did not list his seven bonds as assets in his wife's estate because they were his separate property. He therefore conceded that the seven bonds in the name of decedent were also her separate property. Such is certainly inconsistent with the husband's original statement that there was no separate, divided property, but only partnership property.

The testimony of the accountant Read that the income tax returns of the spouses were handled as joint returns, all income being split equally between husband and wife, including the rentals received from the MacArthur and Leona Street properties and the profit on the sale of the last 50 acres of the Livermore ranch, and that with repect to the latter he made a note "all community property", is inconclusive as to the character of the property involved, because it included the rental of the Leona Street property, concededly separate property of decedent, and because each of the spouses would have received half of the profit on the sale of the 50 acres irrespective of whether they held the ranch as tenants in common, as partners with equal rights, or as community property, and the name given by the accountant could not be decisive.

If we consider the several items in dispute in the light of the above, the following results. Evidently, there can be no doubt as to the Government Bonds (item d.), which concededly were the separate property of the wife as the result of an agreement of the spouses equally to divide certain funds.

[4–7] The decision with respect to the MacArthur property (item c.) is supported by the disputable presumption of Civil Code section 164 that real or personal property acquired by a married woman by an instrument in writing is her separate property. Whether or not this presumption has been overcome by other evidence is a question of fact for the trial court whose holding in this

respect is conclusive on appeal, unless manifestly without support in the evidence. Nichols v. Mitchell, 32 Cal.2d 598, 605, 197 P.2d 550; Steward v. Paige, 90 Cal.App.2d 820, 824, 203 P.2d 858. We cannot say that the trial court's conclusion that the presumption was not rebutted was erroneous as a matter of law. The court could reject appellant's testimony on which he relies, under the rule that the trier of facts may reject the testimony even of an uncontradicted witness, provided that he does not act arbitrarily, and that the interest of the witness in the result of the case, the manner in which he testifies, or contradictions appearing in the evidence may justify such rejection. Hicks v. Reis, 21 Cal.2d 654, 659–660, 134 P.2d 788; Huth v. Katz, 30 Cal.2d 605, 608–609, 184 P.2d 521. Moreover, the deed which conveyed the property to the wife described it as her separate property with the express consent of the husband who participated in the transaction. It has been held that such definitely establishes the character of the property as her separate property and that the intent to make a gift will, if necessary, be assumed. Miller v. Brode, 186 Cal. 409, 411, 199 P. 531.

[8] With respect to the ring (item a.), not acquired by any writing, the above presumption of section 164 does not apply. The husband testified that when he received the ring out of the estate of his mother shortly after his marriage, his wife wanted it and he handed it to her without any conversation as to his or her rights in it. The court could reasonably infer from the character of the chattel, the relation of the parties and the circumstances of the delivery without reservation or restriction that a gift was intended. In re Estate of Claussenius, 96 Cal.App.2d 600, 607, 216 P.2d 485. At any rate it is not clear how the ring, which originally was the husband's separate property could have become community property as contended by appellant, without any agreement to that effect.

[9–11] Neither does the presumption of section 164 apply to the automobile (item b.). "The certificate of registration is not 'an instrument in writing' by which a person acquires title." Pacific Tel. & Tel. Co. v. Wellman, 98 Cal.App.2d 151, 155, 219 P. 2d 506, 510. The implication then is that the property is community property, Pacific Tel. & Tel. Co. v. Wellman, supra, 98 Cal. App.2d at page 154, 219 P.2d 506, and the burden is on the wife to prove that the property acquired became her separate property by gift or otherwise. In re Estate of Walsh, 66 Cal.App.2d 704, 708, 152 P.2d 750. The husband testified that the car was registered in the wife's name for convenience only, because she did the driving, he having no driver's license anymore. Respondents did not offer any contrary evidence or point out any on appeal, relying on the pink slip only. There is no evidence showing that the purchase of the car after the sale of ranch acreage in 1940 was part of an equal division between the spouses like the purchase of the bonds after the 1947 sale. Nor do we see any substantial basis for an inference that a gift was intended, as was the case with respect to the ring. The decision regarding the automobile will be reversed.

[12, 13] The rejection of the lien for reimbursement for improvements made on the Leona Street property by the husband and for the payments made on an encumbrance on said property from funds which the husband testified belonged jointly to him and his wife (item e.) is supported by Dunn v. Mullan, 211 Cal. 583, 588 et seq., 296 P. 604, 77 A.L.R. 1015. That case held that such improvements and expenditures made by the husband from community funds do not give rise to a lien and are presumed to be gifts. See also Callnon v. Callnon, 7 Cal.App.2d 676, 678, 680–681, 46 P.2d 988; In re Estate of Turner, 35 Cal.App.2d 576, 579, 96 P.2d 363. There was in this case no evidence tending to rebut this presumption.

Insofar as the decree adjudged an interest of the brother and sisters of decedent in the LaSalle automobile which forms part of the estate, it is reversed, in all other respects it is affirmed, each party to pay its own costs on appeal.

148 Cal.App.2d 899

William M. DAVIS, Plaintiff and Appellant,

v.

Vernon JOSEPH, Defendant and Respondent.

Civ. 5341.

District Court of Appeal, Fourth District, California.

March 4, 1957.

Hearing Denied May 1, 1957.

Action for claim and delivery of oil and water well drilling equipment, including two trucks on which equipment was mounted. The Superior Court, Kern County, Warren Stockton, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Griffin, J., held where plaintiff had purchased oil and water well drilling equipment from registered owner, plaintiff knew that defendant had had a conditional sales lease option contract with registered owner, but registered owner had not informed plaintiff of defendant's contract, plaintiff was not an innocent purchaser for value from registered owner, even though defendant's conditional sales lease option contract had not been placed on record with Motor Vehicle Department.

Judgment affirmed.

1. Sales ⇐472(5)

Where plaintiff and defendant had formerly been partners, plaintiff had originally entered into a conditional sales lease option contract agreement with registered owner through his partner to purchase water well drilling equipment, including two trucks on which it was mounted and thereafter plaintiff had purchased the equipment from the registered owner, but plaintiff knew that defendant had had a conditional sales lease option contract with registered owner, although registered owner had not informed plaintiff of the conditional sales lease option contract with defendant, plaintiff was not an innocent purchaser for value from registered owner, even though defendant's conditional sales lease option contract had not been placed on record with Motor Vehicle Department.

2. Mortgages ⇐173

An unrecorded mortgage is not void as against a subsequent purchaser or encumbrancer who has actual knowledge of a previous lien.

3. Automobiles ⇐20

A certificate of registration does not necessarily or conclusively establish true ownership. West's Ann.Vehicle Code, § 186.

4. Sales ⇐472(5)

Where plaintiff had purchased oil and water well drilling equipment, including two trucks on which it was mounted, from registered owner, but plaintiff knew that defendant had had a conditional sales lease option contract with registered owner, and there was sufficient evidence to show that defendant was not in default in his conditional sales lease option contract with registered owner, plaintiff could not claim title by virtue of his claim that defendant had breached the conditional sales lease option contract with registered owner.

5. Sales ⇐472(5)

In action for claim and delivery of oil and water well drilling equipment, including two trucks on which it was mounted, where plaintiff knew that defendant had had a conditional sales lease option contract with the registered owner, although conditional sales lease option contract was not recorded, findings that defendant was not negligent in not recording his conditional sales lease option contract with the Motor Vehicle Department and that defendant was not estopped from claiming equitable title under it were justified. West's Ann.Vehicle Code, § 186.

Harrison W. Call, Fair Oaks, for appellant.

Vizzard, Baker & Sullivan, Bakersfield, for respondent.

GRIFFIN, Justice.

In this action for claim and delivery of numerous articles of personal property (oil and water-well drilling equipment) includ-

ing two trucks on which it was mounted, plaintiff and appellant alleged ownership, right of possession, and that defendant and respondent wrongfully came into possession of it on August 5, 1954, and unlawfully retained possession of it. Defendant answered, denied generally the allegations of the complaint and alleged he was in rightful possession of the property; that plaintiff wrongfully took possession of it by means of claim and delivery and that one Janie B. McCarty was the owner of it; that the property was actually worth $20,000; that defendant was purchasing said equipment for $15,000 under a written agreement with the owner dated May 29, 1951, payable $2,000 down and $300 per month; that he had paid her $12,100 on the purchase price and that he was not in default. As a second affirmative defense it is alleged that there was then pending an action between this defendant and Janie B. McCarty, et al., in Kern County; that it involved the same personal property and plaintiff herein had knowledge of such litigation. Defendant seeks affirmative relief requiring plaintiff to return said personal property to defendant or pay him $12,100 plus $1,500 per month rental value.

It appears that on May 29, 1951, in Utah, plaintiff Davis, who resides in Sacramento, California, together with defendant Joseph, entered into a conditional sales lease option contract, in Joseph's name, with one Janie B. McCarty, registered owner of the trucks, for their purchase, together with the equipment mounted thereon. The legal owner was then Ralph Waters. The option provided that vendor retain title until the total purchase price was paid. About this time plaintiff and defendant entered into some partnership agreement whereby each agreed the other owned a one-half interest in said lease-option and that defendant would pay plaintiff one dollar for each foot of wells drilled. Plaintiff claims it also included an agreement to pay him 50 per cent of the profits. The testimony is in conflict as to which partner furnished the down payment and made certain other payments on the contract. At least plaintiff and defendant operated the rig until December, 1951. Plaintiff claims he was unable to locate the rig operated by defendant and finally discovered it in some town in Nevada and he immediately, on May 28, 1952, filed suit there against defendant claiming a partnership dissolution and seeking an accounting. Defendant filed an answer and counterclaim. Plaintiff claims defendant then removed the rig to California and later plaintiff discovered it here on May 26, 1953, filed a similar suit against defendant in Kern County and sought an accounting and the appointment of a receiver. (Action No. 60615.) On June 15, 1953, defendant answered, admitted the agreement of partnership in 1951, and claimed he furnished one-half of the down payment on the purchase contract; that the plaintiff orally agreed to pay defendant $500 per month for his services to the partnership, and that plaintiff also agreed to devote his full time to securing contracts for the drilling of wells but failed to do so and performed no services under the partnership agreement. He admitted the filing of the previous action in Nevada, and claimed that plaintiff therein declared that the partnership had been dissolved; that the rig was then in the jurisdiction of that court and that said action is still pending. In addition to general relief judgment was sought for defendant declaring that plaintiff had breached the agreement with defendant. A receiver was appointed. It then appears that on August 11, 1953, by proper order, Janie B. McCarty, lessor, appeared as intervenor in said action, set up the lease agreement, and alleged that $600 was due on the installments for May and June, 1953. She also alleged other claimed breaches of the lease and sought possession of the property. Defendant alleged he had made all payments due, totaling $10,900 on said contract, up to the time the receiver had been appointed. On September 30, 1953, there was filed in said action a stipulation of respective counsel for all parties that the action be dismissed with prejudice; that defendant Joseph pay certain charges; that "the partnership alleged to have existed between the plaintiff and the defendant

Joseph shall be deemed to have been dissolved as of May 28, 1952"; that the action in Nevada be dismissed, and that plaintiff waives any right, title or interest which he might have or asserts in and to any partnership that may have existed between them, and to the personal property described in the lease contract; that Joseph assume all obligations due under it (approximately $3,328.98); and that the equipment be delivered over to Joseph. Dismissals were entered accordingly.

It appears from defendant's testimony in the present action that thereafter, about October 22, 1953, he and Janie B. McCarty entered into some oral partnership agreement for the use of this equipment in the drilling of water wells. Defendant testified the court was about to sell the rig for bills contracted and unpaid, for $5,000 to a Mr. Bradshaw, in Utah; that both agreed that if defendant would pay these bills they would each own a "fifty-fifty partnership in the equipment" and each was to put up $500 to pay off Mr. Waters, the legal owner, but Mrs. McCarty failed to make such payment. This partnership arrangement continued for some time and subsequently Mrs. McCarty, on March 8, 1954, took exclusive possession of the rig, the main asset of the partnership, without notice to defendant of any default, and stored it in the Petroleum Supply Company yard in Bakersfield under a claim of breach of the partnership agreement. On March 16, 1954, Joseph brought an action against her (Case No. 62495) to recover possession of the rig and outfit, for dissolution of their partnership, and asked for the sale of the property. He sought a restraining order from any disposition of the property pending trial of the action. A temporary restraining order was issued. On the hearing the rig was released to Mrs. McCarty, and the restraining order dismissed on condition she give a bond in the sum of $7,500. No bond was posted. By answer, Mrs. McCarty denied such a partnership, denied that the drilling rig was an asset of the partnership, and claimed it as her sole and separate property. The parties, through their attorneys, then entered into some negotiations for settlement for $4,000 (the balance due on the contract), $3,000 to be paid to Mrs. McCarty and $1,000 to Waters, the legal owner, at $200 per month, and a contract was drawn accordingly. A check for $200, the first payment, was left with Mrs. McCarty's attorney. The contract of purchase was signed by Vernon Joseph but later Mrs. McCarty refused to sign it although her attorney testified in this action that she agreed to its terms in open court and that the restraining order be dissolved. The restraining order was dissolved by minute order of the court. This attorney was subsequently substituted out of the case by Mrs. McCarty, and no other written order was entered in the minutes. Mrs. McCarty admitted she formed some sort of a partnership agreement with Joseph at the time indicated but claimed Joseph never performed according to the agreement. She denied making this settlement according to the terms set forth in the new conditional sales contract dated July 20, 1954.

Apparently, under the belief that the new contract agreed upon would be signed, and upon order of the respective attorneys, the storage keeper released the outfit to the defendant Joseph who, in turn, leased it for $750 per month, and it was removed to San Benito County for drilling purposes. It then appears that within a month Mrs. McCarty contacted plaintiff Davis and informed him the rig was for sale and she thought he would find it in the storage yard in Bakersfield; that she had not substituted her new lawyer in the case at that time; that she told Davis and his lawyer about this pending lawsuit; and that Davis said he searched the title at the Motor Vehicle Department and found Waters to be the legal owner and Mrs. McCarty the registered owner. Plaintiff's bank handled the transaction and the legal title to the two trucks passed to plaintiff. Plaintiff testified that he thought the outfit was in storage in Kern County when he bought it; that Mrs. McCarty told him she had repossessed the outfit and said something about the lawsuit pending between her and Joseph but they

talked to a lawyer about it; that he, Davis, did not talk to defendant Joseph, his former partner, about the title to the trucks or their location, but on investigation he learned they had been removed to San Benito County, and he and the sheriff there made search for them and found them being operated there. He further stated he believed the original "option sale lease agreement" was never placed on record with the Motor Vehicle Department. He then brought this action for claim and delivery against defendant, filed the necessary bond and the sheriff took possession. No redelivery bond was filed and plaintiff then sold the rig to a drilling company in Utah for $11,000 (Bradshaw). After transfer of the action to Kern County, trial was had there and the court found generally against the plaintiff and in favor of defendant on his affirmative defenses; that defendant had complied with all of the provisions of the lease sale agreement at that time; that action No. 62495 is still pending and involved the subject matter here in dispute and that plaintiff had notice of this litigation; that the reasonable value of the outfit was $15,000 and defendant's equity therein was $12,100.

[1] It is plaintiff's position on this appeal that he was a bona fide purchaser, in good faith and for a valuable consideration, of the trucks and rigging and entitled to possession as such; that he made all reasonable inquiry and search of the records as to title and ownership; that he was told by Mrs. McCarty that she had repossessed said outfit and he believed she was entitled to transfer her title as registered owner; that defendant could have put everyone on notice of his claim by restraining the registrar of Motor Vehicles from transferring title to the trucks pending the outcome of the suit, and therefore he should be estopped from raising the question of equitable title, citing such authority as Fulkerson v. Stiles, 156 Cal. 703, at page 706, 105 P. 966, at page 967, 26 L.R.A.,N.S., 181; Davis v. Ward, 109 Cal. 186, 41 P. 1010; Pomeroy's Equity Jurisprudence, 4th Ed., Vol. 2, sec. 735, p. 1509 et seq.; Vehicle Code, Sec. 186; Parke v. Franciscus, 194 Cal. 284, 292, 228 P. 435; Bank of America N. T. & S. A. v. National Funding Corp., 45 Cal.App.2d 320, 114 P.2d 49; Coca Cola Bottling Co. v. Feliciano, 32 Cal.App.2d 351, 89 P.2d 686; and Moody v. Goodwin, 53 Cal.App. 693, 200 P. 733.

It is defendant's contention that he held a valid equitable title to the drilling rig, trucks and other personal property here involved; that such title will prevail except against a bona fide purchaser for value; and that under the evidence the court was justified in holding that plaintiff was not such a purchaser, citing such authority as Bush v. Bank of America Nat. Trust & Savings Ass'n, 1 Cal.App.2d 588, 37 P.2d 168; Triggs v. Zicovich, 117 Cal.App.2d 768, 771, 257 P.2d 60; Gates v. Levers, 108 Cal.App.2d 131, 133, 238 P.2d 143; and Lynn v. Herman, 72 Cal.App.2d 614, 165 P. 2d 54.

[2] The main distinction between the cases relied upon by plaintiff and the facts in the instant case is that in those cases the sale was to an innocent bona fide purchaser for value. Here we have a finding that plaintiff was not such a purchaser and that he knew of the existence of the unrecorded lease purchase agreement between Mrs. McCarty and defendant. In this connection it was shown that plaintiff originally entered into the agreement with her through his then partner, Joseph, and that this lease purchase agreement was unrecorded with the Motor Vehicle Department. He likewise knew of its existence when it was received in evidence in the action instituted by him in which Mrs. McCarty intervened. By the stipulation he had knowledge at that time that Joseph was not in default and for all intents and purposes was the equitable owner and purchaser of the trucks and rigging and entitled to the possession of them. When investigating the title at the time of his contemplated purchase of this outfit he made no inquiry of Joseph as to his claim to title, although he had been his previous partner and knew his mailing address in Bakersfield and knew the name and address of Joseph's attorney. When the rig was located and in operation in San

Benito County he made no inquiry as to Joseph's claimed title to it but rested upon the Motor Vehicle registration and what he claimed Mrs. McCarty told him. Apparently he called upon his own lawyer in reference to the transaction, who had been previously told about the pending suit by Mrs. McCarty. In considering all the circumstances related the trial court was justified in finding that plaintiff was not an innocent purchaser for value and without knowledge of defendant's claim of right to possession of the property. Our courts have frequently held that an unrecorded mortgage is not void as against a subsequent purchaser or encumbrancer who has actual knowledge of a previous lien, for the reason that he does not acquire his interest in good faith. Harms v. Silva, 91 Cal. 636, 27 P. 1088; Silverthorn & Sons v. Pacific Finance Corp., 133 Cal.App. 163, 23 P.2d 798; Bush v. Bank of America Nat. Trust & Savings Ass'n, 1 Cal.App.2d 588, 37 P.2d 168.

[3] It has been held that under section 186 of the Vehicle Code, pertaining to the transfer of title or any interest in a vehicle, a certificate of registration does not necessarily or conclusively establish true ownership. Gates v. Levers, supra; Logan v. Serpa, 91 Cal.App.2d 818, 822, 206 P.2d 70; Lynn v. Herman, supra; Henry v. General Forming, Ltd., 33 Cal.2d 223, 200 P.2d 785.

[4, 5] Although in conflict, there was sufficient evidence to show that defendant was not in default in his contract at the time plaintiff filed his action for claim and delivery and plaintiff cannot claim title by virtue of his claim that defendant had breached the contract with Mrs. McCarty. It was not established, as a matter of law, that defendant was negligent in not recording his contract of purchase with the Motor Vehicle Department, or that he was estopped from claiming equitable title under it. Pike v. Rhinehart, 112 Cal.App.2d 530, 533, 246 P.2d 963. In fact, the findings are contrary to plaintiff's claim.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

149 Cal.App.2d 137

ADVANCE HARDWARE COMPANY, a Corporation, Plaintiff and Appellant,

v.

Peter A. COMRAS, Defendant and Respondent.

Civ. 21676.

District Court of Appeal, Second District, Division 3, California.

March 13, 1957.

Hearing Denied May 8, 1957.

Action by seller of hardware business against buyer for balance due on buyer's note which was executed, subject to adjustment of its face amount after verification of inventory totals, so that escrow involved could be completed prior to checking such totals. The Superior Court, Los Angeles County, John Gee Clark, J., entered judgment for unpaid balance remaining after allowing buyer credit for difference between amount of inventory set in determining face value of note and correct amount of the inventory total, and seller appealed. The District Court of Appeal, Vallée, J., held that, where trial court found on substantial evidence, that buyer was entitled to the credit, failure of consideration in amount of the error was established, and buyer would be entitled to the credit.

Affirmed.

1. Sales ⇐21

Where buyer of hardware business signed note subject to adjustment of its face amount after opportunity to verify inventory totals so that escrow involved in sale could be completed prior to checking of the inventory totals, but correct amount of inventory was shown to be less than that originally fixed in determining face amount of note, consideration for the note failed in such amount. West's Ann.Civ.Code, § 3109.

2. Bills and Notes ⇐97(2)

Partial failure of consideration is a pro tanto defense in a suit on a note.

3. Sales ⇐21, 188

Where, in action by seller on note which buyer executed, subject to adjustment

of its face amount after opportunity to verify the inventory totals, for purpose of completing the escrow involved prior to checking of the inventory totals, trial court found, on substantial evidence, that buyer was entitled to designated credit against face amount of note because of error in seller's favor in the inventory totals, failure of consideration in amount of the error was established, and buyer would be entitled to credit therefor in determining unpaid balance of the note. West's Ann.Civ.Code, § 3109.

4. Sales ⇐359(1)

In action by seller of hardware business against buyer on buyer's note which was executed subject to adjustment of face amount of note after inventory totals had been verified, evidence sustained trial court's finding that buyer was entitled to credit against amount of note because correct amount of inventory was less than that originally fixed in determining face of note. West's Ann.Civ.Code, § 3109.

Sander Cotlow, Azusa, for appellant.

Hahn, Ross & Saunders, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment awarding plaintiff $3,408.26 as the unpaid balance on a promissory note after allowing a credit claimed by defendant. Plaintiff's claim is that the credit should not have been allowed.

On August 20, 1949, defendant entered into an agreement with plaintiff's assignor, Advance Hardware Company of Pasadena, for the purchase of a hardware business. The agreement provided that the sales price would be "the total value of the inventory of said business as of August 21st, 1949 at prevailing wholesale prices plus the sum of one thousand dollars, ($1,000.00) for fixtures * * *," payable $5,000 down, $15,000 when the seller had approved the sale by appropriate resolution and procured written consent to the assignment of a lease, $5,000 thirty days from the date of execution of the agreement, and the balance at the rate of $400 a month including 5 per cent interest. An escrow was opened on August 22. The contract of sale was deposited in the escrow.

The inventory was taken at the time the agreement was entered into. A "lot" of the items were priced and the inventory was sent to Union Hardware Company for appraisal with respect to items that could not be priced at that time. It was then deposited in the escrow. In order to complete the escrow prior to checking the inventory totals, defendant agreed to sign a promissory note for $25,345.46 subject to adjusting its face amount after an opportunity to verify the inventory totals. This was necessary because some of the inventory prices were not available at the time the parties wanted to close the escrow and the note had to be signed in order to close the escrow. Accordingly, on August 30 a further agreement was entered into. It read:

"The following is to be made part of the escrow for the purpose of expediting in taking possession and also the close of escrow.

"It is agreed between the seller and the buyer that the buyer is to accept the amount totaled on the inventory taken for the present.

"It is also agreed that at the close of escrow the buyer is to be given the opportunity to check the total figures on inventory that has been taken and in the event that any discrepancies are found as to pricing or through error in bringing out any of the extensions, the seller is to adjust the balance due from the buyer and given [sic] credit on the note that has been signed which carries monthly payments.

"In the event any discrepancies through error or otherwise arise where the seller has made an error whereas there may be an adjustment due the seller from the buyer, that also is agreed upon.

"The above is intended for pricing and the extension of pricing only."

On September 12, 1949, defendant executed the note for $25,345.46.

On September 17 plaintiff received a copy of the inventory from the escrow holder. At the close of the escrow, about September 21, defendant also received a copy. He totaled it and arrived at the figure $40,209.86. Thus the total consideration for the sale should have been about $41,209.86, including $1,000 for the fixtures, rather than $45,345.46.

Within a few days thereafter, defendant attempted to discuss the matter with the officers of plaintiff and its assignor. He called them once a week for several months but was "put off." He also wrote four letters to officers of plaintiff's assignor on October 15, 1949, December 17, 1949, January 12, 1950, and February 16, 1950, in which he expressed the desire to get together with them to go over the inventory and adjust the amount of the note, but without avail. Defendant paid $18,413.88 on the principal of the note. The action is for $6,913.88, the difference between the amount paid and the amount of the note.

The court found: defendant executed the note to facilitate the closing of the escrow and in reliance on the agreement of August 30; the total of the inventory was fixed at $44,345.46 for the purpose of closing the escrow subject to revision under the agreement of August 30, plus an additional $1,000 for fixtures, totaling $45,345.46, from which was deducted the $20,000 paid into escrow by defendant; immediately following the close of escrow defendant checked the inventory by totaling the figures and determined that it totaled $40,209.86; immediately thereafter defendant advised plaintiff's assignor of the difference in the inventory and attempted to meet with the officers of plaintiff's assignor and the officers of plaintiff for the purpose of adjusting the difference in accordance with the agreement of August 30; the officers refused to meet with defendant; the true total of the figures of the inventory was $40,209.86 rather than $44,345.46; by reason of the foregoing defendant was entitled to credit of $4,135.60 against the amount of the note. Judgment for plaintiff followed for $3,408.26.

Plaintiff contends: 1. The findings are outside the issues made by the pleadings. 2. The findings are not supported by the evidence. 3. The findings do not support the judgment. The contentions are untenable.

[1–4] The defense was that there was a partial failure of consideration. The answer, the proof, and the findings were all to the effect that the amount of the note was to be based on the actual amount of the inventory, a tentative amount was agreed on to facilitate closing the escrow, and the note was executed. The correct amount of the inventory was $4,135.60 less than that originally fixed. Thus the consideration for the note failed in that amount. Partial failure of consideration is a *pro tanto* defense in a suit on a note. Civ.Code, § 3109; Benjamin Moore & Co. v. O'Grady, 9 Cal.App.2d 695, 50 P.2d 847; Benson v. Andrews, 138 Cal.App.2d 123, 132, 292 P.2d 39. The court having found on substantial evidence that defendant was entitled to a credit of $4,135.60 against the amount of the note, a failure of consideration in that amount was established. Benjamin Moore & Co. v. O'Grady, supra, 9 Cal.App.2d 699, 50 P.2d 847.

It is evident the findings are not outside the issues, they are supported by the evidence, and they support the judgment. The appeal borders on the frivolous.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

149 Cal.App.2d 176

Kitty M. LEWIS et al., Plaintiffs and Appellants,

v.

Norman Ira DOYLE, Defendant and Respondent.

Norman Ira DOYLE, Cross-Complainant and Respondent,

v.

Kitty M. LEWIS, Cross-Defendant and Appellant.

Civ. 5390.

District Court of Appeal, Fourth District, California.

March 15, 1957.

Action for injuries sustained in automobile collision wherein defendant filed a cross-complaint. From a judgment of the Superior Court, Kern County, Warren Stockton, J., the plaintiffs appealed. The District Court of Appeal, Mussell, J., held, inter alia, that in action for injuries and damage sustained in intersection automobile collision, giving of instruction in language of statute pertaining to adequacy of brakes and maximum stopping distances did not constitute reversible error notwithstanding there was no evidence that brakes of defendant's automobile were defective where it did not appear that jury was misled to prejudice of plaintiffs by such instruction.

Affirmed.

1. Appeal and Error ⇐1066

An instruction which relates to matters as to which there is no evidence will not justify a reversal unless it has misled jury to prejudice of the appellant.

2. Appeal and Error ⇐1066

In action for injuries and damage sustained in intersection automobile collision, giving of instruction in language of statute pertaining to adequacy of brakes and maximum stopping distances did not constitute reversible error notwithstanding there was no evidence that brakes of defendant's automobile were defective where it did not appear that jury was misled to prejudice of plaintiffs by such instruction. West's Ann. Vehicle Code, § 670(a).

3. Automobiles ⇐245(14)

In action for injuries and damage to plaintiff's automobile struck at intersection by defendant's automobile which had passed a truck on through highway, whether defendant's automobile was an "immediate" hazard within statute relating to vehicles entering through highway was for jury. West's Ann.Vehicle Code, § 552.

4. Trial ⇐241

In action for injuries and damage to automobile struck at intersection by defendant's automobile which had passed a truck on through highway, instruction in language of statute to effect that statute related to vehicles traveling on all lanes and not on any one particular lane of traffic on through highway was proper under evidence. West's Ann.Vehicle Code, § 552.

5. Appeal and Error ⇐1064(1)

In action for injuries and damage sustained in intersection automobile collision, giving of instruction in language of statute setting forth the basic speed law and informing jury that violation of the statute constituted negligence was not reversible error. West's Ann.Vehicle Code, § 510.

6. Appeal and Error ⇐1064(1)

In action for injuries and damage sustained in intersection automobile collision, instruction on speed was not prejudicial to plaintiffs because instruction required "clear proof" on their part that defendant's speed was negligent since quoted words mean the preponderance of the evidence. West's Ann.Vehicle Code, § 510.

See publication Words and Phrases, for other judicial constructions and definitions of "Clear Proof".

7. Appeal and Error ⇐1064(1)

The mere repetition of instructions upon same subject did not constitute reversible error.

Glickfeld & Goldstein, Beverly Hills, Baker, Palmer, Wall & Raymond, Bakersfield, for cross-defendant and appellant.

Borton, Petrini, Conron & Brown, Bakersfield, for cross-complainant and respondent.

MUSSELL, Justice.

This is an action for wrongful death, personal injuries and property damage arising out of an intersection collision between an automobile owned by plaintiff Kitty M. Lewis and operated by her husband, and an automobile owned and operated by defendant Norman Ira Doyle. A jury trial resulted in a verdict against plaintiffs on the complaint and in favor of the defendant. The verdict also awarded defendant damages on his cross-complaint for damage to his automobile. Plaintiffs appeal from the judgment entered in accordance with the verdict of the jury and contend that the trial court erred in its instructions to the jury.

The intersection at which the collision occurred is located approximately one mile north of Lebec, on United States highway 99. At this point the highway runs generally north and south. It is a through highway and the two northbound traffic lanes, each 12 feet wide, are separated from the two southbound traffic lanes, each 12 feet in width, by a dividing strip, 48 feet wide. Old United States highway 99, now a private road, approximately 60 feet wide, enters new highway 99 from the west and there is a crossing marked by curbing to permit traffic to cross the highway and turn into the northbound traffic lanes. There is a stop sign approximately 45 feet west from the west edge of United States highway 99 at the intersection and there are several large trees on the west side of the highway north of the intersection. There is a slight crest or hill approximately 700 feet north of the intersection and the highway slopes gradually downward south to the intersection from this crest.

At about 9:15 a. m. on December 3, 1954, plaintiff, Kitty M. Lewis, and her husband left their home at Tejon Lodge, about a mile from the intersection involved, intending to drive to Bakersfield. Plaintiff's husband, James D. Lewis, aged 74, was driving a 1940 Chevrolet two door sedan. The pavement was damp and it was somewhat cloudy. Lewis approached the intersection from the west on old highway 99 and stopped at the stop sign 45 feet west of the new highway. He then looked along the highway to the north and proceeded to cross to the northbound traffic lanes on the through highway. When his car occupied approximately 10 feet of the inside or east southbound traffic lane, it was struck by defendant's car, then being driven south on the inside southbound traffic lane. Lewis was thrown from his car and received injuries resulting in his death the following day.

Kitty Lewis testified that when they drove up to the stop sign they stopped and "* * * we looked down the highway to the north, and we didn't see anything coming up but the truck; and we both spoke together and says, 'Well, I guess we can make it', or no, 'We can make it', and I think he said the same. I'm not sure, but we spoke the same time, we could make it before the truck got there. So we just started to cross, * * *"

Defendant Doyle, an oil driller, testified that he was traveling south in his Cadillac automobile on United States highway 99; that after he passed the crest of the hill to the north of the intersection, he passed a truck going in the same direction; that when he was about 300 to 350 feet from the intersection and traveling at about 50 miles per hour, he first saw the Lewis car; that "when I first saw it, it was entering the pavement, not the asphalt pavement itself, just coming on very slowly, and moved across, and I figured, well, that is plenty of time to get across into the safety zone, but I stepped on the brakes anyway, when it seems like he came to a stop right in my lane, and I just couldn't get stopped quick enough"; that he attempted to turn his car but the wheels were locked and the car would not turn; that as he saw the Lewis

car crossing the road, the driver was looking south, until just before the accident he looked in Doyle's direction; that the left front fender of his car hit the rear door of the Chevrolet.

Lawrence M. Newman testified that he witnessed the accident from a point about 350 feet north of the intersection; that he was driving a "tractor and set of doubles" southerly on United States highway 99; that the weather was overcast and it was damp and dark; that when he was approximately 350 feet north of the intersection, he was traveling about 20 miles per hour, and saw the Chevrolet automobile coming into the west side of the truck's lane of traffic; that he first saw the Cadillac when it passed him about 250 or 300 feet north of the intersection. When asked what he saw, Newman replied as follows: "* * * I saw the Chevrolet approaching the outside lane which would be the west lane in front of me. The driver of that vehicle turned and looked at me, and he could see that he had plenty of clearance, because I was moving so slow; and when he moved out in front of me across my lane into the inside lane, still traveling the inside lane with me going south, this Cadillac came up alongside of me and went past me. Then he applied his brakes and went straight on into it and hit the black Chevrolet car."

Appellants first assert that the court erred in giving an irrelevant and misleading instruction on brake efficiency. The instruction given was as follows:

"You are instructed that at the time of this accident Section 670(a) of the Vehicle Code of the State of California provided as follows:

"'670 Brakes. (a) No person shall operate on any highway any motor vehicle or combination of motor vehicle and other vehicle or vehicles of a type subject to registration hereunder unless such motor vehicle or at least one unit of any such combination of vehicles is equipped with brakes adequate to bring such motor vehicle or combination of vehicles to a complete stop when operated upon dry asphalt or concrete pavement surface where the grade does not exceed 1 percent at the speeds set forth in the following table within the distances set opposite such speeds:

"Miles per hour	Stopping distances
10	9.3 feet
15	20.8 feet
20	37.0 feet
25	58.0 feet
30	83.3 feet
35	113.0 feet
40	148.0 feet
45	188.0 feet.'"

[1, 2] There was no evidence in the instant case that the brakes on the Doyle car were defective. However, in Nelson v. Porterville U. H. School Dist., 117 Cal.App. 2d 96, 99, 254 P.2d 945, this court held that an instruction which relates to matters as to which there is no evidence will not justify a reversal unless it has misled the jury to the prejudice of the appellant. And in Jeffs v. LaGore, 131 Cal.App.2d 181, 280 P.2d 140, in an action by a pedestrian against the driver of an automobile in an intersection accident, where the defendant testified that he was not going over 25 miles per hour, an instruction in the language of section 670 of the Vehicle Code pertaining to adequacy of brakes and maximum stopping distances was held to be proper. It does not appear that the jury in the instant case was misled to the prejudice of appellants by the instruction given and no reversible error appears in this connection. Trelut v. Kazarian, 110 Cal. App.2d 506, 512, 243 P.2d 104.

[3, 4] Appellants' next argument is that the court erred in giving an instruction regarding traffic lanes. In this connection, at the request of the defendant, the trial court gave the following instruction, after reading section 552 of the Vehicle Code:

"The requirements of Vehicle Code section 552 apply to all vehicles travel-

ing upon a through highway and not only to vehicles traveling upon one lane thereof if the highway is divided into more than one lane. Therefore, the duty imposed upon a person entering such a highway to yield the right of way to other vehicles as set forth therein relates to vehicles traveling upon all lanes and not any one particular lane of traffic on said through highway."

Appellants concede that perhaps this instruction might be correct if both the Doyle car and the Newman truck were in sight of Lewis when the latter sought to enter the highway and one of the approaching vehicles was an immediate hazard while the other was not, but contend that where, as here, the testimony of both sides was that only the truck was visible, it would be a contradiction in terms to call the hazard created by the Doyle vehicle "immediate". The question of whether it was an "immediate" hazard was one of fact for the jury. It clearly appears that an instruction in the language of section 552 of the Vehicle Code was proper under the circumstances and the quoted part of the charge instructing the jury that section 552 relates to vehicles traveling on all lanes and not on any one particular lane of traffic on said through highway is a correct statement of law. There was evidence that Lewis stopped at a sign 45 feet west of the roadway and then proceeded into the intersection. While he was crossing the southbound traffic lanes, the Doyle car was approximately 300 to 400 feet to the north, traveling in the inside southbound traffic lane. The jury could reasonably infer that the Doyle car was then visible to Lewis and that it was his duty not to pull in front of the Doyle car when an immediate hazard existed.

[5] It is further argued that the court erred in giving an instruction regarding speed. This argument is without merit. The criticized instruction reads as follows:

"The law of this state does not prescribe an absolute speed limit, in terms of so many miles an hour, that was applicable at the time and place of the accident involved in this case. The law does ordain what it calls '*prima facie* speed limits'; and the law says that if the speed of a vehicle upon a highway is not in excess of the *prima facie* limit, such speed is lawful unless clearly proved to be in violation of what is known as the basic speed law; and if the speed of a vehicle upon a highway is in excess of the applicable *prima facie* limit, such speed is unlawful unless proved to be not in violation of the basic speed law.

"However, our law further provides that proof of speed in excess of any *prima facie* limit shall not establish negligence as a matter of law, but that anyone who claims that a speed in excess of such a limit was negligent must, to support such a claim, prove as a fact that such speed was negligent in the circumstances involved.

"The basic speed law to which I have referred provides as follows:

" 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.'

"The *prima facie* speed limit that was in effect at the time and place of the accident involved in this case was 55 miles an hour."

Appellants cite Eslick v. Leach, 135 Cal. App.2d 455, 288 P.2d 38, as authority for the proposition that the giving of this instruction was improper and constituted reversible error. However, in Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 439, 260 P.2d 63, 67, it was held that in an action involving negligence in the operation of a motor vehicle it is proper to give an instruction in the language of section 510 of the Vehicle Code setting forth the basic speed law and to inform the jury that

a violation of the statute is negligence; that

"It is proper under section 513 of the Vehicle Code to give an instruction on the prima facie speed limit even though proof of speed in excess of that limit is not enough, standing alone, to show that the vehicle was being operated negligently. This statute, applicable only in civil actions, provides that speed in excess of any prima facie limit declared in section 511 shall not establish negligence as a matter of law and that it is necessary to show as a fact that 'such excess speed' constituted negligence. The words 'such excess speed' clearly refer to an excess over the prima facie limit mentioned in the first part of the section, and it follows that the plaintiff may introduce evidence of the prima facie speed limit in order to show that there was 'such excess speed.' It has been held, accordingly, that in civil cases the prima facie speed limit is a factor to be considered with other pertinent factors and that the plaintiff is entitled to an instruction thereon." (Citing cases.)

In Guerra v. Brooks, 38 Cal.2d 16, 236 P.2d 807, in an action for damages arising out of a collision between an automobile driven by defendant and a motorcycle operated by plaintiff in an area which was not signposted, it was held to be prejudicial error to fail to give a specific instruction on the relation of signposting to the applicable prima facie speed limit. In Burch v. Valley Motor Lines, Inc., 78 Cal.App.2d 834, 179 P.2d 47, it was held error to refuse to give an instruction based on Vehicle Code section 511 when the jury was instructed on sections 510 and 513 of said code, which refer to section 511, where the zone on either side of the underpass where the collision occurred was a 55-mile zone, and where there was evidence that plaintiff was driving at a speed of 25 to 30 miles per hour just before the collision.

[6] Appellants' contention that the instruction was prejudicial to them because it required "clear proof" on their part that defendant's speed was negligent is likewise without merit. As is said in Olson v. Union Oil Co., 25 Cal.App.2d 627, 629–630, 78 P.2d 446, 447:

"There are many decisions in civil actions in which the words 'clearly proved' are used. But when they are so used they are to be understood as meaning the preponderance of the evidence." (Citing cases.)

[7] Appellants' last contention is that the court erred in giving repetitive and irrelevant instructions unduly emphatic of the duties of plaintiff and her decedent. While the instructions may in some respects be repetitious, it does not appear they were erroneous statements of the law. The court instructed the jury:

"If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others. The order in which the instructions are given has no significance as to their relative importance.

"If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of any party, you will not suffer yourself to be influenced by any such suggestion.

"I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; what facts are, or are not established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it."

The mere repetition of instructions upon the same subject would not constitute reversible error. Faeh v. Union Oil Co.,

107 Cal.App.2d 163, 236 P.2d 667; Gilbert v. Pessin Grocery Co., 132 Cal.App.2d 212, 223–224, 282 P.2d 148.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



148 Cal.App.2d 829

Leslie Herman STERNBECK, Plaintiff and Appellant,

v.

Lloyd I. BUCK and Marie Dell Buck, Defendants and Respondents.

Civ. 22042.

District Court of Appeal, Second District, Division 2, California.

March 1, 1957.

Rehearings Denied March 25, 1957.

Hearing Denied April 25, 1957.

Proceeding to vacate default judgment obtained against plaintiff in an action for damages to defendants' automobile. The Superior Court, Los Angeles County, Philip H. Richards, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that the delivery by the process server to the plaintiff's wife on the front driveway of their home of copies of summons and complaint and her promise to see that her "husband gets them" did not constitute service of process within statute requiring personal service where husband was out of view, 100 feet distant in the rear, building a barn.

Judgment reversed.

Ashburn, J., dissented.

1. Motions ⇐64

Where plaintiff had been sued for damages to defendants' automobile and a default judgment was entered against plaintiff, plaintiff had moved to be relieved of his default under Rules of Civil Procedure on the ground of excusable neglect and want of personal summons, denial of motion on ground that time for motion had expired was not res judicata in plaintiff's action in equity to vacate the default judgment on the same grounds alleged in previous motion. West's Ann.Code Civ.Proc. § 473.

2. Motions ⇐64

Ruling by a trial court denying motion to set aside a default judgment is not res judicata of the allegations of a complaint in equity to set aside the default judgment where the ruling is based on merely procedural or jurisdictional grounds or the judgment is directly rather than collaterally attacked.

3. Motions ⇐64

An order made in response to a motion is not res judicata of a direct attack on the judgment.

4. Judgment ⇐403

An action in equity to set aside a judgment entered in a prior action is treated as a direct rather than a collateral attack for purposes of determining whether doctrine of res judicata is applicable.

5. Process ⇐4

Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional, and absent such service, no jurisdiction is acquired by the court.

6. Process ⇐64

"Personal service" means the actual delivery of the papers to the defendant in person.

See publication Words and Phrases, for other judicial constructions and definitions of "Personal Service".

7. Process ⇐64

"Delivery of process" connotes manual tradition to the person to be served.

See publication Words and Phrases, for other judicial constructions and definitions of "Delivery of Process".

8. Process ⇐79

Generally, under statutes requiring that a party be served personally, substituted

service upon a member of the defendant's family at the residence of the defendant does not suffice to confer personal jurisdiction upon the court.

9. Process ⇐79

The delivery by the process server to the defendant's wife on the front driveway of their home of copies of summons and complaint in action for damages to automobile and wife's promise to see that her "husband gets them" did not constitute service of process within statute requiring personal service where the husband was out of view, 100 feet distant in the rear, building a barn. West's Ann.Code Civ. Proc. § 411, subd. 9.

10. Constitutional Law ⇐70(3)

Question whether to liberalize the techniques of serving process if it be deemed in the best interests of the administration of justice is for the legislature.

On Petition for Rehearing

11. Process ⇐48

Although defendant, who had not been personally served as required by statute, actually had received summons and complaint, court did not acquire jurisdiction over defendant. West's Ann.Code Civ.Proc. §§ 410, 411, subd. 9.

Royal M. Galvin and Walter R. Baranger, Beverly Hills, for appellant.

Samuel Duskin and David S. Smith, Los Angeles, for respondents.

MOORE, Presiding Justice.

The paramount question posed by this appeal is whether, according to the findings, the delivery by the process server to the defendant's wife on the front driveway of their home of copies of summons and complaint and her promise to see that her "husband gets them" constitutes service of process, the husband having been out of view 100 feet distant in the rear, building a barn, process server having neither proceeded farther to the rear nor attempted to contact him.

Mr. and Mrs. Buck first sued appellant for damages to their automobile by reason of the allegedy wilful acts of appellant (action 624714, Los Angeles Superior Court) and no answer having been filed, a default judgment was entered against Sternbeck. He moved to be relieved of his default under Code of Civil Procedure, section 473, on the grounds of excusable neglect and want of personal service of the summons. Such motion having been finally denied on the ground that the time for the motion had expired, he brought this action in equity to vacate the default judgment on the same grounds alleged in his motion. Having heard the evidence, the trial court determined that the neglect of Sternbeck and his original attorney were not excusable, and that while the facts averred in Sternbeck's complaint relative to the service of process were substantially correct, yet the service was legally complete. Appellant contends that the judgment in action 624714 had been entered without service of summons having been made.

[1, 2] Respondents contend that the denial of relief from the judgment under section 473 on the ground of excusable neglect is res judicata of appellant's complaint. That claim is without support in law. Such action by a trial court is not res judicata of the allegations of a complaint in equity where the ruling is (a) based upon merely procedural or jurisdictional grounds or (b) the judgment is directly rather than collaterally attacked. Lake v. Bonynge, 161 Cal. 120, 131, 118 P. 535. It is obvious that both conditions are present in the instant controversy. The record in action 624714 discloses that the motion to set aside default judgment was denied because filed too late. It follows, therefore, that the order was not based upon the merits of the claim. Nothing was decided relative to the validity of the judgment attacked except that it was too late to pursue the special remedy provided by section 473.

[3, 4] Also, the present attack on the judgment is by an equitable action. The doctrine announced by Lake v. Bonynge,

supra, to wit, that an order made in response to a motion is not res judicata of a direct attack, has been held in numerous decisions. Newman v. Barnet, 165 Cal. 423, 426–427, 132 P. 588; Bacon v. Bacon, 150 Cal. 477, 484–485, 89 P. 317; Estudillo v. Security Loan & Trust Co., 149 Cal. 556, 564–565, 87 P. 19; Wilson v. Wilson, 55 Cal.App.2d 421, 426, 130 P.2d 782; Winn v. Torr, 27 Cal.App.2d 623, 627, 81 P.2d 457; Anglo California Trust Co. v. Kelley, 117 Cal.App. 692, 695, 4 P.2d 604. An action in equity to set aside a judgment entered in a prior action is treated as a direct rather than as a collateral attack. Bacon v. Bacon, supra; Wilson v. Wilson, supra. In the interest of accuracy, some courts have chosen to designate the attack as "indirect." See Le Mesnager v. Variel, 144 Cal. 463, 467, 77 P. 988. However, in any event, the same results flow as on direct attack.

[5] It thus becomes necessary to determine whether the alleged service of summons in the original action operated to confer upon the court personal jurisdiction of Sternbeck. The findings in the instant action indicate that compliance with all requisites of an action in equity to annul a judgment has been observed if indeed such service was insufficient. Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional. Absent such service, no jurisdiction is acquired by the court in the particular action. Chaplin v. Superior Court, 81 Cal. App. 367, 371, 253 P. 954, 959; Witkin's California Procedure, p. 329.

[6, 7] Section 411, Code of Civil Procedure, in its first eight subdivisions prescribes with meticulous care the manner of service upon corporations, joint stock companies, minors, insane persons, cities, dissolved corporations, a state board, a candidate for public office who cannot be found within the State. By subdivision 9, it provides that "In all other cases [a copy of the summons must be delivered] to the defendant personally." In the Chaplin case, supra, it was held "that in the absence of service of process on the defendant" orders made against him are void. "Personal service" means the actual delivery of the papers to the defendant in person. Holiness Church of San Jose v. Metropolitan Church Ass'n, 12 Cal.App. 445, 448, 107 P. 633; Hunstock v. Estate Development Corporation, 22 Cal.2d 205, 138 P.2d 1, 4, 148 A.L.R. 968. In considering the appropriate method of serving a corporation, the court in the Hunstock case reasoned that "delivery" of process connotes manual tradition to the person to be served and that "delivery" is identical with "the common law rule of personal delivery" as provided for in Code of Civil Procedure, section 411. Although the strict requirements of manual tradition of the papers are relaxed when the defendant attempts to flee the approaching process server (see In re Ball, 2 Cal. App.2d 578, 38 P.2d 411, where the process was thrown at the retreating defendant; Trujillo v. Trujillo, 71 Cal.App.2d 257, 259–260, 162 P.2d 640, where the papers were placed in the windshield wiper of defendant's retreating automobile), no such problem was presented by the instant case. In fact, appellant seems to have been perfectly amenable to proper service. He was within easy reach of the deputed process server who chose not to walk a hundred feet to deliver the summons.

[8] The vast majority of jurisdictions possessing statutes requiring that a party be served "personally" or "personally served" hold that a "substituted service" upon a member of the defendant's family at the residence of the defendant *does not* suffice to confer personal jurisdiction upon the court. Note, 172 A.L.R. 521. Research of California authority does not disclose any reason to depart from these holdings. As mentioned above, section 411 enacts "the common law rule of personal delivery."

[9, 10] Respondent contends that since this action is one in equity, the only question to be determined is whether or not the defendant actually received the papers which would have given notice of the suit. Such contention ignores the plain verbiage of the statute and in effect asks the court

to rewrite section 411 by adding to subdivision 9 substantially the following: "but when a summons is not personally served, the trial court may ascertain whether the defendant ultimately came into possession of the summons and if so, there was satisfactory compliance with the section." Such action would be a judicial re-writing of a statute. The legislature is available for that service. An action in equity to set aside a judgment is a direct attack upon it just as a motion under section 473 or an appeal. In fact, should the time for appeal or motion have expired, such an action is the only *direct* attack available. In all events, it is the most practicable mode since it is difficult to obtain proof of lack of service other than by affidavits. Therefore, exactly as on motion or appeal, if service in the original action has not been made within the provisions of section 411, the court has no jurisdiction whatsoever over the defendant, its judgment is a complete nullity and should, after proper proceedings, be set aside. Merely because an action sounds in equity, it does not justify the court in re-writing the code sections relating to personal jurisdiction by proclaiming that "substituted service" is just as good as "personal service" where the defendant in fact receives the papers. If such reasoning were sound, service by mail would similarly suffice where the defendant actually opened the envelope and received the documents. It is for the legislature, not the courts, to liberalize the techniques of serving process if it be deemed to be in the best interests of the administration of justice.

The frailty of respondent's thesis is verified by the solitary authority cited, to wit, Vail v. Jones, 209 Cal. 251, 287 P. 99. At first blush, it implies that service upon a member of his family might be deemed service upon the defendant. But, a close inspection indicates that the court studiously detoured around such a commitment. The trial court in that case found that the purported process server did not in fact serve the defendant but that the defendant had already been "served." The record presented conflicting testimony. Its gist was that the defendant was an invalid whose daughter handled all her business affairs; the process server knocked on the door; the daughter answered, the defendant was in another room in the four-room house, possibly within sight of the door; the daughter took the summons. The court held that this evidence could raise "inferences" to justify the finding of service—for example, perhaps, that the daughter was the defendant's agent or that the server was in the presence of the defendant. Thus, the court there laid down no rule for the guidance in future controversies. No court since the rendition of the Vail decision has ventured to hold that section 411 authorized any other mode of service than the delivery of the summons to the defendant in person as explicitly required by the code. See discussion in Witkin on California Procedure, p. 811. In effect, the opinion merely stands for the proposition that in the particular record there presented, sufficient inferences of due service to support a finding of service existed.

Respondent cites authority to the effect that it is the fact and not the proof of service which confers jurisdiction upon the court. They are not in point. The findings of the trial court illustrate that there was no delivery of a copy of summons and complaint in *fact* and thus no service and no jurisdiction was acquired to render default judgment in action number 624714.

However, the testimony of Mr. Smith, the process server, is that Mr. Sternbeck's wife accompanied him to the rear of the yard where he met Mr. Sternbeck, and that they were within approximately three feet of each other. Smith testified that he there informed Mr. Sternbeck that he had a copy of a summons and complaint for him. He testified: "I reached out, quite certain that I touched his body with the papers. And he said, 'No. Give it to my wife.' And I handed the papers to Mrs. Sternbeck in his presence." Evidently the trial court did not believe Smith's testimony that he reached out and was quite certain that he touched "his body with the papers"

and that he "handed the papers to Mrs. Sternbeck in his presence." Now, if, as Mrs. Sternbeck testified, Smith gave the papers to her at the entrance to the driveway on her promise that she would give them to her husband, he was not authorized to depute the wife or any other person to give the summons and complaint to Mr. Sternbeck. *Potestas delegatus non delegandus potest* is a principle as old as the law itself. Mr. Smith testified that he was serving all the papers of Mr. Duskin, attorney for Buck, "at that time." In that event, he had no authority to leave the summons with Mrs. Sternbeck on any promise she might make.

Of course, Mr. Smith's testimony if believed upon retrial, would support a finding of personal service. See In re Ball, 2 Cal. App.2d 578, 579, 38 P.2d 411; Thorndyke v. Jenkins, 61 Cal.App.2d 119, 121, 142 P.2d 348.

The judgment is reversed.

FOX, J., concurs.

ASHBURN, Justice (dissenting.)

Appellant does not attack the finding that his failure to defend the action of Buck v. Sternbeck was due to inexcusable neglect. Nor does he attack finding IV: "That the liability of Leslie Herman Sternbeck for the acts referred to in case No. 624714 is clear, and that defendants herein were entitled to recover damages from Leslie Herman Sternbeck", or finding III: "That if the case were re-tried, it is difficult to ascertain what ultimate disposition might be made as to an award of damages, although this Court believes that the award might be substantially less than that awarded in case No. 624714." His reply brief says: "Appellant seeks to clarify that point by unequivocally stating that he intends to and is only raising one issue before the Appellate Court, to wit—Did the delivery upon Appellant's wife of the Summons and Complaint and subsequent delivery by her to Appellant constitute personal service upon Appellant within the meaning of Section 411(8) [now subd. 9] of the Code of Civil Procedure."

The findings show that the court adopted the testimony of Mrs. Dolores Sternbeck, the wife of appellant. She testified that she was in the driveway when the process server, Smith, approached her saying: "Pardon me." She asked if she could help him and, being identified as Mrs. Sternbeck, told him in response to his inquiry that her husband was in the back yard. "And then he says, 'I have some papers for him. Will you see that he gets them?' And I said yes, I would, right away. Of course—* * *. Q. A man handed you some documents, is that right? A. Yes. How did. * * * Q. Did he say anything to you about what these papers were? A. No. He said he had some papers for my husband, for Mr. Sternbeck. * * * Well, the man handed me the papers. And I said, 'I will see that my husband gets them.' And I turned and walked away. And he left." Within five to ten minutes she handed the papers (a summons and complaint) to her husband, saying: "Here is some papers from Marie Buck." Appellant himself testified: "Well, she brought the papers back and says, 'Here is papers from Marie Buck.' Or 'The Bucks.' Something—something of that kind. So when she took—I didn't like it when she took them because he was supposed to serve me. * * * Q. What did you do with them when she gave them to you? A. I took them and read them. And that was all I did with them that day." He also said: "I don't recall what date it was. I was served the papers—I got the papers on Saturday. And I believe I went up there [attorney's office] Monday or Tuesday, within the next few days, to take care of it." Concededly, after reading the documents he took them to an attorney for the purpose of making a defense.

The essence of personal service of process is the passing of the document from the hand of the process server into the hands of the defendant, or an equivalent act in case defendant refuses to take the same. Hunstock v. Estate Development Corp., 22 Cal.2d 205, 209, 210, 138 P.2d 1,

148 A.L.R. 968. Any person other than a party to the action may make the service, Code Civ.Proc. § 410. That person may be actually interested in the result, for it may be the plaintiff's attorney. Sheehan v. All Persons, etc., 80 Cal.App. 393, 398, 252 P. 337; In re Guardianship of Andrews, 17 Cal.2d 500, 505, 110 P.2d 399. No type of ritual is essential to good service. Merely placing the process in defendant's hands without a word is enough where he is named as a defendant. It is the fact and not the accuracy of the proof of service that fastens the court's jurisdiction onto the defendant. Vail v. Jones, 209 Cal. 251, 255, 287 P. 99; 21 Cal.Jur. § 57, p. 538. If a process server designates a subagent for the purpose of service that is no affair of defendant's. The receipt of summons and complaint, with understanding of its nature, is what counts. In this instance defendant fully understood the documents, as is evidenced by the fact that after reading the same he took them to an attorney for the purpose of defending the action.

According to the wife's testimony she was delegated by the process server to deliver the papers to her husband, expressly undertook to do so and actually performed that promise within five to ten minutes. The case of Vail v. Jones, supra, 209 Cal. 251, 287 P. 99, correctly interpreted, is directly in point. In that instance it appeared that the summons and complaint in an action of one Jones v. Annie H. Vail had been delivered by the city marshal to the daughter of defendant Vail "for the mother," as the opinion phrases it, 209 Cal. at page 254, 287 P. at page 101. Mrs. Vail and the daughter both denied that the latter delivered the papers to Mrs. Vail or that she, the defendant, ever knew of the action. The lower court found that the process had not been served by the marshal as stated in his return of service, but that it had been duly served. At page 255 of 209 Cal., at page 101 of 287 P. the court said: "It cannot avail appellant that the proof of service made in the quiet title action differed from the fact of service, and, therefore, it becomes unimportant whether the service was made by Crosbie, as he alleged in his return, or whether it was made by someone else, as would follow from the trial court's finding as to service. Jurisdiction does not depend upon the proof of service, but upon the fact that service has been made." This language could refer to nothing other than a delivery by the daughter to the mother, as had been circumstantially shown. This being so the case is directly parallel with the one at bar. In Vail, the process server delivered the papers to defendant's daughter who understood they were for the mother; she in turn delivered them and that was held to be valid service. In the present instance the papers were delivered to the wife with request to deliver the same to defendant husband; she agreed to do so and promptly performed. That should be held valid service here.

It is not suggested that leaving the process at the residence of defendant or with a relative, without more, is sufficient to effect personal service. But in my judgment the finding of personal service in the case at bar should be upheld upon the theory that Smith, the process server, delegated to Mrs. Sternbeck the task of completing service; that that was a delegable duty, cf. Civ.Code, § 2349; Steele v. Board of Trustees, 121 Cal.App. 419, 422, 9 P.2d 217; Knickerbocker v. Redlands High Sch. Dist., 49 Cal.App.2d 722, 725, 122 P.2d 289; that it is legally inconsequential whether he had authority to delegate or not; that the subagent, Mrs. Sternbeck, performed the task and completed the service, the significance of which was understood by the defendant.

On Petition for Rehearing

PER CURIAM.

Respondents' argument on petition for rehearing is a reaffirmation of the age-old but oft' repudiated doctrine that "the end justifies the means." Respondents say that since appellant actually received the summons and complaint, it matters not that

the service did not conform with the statutes or that the process server filed a perjured affidavit. Section 411 of the Code of Civil Procedure provides that the summons must be served "by delivering a copy thereof: * * * 9. In all other cases to the defendant personally." Section 410, Code Civil Procedure, provides that the summons (together with a copy of the complaint) may be served by certain peace officers, "or any other person over the age of 18, not a party to the action." With respect to the return it states: "When it is served by any other person, it must be returned to the same place, with the affidavit *of* such person of its service, and of the service of a copy of the complaint." (Emphasis added.)

Read together, these sections mean that the summons and complaint must be delivered to the defendant personally, and that the person making the delivery *must* make the affidavit. No other conclusion can be reached.

The form of summons currently in use in the County of Los Angeles has on its reverse side an "Affidavit of Service" reading in part as follows: "The undersigned being duly sworn, says: I am and was at the time of the service of the summons herein, over the age of 18 years, and not a party to the within entitled action; *I personally served* the within Summons on the hereinafter named defendants, *by delivering to* and leaving with each of the said defendants *personally* * * *". (Emphasis added.) Thus it can be seen that the affidavit complies with the law.

For this court to hold that a process server can delegate his authority, as was done in the case at bar, and then legally execute and file the above affidavit, would be for us to encourage perjury in the filing of false affidavits. It matters not that the plaintiff in the instant case actually received the documents. To countenance the illegal practice in this case would be to invite every process server to delegate his authority and then file an affidavit based upon the hearsay and uncorroborated statement of the delegatee that he had properly made the service. An affidavit thus prepared might lead to an invalid, default judgment. Petition denied.

ASHBURN, J., dissents.



148 Cal.App.2d 920

CITY OF GLENDORA, a municipal corporation, Plaintiff and Respondent,

v.

L. C. FAUS et al., Defendants and Appellants,

Pacific Electric Railway Company, Defendant and Respondent.

Civ. 21967.

District Court of Appeal, Second District, Division 1, California.

March 5, 1957.

Hearing Denied May 1, 1957.

Condemnation proceedings. From an interlocutory judgment of the Superior Court of Los Angeles County, James G. Whyte, J., adverse to some of the defendants, they appealed. The District Court of Appeal, White, P. J., held that where deed conveying land to railroad stated in the granting clause that such land was for railroad purposes only, railroad did not receive an unlimited fee title to land but merely an easement or right to use land for railroad purposes.

Reversed.

1. Easements ⇐30(1), 37

Easement acquired by utility for a public purpose is terminated by abandonment of that purpose, and whether or not there has been such an abandonment is ordinarily a question of fact.

2. Railroads ⇐69

In construing deeds for railroad rights of way, such deeds are usually construed as giving a mere right of way, although terms

of deed would be otherwise apt to convey a fee, and the same rule is applicable to grant of land to be used as a railroad station.

3. Railroads ⚖69

Where deed to railroad conveyed a strip of land and granting clause declared that land was to be used for "railroad purposes only", deed did not convey an unlimited fee title to land but merely an easement or right to use land for railroad purposes. West's Ann.Civ.Code, §§ 802, 806, 1066–1068, 1070.

See publication Words and Phrases, for other judicial constructions and definitions of "Railroad Purposes Only".

4. Easements ⚖12(2)

In order to grant an easement it is necessary to describe both the land to be subjected to a use and the use to which land is to be subjected.

John Boyce-Smith, Los Angeles, for appellants.

E. D. Yeomans, Roger M. Sullivan, Los Angeles, for respondents.

WHITE, Presiding Justice.

L. C. and Mary G. Faus, two of the defendants, appeal from an Interlocutory Judgment in Condemnation that "upon payment by the plaintiff City of Glendora, a municipal corporation, of the sum of Forty-seven Thousand Four Hundred Dollars ($47,400.00) to the defendant Pacific Electric Railway Company * * * the said plaintiff * * * shall thereupon become the owner of the fee of the lands and all rights and properties therein * * *" and that the defendants Faus are entitled to no "compensation for the taking of their or any of their rights, titles, interests or estates, if any, in or to any of the property described in plaintiff's complaint * * *."

Appellants claim an interest in Parcel 2 only. It is 1600 feet long, the easterly 830 and the westerly 450 feet of which is 80 feet wide, and the center of which is wider—140 feet thereof being 195 feet wide, 20 feet thereof being 255 feet wide and 160 feet thereof being 95 feet wide. The 80 foot strip was used for Pacific Electric Railway tracks and the wider portion was occupied by the Glendora station, station grounds and a team track.

By the instant action the City of Glendora condemned said land for use for off-street motor vehicle parking purposes. The court found "that the property described * * * has heretofore been appropriated to a public use, i. e., railroad purposes, but that the use for which the property is herein sought to be condemned * * * is now a more necessary public use than the present continuation of the use to which the same had heretofore been appropriated." The court further found "that the defendant Pacific Electric Railway Company acquired title to the property * * * by virtue of deed dated June 1, 1906, from Glendora Land Company, a corporation, to the Los Angeles Inter-Urban Railway Company, predecessor in interest of the present railway company; that said deed granted to the railway company a fee upon certain conditions, two of which expressly provide for reverter of title in case of breach; that the recital '*for railroad purposes only*' contained in the granting clause of said deed was not a condition but, at the most, a covenant, and the breach thereof by defendant Pacific Electric Railway Company would not cause a divestment of their title; that none of the remaining conditions or covenants of the said deed have been breached, and the defendant Pacific Electric Railway Company is the owner in fee simple of the aforesaid property and entitled to the award to be given therefor; and the court having found that defendant Pacific Electric Railway Company acquired title to the aforesaid property by virtue of said deed, and is now the owner in fee simple thereof by reason of the specific things and matters found by the Court in this paragraph aforesaid, the Court therefore expressly makes no findings on the remaining issues with regard to title raised by the pleadings of the defendants herein". The court further found that none of the other

defendants, including appellants, has any "right, title, interest or estate of a compensable nature in or to any of the property described * * *". (Emphasis added.)

The deed of June 1, 1906, between Glendora Land Company and Los Angeles Inter-Urban Railway Company, reads in part as follows:

"Witnesseth: That the said party of the first part for and in consideration of the sum of ten dollars ($10.00) to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged by the said party of the first part, *doth hereby grant, bargain, sell and convey,* unto the said party of the second part, *for railroad purposes only, and* subject to the conditions hereinafter specified, all those certain pieces or parcels of land * * * (property description) * * * Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the rents, issues, and profits thereof, subject however to the following conditions, which the party of the second part for itself and its successors and assigns, accepts and obligates itself, to fulfill, to-wit: * * * (conditions) * * *

"To Have and to Hold, all and singular the said premises together with the appurtenances unto said party of the second part, its successors and assigns forever, subject to the foregoing conditions."

Appellants, in their answer, allege that defendant Pacific Electric operated its electric railroad along and over said parcel of land and maintained a depot thereon from about June 1, 1906, until on or about September 29, 1951, when service upon said line was terminated, discontinued and abandoned with the approval of the Public Utilities Commission of the State of California, and that since September 29, 1951, said property has not been used for railroad purposes. It is their contention that the use "for railroad purposes only" was abandoned and that, upon such abandonment, all the right, title, interest or claim of defendant Pacific Electric reverted to appellants, as successors of the Glendora Land Company. Since the record on appeal is a Clerk's Transcript only and because of the "Stipulation for Separate Trial of Issue of Title" and the stipulation that "if on appeal said judgment shall be reversed in full or in part then all the findings of fact and conclusions of law are to be set aside and a new trial shall be had on all issues raised by the pleadings except as may be limited by the appellate opinion or order of reversal * * *", purposely we make no comment regarding appellants' alleged ownership of the land.

In the instant action, the trial judge filed a six-page memorandum decision explaining his judgment. In it, he states that "The first issue to be determined is the nature of the estate created by the deed dated June 1, 1906 * * * specifically whether said deed created a fee title or an easement". He then states that he has concluded that the deed transferred to the grantee fee title to the property involved.

The trial judge cites, as authority for his decision that "the deed creates a fee title rather than an easement", the following California decisions: Behlow v. Southern Pacific R. Co., 130 Cal. 16, 62 P. 295; Hannah v. Southern Pacific R. Co., 48 Cal.App. 517, 192 P. 304; Moakley v. Blog, 90 Cal.App. 96, 265 P. 548; Basin Oil Co. of California v. City of Inglewood, 125 Cal. App.2d 661, 271 P.2d 73; and Shultz v. Beers, 111 Cal.App.2d 820, 245 P.2d 334. Of these decisions, respondent cites only one in its brief on this appeal, to-wit: Hannah v. Southern Pacific R. Co., which it states it the "closest analogy to the factual situation" in the instant action.

The cases of Hannah v. Southern Pacific R. Co., supra, Behlow v. Southern Pacific R. Co., supra, Moakley v. Blog, supra, and Shultz v. Beers, supra, involve deeds containing statements concerning the purpose of the grant appearing in parts other than in the granting clauses thereof.

Basin Oil Co. of California v. City of Inglewood, supra [125 Cal.App.2d 661, 271 P.2d 74], is an action in interpleader for the purpose of ascertaining the true owner of a strip of land conveyed in 1909 to the city, by an instrument which recites as part of the consideration the acceptance "of the land hereby offered for dedication as part of a public street", and, after the property description, contains the following: "To Have and to Hold unto the said second party for public street or right-of-way and to form a portion of that public street now named and known as Centinela avenue". The sole question involved was whether the deed to the city granted the fee title or merely an easement. Judgment that the city was the owner of the fee and entitled to payment of oil royalties was affirmed. However, in that decision, 125 Cal.App.2d at page 664, 271 P.2d at page 75, it is said:

"There are some cases holding that the limitation on use may also limit the estate transferred. A deed conveying 'for road and watering purposes all of the following described tracts' was held to convey only an easement in West Texas Utilities Co. v. Lee, Tex.Civ.App., 26 S.W.2d 457.

* * * * * *

"Appellant relies upon the case of Marshall v. Standard Oil Co., 17 Cal. App.2d 19, 61 P.2d 520. But the decision there noted that *the deed contained reservations in the granting, not the habendum clause,* and in that respect differed from most cases on this subject. Said the court, 17 Cal.App.2d at page 23, 61 P.2d at page 522: 'This distinction is made clearly to appear from the following excerpts which we quote from 9 California Jurisprudence, page 274: "An expression of the purposes of the conveyance as to the use of the property conveyed, 'as for the purpose of a public road', or 'for a county high-school ground and premises', or for certain religious and educational purposes, are generally held to be directory only, and not to qualify or limit a grant which is in absolute form. But *this principle is not applicable where the qualifying words are in the granting part of the deed,* and so clearly connected with the word 'grant' as naturally to suggest that the intention was merely to convey the right to use the property for a certain purpose."'" (Emphasis added.)

From a careful consideration of the Basin Oil Co. decision, supra, it appears to us that, had the granting clause of the deed there involved contained the words limiting the use of the land, as does the granting clause which is the subject of the instant appeal, the decision would have been different.

As urged by respondent, conceded by appellant, and concluded by the trial court, the words "for railroad purposes only" found in the granting clause of the deed being considered on the instant appeal are not a condition subsequent. Therefore, we shall not discuss the cases concerning conditions subsequent cited by the parties.

The decision in Marshall v. Standard Oil Co., 17 Cal.App.2d 19, 61 P.2d 520, depended upon the construction of a deed from Huntington Beach Company to the City of Huntington Beach. At page 25 of 17 Cal.App.2d, at page 522 of 61 P.2d, the court said: "The deed under consideration, in the granting part thereof, uses language which we think clearly imparts the intention of the parties at the time of its execution. We refer to the following language contained therein: 'Reserving and providing, however, that the land herein conveyed is to be used exclusively for street purposes.' * * * The word 'exclusively' has a definite and certain meaning." Judgment perpetually enjoining the city and its lessee from drilling for oil on any portion of the strip conveyed was affirmed.

In Marshall v. Standard Oil Co., supra, however, it is said that the city had accepted the deed of the strip of land in trust for use as a public street exclusively; and that the grantor was entitled to have the trust agreement enforced, and, 17 Cal.App.

2d at page 29, 61 P.2d at page 524, that "the acceptance of a deed containing a covenant on the part of a grantee is equivalent to an agreement on the part of the grantee to perform the same". While a covenant may be enforced by injunction or may support an action for damages for breach thereof, its breach would not cause a reversion of the title to the grantor. Therefore, we are not discussing the cases cited by the parties involving breaches of covenants to use lands for certain purposes.

Since the Supreme Court, speaking through Mr. Justice Schauer, in the footnote to its decision, Highland Realty Co. v. City of San Rafael, 46 Cal.2d 669, 677, 298 P.2d 15, 19 (decided after the judgment in the instant action), indicates that "the interest in land which an easement constitutes is real property and may itself be held in fee simple" (citing cases), the question to be determined on the instant appeal may be more clearly stated as follows: Did the deed of June 1, 1906, convey to defendant Pacific Electric an unlimited fee title to the land itself or a fee title to an easement entitling it to use the land "for railroad purposes only"?

If the Pacific Electric is the owner of an unlimited fee title to the land itself, then, as decided by the trial court, appellants could have no interest in the land.

[1] "An easement acquired by a utility for a public purpose is terminated by abandonment of that purpose, and whether or not there has been such an abandonment is ordinarily a question of fact. Slater v. Shell Oil Co., 39 Cal.App.2d 535, 549, 550, 103 P.2d 1043, and cases there cited." People v. Ocean Shore Railroad, 32 Cal.2d 406, 417, 196 P.2d 570, 578, 6 A.L.R.2d 1179.

[2] "Further, the general rule is that 'in construing contracts and deeds for railroad rights of way such deeds are usually construed as giving a mere right of way, although the terms of the deed would be otherwise apt to convey a fee." Highland Realty Co. v. City of San Rafael, supra, 46 Cal.2d at page 678, 298 P.2d at page 20. The same rule is applicable to the grant of the wider portion to be used as a station. See Tamalpais Land & Water Co. v. Northwestern Pac. R. Co., 73 Cal.App.2d 917, 167 P.2d 825.

While Section 802 of the Civil Code names only six servitudes which may be granted and held although not attached to land, the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment, by which it was acquired, Civil Code, § 806, and there seems to be no actual limit to the uses of one's land which may be transferred. "* * * the novelty of the burden is no bar to its recognition as an easement if its creation violates no principle of public policy". 17 Cal.Jur.2d 93; Wright v. Best, 19 Cal.2d 368, 382, 121 P.2d 702.

Grants are generally to be interpreted in like manner with contracts, Civil Code, § 1066. "A clear and distinct limitation in a grant is not controlled by other words less clear and distinct". Civil Code, § 1067. And it is only when "the operative words of a grant are doubtful" that other parts may assist in construing the grant. Civil Code, § 1068. Even if there were parts absolutely irreconcilable, the former of the irreconcilable parts prevails. Civil Code, § 1070.

[3] The grant being considered in the instant action is a grant "for railroad purposes only". The portions of the instrument following the granting clause so limited, contain no language inconsistent with the grant of the use for railroad purposes only of the land described. From a consideration of the entire instrument, including the granting clause, we are persuaded that the predecessors of defendant Pacific Electric Railway intended to and did grant an easement or right to use said land for railroad purposes only.

It is urged by respondent that had the intent been to so limit said grant, the property could have been described as a "right-of-way". However, the words "right of way" may refer to the land owned in unlimited fee by the owner of the road or railroad passing over it, or the term may

be used to denote an easement only. The deed in the instant action, in our opinion, is clearer because of the limited grant.

[4] In order to grant an easement it is necessary to describe both the land to be subjected to a use and the use to which the land is to be subjected. We believe the grant in the instant action has done that. The easement is not limited to use as a "right of way", but to use "for railroad purposes only", which, of course, includes the building and operating of a station connected with the railroad.

The judgment is reversed.

DORAN and FOURT, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



149 Cal.App.2d 106

Stanley L. MARTIN, Plaintiff and Appellant,

v.

Bernie CASSIDY, Defendant and Respondent.

Civ. 9024.

District Court of Appeal, Third District, California.

March 12, 1957.

Rehearing Denied April 5, 1957.

Action for forcible entry and detainer and for conversion of personal property. From a judgment of the Superior Court, San Joaquin County, George F. Buck, J., the plaintiff appealed. The District Court of Appeal, Schottky, J., held, inter alia, that evidence including showing that lessee had made statement that he was abandoning leased premises to live elsewhere, that lessee failed to pay any further rent, and that he was absent from premises and was confined in jail for two weeks as a vagrant was sufficient to justify inference that lessee intended to abandon the leased premises, justifying lessor in taking possession of the premises.

Affirmed.

1. Landlord and Tenant ⇐277(3)

Lessor could not forcibly re-enter leased premises without having recourse to legal processes notwithstanding right of re-entry in case of default had been expressly reserved in lease, since such forcible entry tends to a breach of the peace.

2. Abandonment ⇐2

"Abandonment" is the voluntary giving up of a thing by owner because he no longer desires to possess it or to assert any right or dominion over it and is entirely indifferent as to what may become of it or as to who may thereafter possess it.

See publication Words and Phrases, for other judicial constructions and definitions of "Abandonment".

3. Landlord and Tenant ⇐110(1)

Mere absence from leased premises when landlord calls for rent is insufficient to support a finding of abandonment by tenant.

4. Landlord and Tenant ⇐161(1)

That lessee was in jail did not support a finding of abandonment of leased premises so as to authorize landlord to remove lessee's private property from the premises.

5. Landlord and Tenant ⇐109(4)

A surrender of demised premises occurs only through consent or agreement of parties evidenced by express agreement or by unequivocal act inconsistent with terms of lease and with relation of landlord and tenant, or by acts so inconsistent with terms of lease as to imply in law an agreement to surrender, and hence, an acceptance by landlord is requisite.

6. Abandonment ⇐3, 6

Abandonment is a question of intention, to be determined only upon investigation of all facts and circumstances, and the trier of fact is ordinarily the exclusive judge of existence of the elements thereof, including the cardinal element of intention.

7. Landlord and Tenant ⇐112½

Evidence including showing that lessee had made statement that he was abandoning

leased premises to live elsewhere, that lessee failed to pay any further rent, and that he was absent from premises and was confined in jail for two weeks as a vagrant was sufficient to justify inference that lessee intended to abandon the leased premises, justifying lessor in taking possession of the premises.

8. Appeal and Error ⇐1010(1)

Where evidence was sufficient to sustain trial court's finding, such finding would be accepted by appellate court.

John O. Fugazi, Stockton, for appellant.

James I. Harkins, Stockton, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendant for forcible entry, forcible detainer and for conversion of personal property. Defendant denied the material allegations of the complaint and set up the further defenses that he was entitled to reenter the leased premises because of plaintiff's default in the payment of rent and also because of the abandonment of the premises by plaintiff.

The action was tried before the court sitting without a jury. The court found that it was not true that defendant forcibly took possession of the leased premises without the consent of plaintiff; that it was not true that plaintiff was in possession of the premises on February 15, 1955; that it was true that plaintiff, on or before February 15, 1955, abandoned said premises and voluntarily surrendered them to defendant. In accordance with said findings judgment was entered that plaintiff take nothing by reason of said action. Plaintiff has appealed from said judgment.

The record shows that the appellant, Stanley L. Martin, was lessee of certain real property pursuant to the terms of a five year lease in writing with respondent, Bernie Cassidy, the lessor and owner. Appellant had been living in his own house trailer on this property pursuant to the lease for four and one-half years and conducted a retail and wholesale fruit business there. The premises consist of a bare lot upon which there is a fruit stand at the front, with a small shed attached to the end of it. There is no dwelling or other substantial structure on the lot. The lease contained the following provision:

> "2. And it is agreed, that if any rent shall be due and unpaid, or if default shall be made in the performance of any of the covenants herein contained on the part of the Tenant, then it shall be lawful for the said Owner to re-enter the said premises and to remove all persons and property therefrom and at his option terminate this lease."

Respondent testified that on December 6, 1954, appellant came in and paid $30 of the $45, which was the month's rent, and stated that he was abandoning the premises and that he was going to Sunnyvale, California, to his son's or daughter's home. Appellant denied that he had stated that he was abandoning the premises, but admitted that he had stated that he was losing money and that at that time he informed respondent that he was seeking a buyer for his business and equipment and attempting to find a new tenant of the premises for respondent.

Respondent testified that he made numerous trips to the premises in January and February, 1955, to collect the rent from appellant but never found appellant at home. Appellant testified that he never moved away from the premises, although he was absent therefrom for days at a time. He admitted that he made no further payment of rent to respondent after the payment he made on December 6th.

On February 15, 1955, in appellant's absence and pursuant to advice of counsel, respondent removed from the premises certain personal property of appellant, to wit: One used house trailer, one used automobile, one wood and wire mesh fence, and seven or eight small seedling trees in one-gallon containers. Many of appellant's business fixtures and equipment were not

removed from the premises and were still there when the respondent leased the premises to a Mr. Tinsley on February 15, 1955. At that time appellant was confined in the San Joaquin County jail. When appellant was released on February 21, 1955, he returned to the premises in question and was told by Mr. Tinsley that appellant could take any property that was his. Appellant did take custody of most of this property at various times prior to the trial.

On March 10, 1955, appellant made demand in writing on defendant for the return of the possession and occupancy of the leased premises, which demand was refused.

Appellant's principal contention is that the evidence is insufficient to support the judgment.

The principal question to be decided in this case is whether or not the evidence is sufficient to support the court's finding of abandonment. For if there is no support for such a finding we think it clear that appellant established a cause of action for forcible entry and detainer.

Code of Civil Procedure, section 1160, subdivision 2, provides that a person is guilty of forcible detainer, "Who, in the night-time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant."

[1] Respondent argues that the lease provided for the right of re-entry by respondent when appellant was in default in payment of the rent and that therefore a three day notice was not required. He cites the case of Noblit v. Blickshire Hotels & Motels, Inc., 93 Cal.App.2d 864, 210 P.2d 43, in which case plaintiffs were in arrears in the payment of rent, and had locked their rooms and left on a vacation. While away the defendants broke the lock, entered the premises and removed plaintiffs' property and placed it in a store-room. The lower court nevertheless gave judgment to plaintiffs. The judgment was reversed, the appellate court holding that no actionable wrong had been committed for the reason " 'that plaintiffs had refused and continued to refuse to pay the lawful charge for the occupancy of said cottage' and that the actions of defendants were not willful or malicious."

However, as pointed out by appellants, the cited case is not in point as the court was there dealing with a factual situation that came within the provisions of California Civil Code, sections 1861 and 1861a which relate to hotel, motel, inn, boarding house and lodging house keepers, and keepers of apartment houses, apartments, cottages or bungalow courts, and grant landlords thereof the right to reenter, take possession of the unit and place a lien upon the possessions of the tenant for the unpaid rent. In the instant case the appellant was in possession under a five year lease of which only four and one-half years had expired at the time respondent took possession and removed certain personal properties of appellant from the premises.

In the case of Eichhorn v. De La Cantera, 117 Cal.App.2d 50, at page 54, 255 P.2d 70, at page 72, the court said:

> "But wholly aside from that, it is well settled in this state that an owner cannot forcibly re-enter without having recourse to legal processes. The reason for the rule is that such forcible action tends to a breach of the peace.
>
> "As early as 1859 the Supreme Court declared in McCauley v. Weller, 12 Cal. 500, 524, that the object of the forcible entry law was 'to prevent the disturbance of the public peace, by the forcible assertion of a private right.' And the court said, also: 'Questions of title or right of possession cannot arise * * *.' A few years later in Mitchell v. Davis, 23 Cal. 381, 384–385, the court said: 'One great object of the Forcible Entry Act, is to prevent even rightful owners from taking the law into their own hands and attempting to recover, by violence, what the remedial process of a Court would

give them in a peaceful mode.' Voll v. Hollis, 60 Cal. 569, 573–574 follows both the McCauley and Mitchell cases. In the early case of Brown v. Perry, 39 Cal. 23, 24, the court said: 'The law prohibits a forcible entry, *even by the person entitled to possession*, for the reason, among others, that *it necessarily tends to a breach of the peace.*' (Emphasis added.) See, also, Knowles v. Crocker Estate Co., 149 Cal. 278, 285, 86 P. 715, and discussion in 12 California Jurisprudence page 595 et seq.

"Even in cases where a landlord's right of re-entry in case of default is expressly reserved in a lease, it has been held that he cannot re-enter by force. California Products, Inc., v. Mitchell, 52 Cal.App. 312, 314, 198 P. 646; Calidino Hotel Co. [of San Bernardino] v. Bank of America, 31 Cal.App.2d 295, 306, 87 P.2d 923; Igauye v. Howard, 114 Cal.App.2d 122, [125] 249 P.2d 558.

"The absence of the occupant from the premises at the time does not make the entry any the less a forcible entry. Ely v. Yore, 71 Cal. 130, 133, 11 P. 868."

See also Pickens v. Johnson, 107 Cal. App.2d 778, 238 P.2d 40.

We come now to the question of whether there is sufficient evidence to support the court's finding of abandonment and surrender.

[2, 3] Abandonment is defined as the "voluntary giving up of a thing by the owner because he no longer desires to possess it or to assert any right or dominion over it and is entirely indifferent as to what may become of it or as to who may thereafter possess it." (1 Cal.Jur.2d, sec. 2, p. 2.) Mere absence from the premises when the landlord calls for the rent is insufficient to support a finding of abandonment. In Swigert v. Stafford, 85 Cal.App.2d 469, 472, 193 P.2d 106, 108, the court states:

"Abandonment cannot be inferred unless it can be fairly shown that non-user by lessee is coupled with an intent to relinquish all rights in the premises."

[4] Respondent knew that appellant was in jail on February 11, 1955, four days before he removed appellant's property from the premises and took possession of them. The fact that appellant was in jail does not support a finding of abandonment. Riner v. Vernon, 132 Cal.App. 178, 22 P.2d 255.

[5] As stated in 32 Am.Jur., sec. 901, page 763:

"A surrender of demised premises occurs only through the consent or agreement of the parties evidenced either by an express agreement or by an unequivocal act inconsistent with the terms of the lease and with the relation of landlord and tenant, or by acts so inconsistent with the terms of the lease as to imply in law an agreement to surrender, and hence, an acceptance by the landlord is requisite."

[6] In 1 Cal.Jur.2d, sec. 13, at page 15, it is stated:

"Abandonment is a question of intention, to be determined only upon an investigation of all the facts and circumstances, and the trier of fact is ordinarily the exclusive judge of the existence of the elements thereof, including the cardinal element of intention. But in the exceptional case where there is no dispute as to the facts or the inferences to be drawn therefrom, the question becomes one of law for the court."

Appellant argues that the fact that he never removed his worldly possessions from the premises shows an intent to retain possession of those premises, and that the fact that appellant was seeking a buyer for his business equipment and a new tenant for respondent shows an intent to derive a profit from his property.

Respondent in reply contends that he was entitled to construe the acts and statement of appellant as an abandonment and surrender of the leased premises. He argues

that the inference may be drawn from the evidence of appellant's admitted business failure, his inability to pay the rent and his confinement as a vagrant in jail for two weeks, that appellant fully intended to and did surrender the premises to respondent. Furthermore, respondent contends, appellant's statement made on December 6, 1954, that he was abandoning the leased premises to live in Sunnyvale, California, was entitled to belief by respondent.

However, as appellant points out, respondent testified that on December 6, 1954, the time appellant stated that he was abandoning the premises, appellant paid the rent for the entire month of December, which was for future rent, and appellant argues that this inconsistent act completely refutes this statement by appellant as showing a valid intent on the part of appellant to abandon or surrender the premises at that time. Appellant argues that since it is contrary to human nature and experience for anyone to surrender a lease and at the same time to pay the rent in advance, the respondent was not entitled to construe this statement as an abandonment or surrender of the leased premises. Appellant argues further that respondent's own testimony shows that respondent did not treat it as such, but continued to seek to collect rent from appellant up until the time when he apparently thought he would place a better tenant in possession and during a time when he would not have any trouble from appellant because he knew that he was in jail.

[7, 8] It is apparent that it might well be inferred from the record that appellant did not intend to surrender and abandon the leased premises but a careful study of the record convinces us that it cannot be held as a matter of law that there is no substantial evidence to support the court's finding of abandonment. Appellant's statement to respondent on December 6th, his failure to pay any further rent, his absence from the premises, and the other circumstances hereinbefore recited were sufficient in our opinion to justify the inference that appellant intended to abandon the premises. We believe that the issue was one of fact for the trial court to determine and under familiar rules governing appellate courts we must accept the finding of the trial court.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

KEY NUMBER SYSTEM

Angela CHAVEZ, widow of deceased employee Jose Chavez, et al., Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Vernon Paving Company, a corporation, and Casualty Insurance Company of California, a corporation, Respondents.*

Civ. 22039.

District Court of Appeal, Second District, Division 1, California.

March 12, 1957.

Rehearing Denied April 8, 1957.

Hearing Granted May 8, 1957.

Proceeding brought for review of an order of the Industrial Accident Commission disapproving a compromise and release, and awarding death benefits in an amount less than that agreed upon. The District Court of Appeal, White, P. J., passing upon a question of first impression, held that workman's non-industrial death did not entitle employer and its insurance carrier to rescind compromise agreement on ground of failure of consideration.

Award annulled.

1. Workmen's Compensation ⇐1145

Workman's nonindustrial death did not entitle employer and its insurance carrier to rescind compromise agreement on ground of failure of consideration. West's Ann.Civ.Code, § 1689, subd. 4.

2. Workmen's Compensation ⇐1123

Approval procedure prescribed by Labor Code is not an integral part of com-

* Opinion vacated 321 P.2d 449.

promise agreement, and where compromise agreement has been duly executed, it is not invalid merely because Commission has not yet approved it. West's Ann.Labor Code, §§ 5000, 5001.

Levy, Russell & DeRoy, George DeRoy, Los Angeles, for petitioner.

Everett A. Corten, San Francisco, Edward A. Sarkisian, Los Angeles, for respondent, Industrial Accident Commission.

Thompson & Talbott, George Thompson, Los Angeles, for respondents, Vernon Paving Co., a corporation, and Casualty Ins. Co. of California, a corporation.

WHITE, Presiding Judge.

The widow and dependent children of Jose Chavez, hereinafter referred to as the employee, seek a review and the annulment of an award to them of certain death benefits and review of an order (entered simultaneously with said award) disapproving a compromise and release. The compromise settled, for an amount larger than the amount of the award, the claims of the employee by reason of an industrial injury suffered by him and hereinafter referred to.

As to the factual background surrounding this proceeding, the record reflects that on January 5, 1956, the employee filed an application for adjustment of compensation claiming injury to his right hand and wrist, when he was thrown off a truck while stacking lumber. The matter was set for hearing on February 27, 1956, at which time oral testimony was taken from the employee and other evidence received. Thereafter, and prior to March 10, 1956, the parties entered into an agreement to settle all claims on account of his said injury. On March 10, the employee signed the compromise agreement (on forms provided by the Commission) and forwarded them to the carrier. On March 12, the employee died from a heart attack, entirely unrelated to his industrial injury.

On March 19, 1956 (one week after the employee's death), the carrier forwarded the compromise and release, duly executed by itself to the Commission for its approval. On the following day the referee issued a notice of intention to take the matter off-calendar, "(S)uggestion of the death of the applicant having been made to the referee—and good cause appearing therefor."

On April 13, 1956, the carrier submitted a certified copy of the death certificate and asked to withdraw from the compromise.

On the same day, petitioners by their counsel requested in writing that the compromise be approved and advised that they were "not requesting a hearing at this time because of the provisions" of a sentence in the compromise that it was "subject to the following conditions subsequent", that "(R)egardless of any other section" of the agreement, it was to be "withdrawn, void, rescinded of no force and effect", if the matter were set for hearing as to its adequacy.

On May 9, 1956, the carrier served formal notice that it rescinded its said agreement, "based upon the rights given under California Civil Code, Sections 1688 through 1691, and such other laws of California as are applicable."

On July 2, 1956 the referee, by order, disapproved the compromise, "applicant having died prior to the approval thereof and good cause appearing therefor."

Simultaneously, the referee issued findings and award in favor of the widow, as trustee, for the sum of $407.14, which the referee computed to be the value, at statutory rates, of the temporary disability and permanent disability, accrued and unpaid at the date of death. Labor Code, Section 4700. The findings spelled out that the injury had caused temporary disability from "November 29, 1955, to and including January 15, 1956, and again beginning January 28, 1956, to and including February 14, 1956, entitling the applicant to $35.00 per week during said time, based upon maximum earnings, in the total sum of $330.00" and "permanent disability, which, for the employee's age and occupation, is rated at

31-¼ percent, entitling him to $30.00 per week for 125 weeks, in the total sum of $3,750.00, based upon maximum earnings." The unpaid permanent disability accrued to the date of death brought the entire unpaid amount to the sum of $407.14.

On August 16, 1956, the applicants' petition for rehearing was denied by the Commission and applicants thereupon petitioned this court for a Writ of Review.

The order of respondent Commission disapproving compromise and release insofar as here pertinent, reads:

> "The parties to the above entitled action filed a Compromise and Release herein, March 20, 1956, and this Commission, having considered the entire record, now finds that it is not for the best interests of the parties to approve said Compromise and Release and that it should be disapproved, applicant having died prior to approval thereof * * *"

The question presented to us in this proceeding is whether the respondent Commission exceeded its jurisdiction by disapproving (as having been rescinded for failure of consideration) an executed compromise and release, which was submitted to said Commission after the death of the injured employee from a non-industrial cause and where the cause of and actual death of said employee were unknown to respondent employer and its insurance carrier at the time of execution of the aforesaid compromise and release.

At the outset it should be noted that admittedly, respondent Commission did not in any way base its disapproval of the compromise agreement upon the ground that it was inequitable or unfair; upon the ground that it had not been executed or delivered by the employee prior to his death, or that it was executed and delivered to respondent Commission by respondent employer and its insurance carrier under a mistake of fact. On the contrary, the record reflects that respondent Commission disapproved the compromise and release solely upon the ground that the consideration therefor failed in a material respect by reason of the death of the employee giving the employer and its carrier a right to rescind, and upon the ground that the compromise agreement was not valid for the reason that the commission had not approved it at the time of the employee's death.

To us there appears to be no question that, as between themselves the parties to the agreement and release had "struck a bargain" for settling the employee's claims and equally unquestioned is the fact that the employee had formally executed the written embodiment of their agreement and placed it in course of transit to the respondent insurance carrier. Also, it is manifest, that decedent's consent to the terms of the understanding reached by the parties was effectively communicated to respondent insurance carrier thereby making the release immediately operative in accordance with its terms when the employee released possession of it with the apparent intent that it should become immediately effective, Civil Code, Sec. 1583; Restatement of Contracts, Sec. 402, comment b.

[1] Respondent employer and its insurance carrier first contend that due to the non-industrial death of the employee they were entitled to rescind and withdraw from the compromise and release submitted to respondent Commission. That such recission is authorized by the terms of Civil Code, Sections 1688-1691.

Reference to the Report of respondent Commission, Panel Two, on order denying petitioners' application for reconsideration clearly shows that the panel relied upon Civil Code, Section 1689, Subd. 4, which permits recission by a party to a contract if the "consideration, before it is rendered to him, fails in a material respect, from any cause."

All parties to the present controversy agree that the question of whether the consideration for the compromise and release agreement can be said to have failed in a material respect by reason of the death of the employee, thereby giving rise to a right to rescind pursuant to the provisions of Civ-

il Code, Sec. 1689, subd. 4, tenders a case of first impression and has never been decided by the courts of this state. A rather extensive search by us of the annotations to the pertinent code section, as well as a review of the discussions in various text books and digests as to the right to rescind for failure of consideration has proved fruitless insofar as our efforts to find any cases wherein the immediate question involved has been considered or decided by the appellate courts of this state or any other jurisdiction is concerned.

Respondent employer and its insurance carrier's argument seemingly is based upon the claim that the bulk, or at least a substantial part of the settlement and release was to compensate the employee for further permanent disability. Recourse to the agreement discloses that the reason for compromise was "To avoid the hazards of litigation, a dispute has arisen as to the nature, extent and duration of the Applicant's disability. The defendants deny that the Applicant is temporarily totally disabled after November 28th, 1955, and further assert that the Applicant's present disability, if any, is a result of a hemorrhoid operation performed February 21st, 1956. It is further alleged that the Applicant's condition will improve with the passage of time, and further activity, and that the Applicant's permanent disability will be less than the present stated medical record. It is therefore believed to be to the best interests of all parties to dispose of this matter by Compromise and Release, and that the amount offered is a just and adequate settlement of this claim." The foregoing provisions of the settlement and release agreement would seem to lend force to the view expressed by respondent Commission in its answer to the Petition for Writ of Review herein, that "It was not so much temporary disability, so much medical expense and so much permanent disability they would be adjusting, although these were involved in the controversy. It would be the *controversy itself* which was being settled."

We have concluded that the contention of respondent employer and its insurance carrier that they were entitled to rescind upon the ground of failure of consideration, Civil Code, Sec. 1689, subd. 4, cannot be sustained and that the facts contained in the evidentiary features of this controversy do not support the findings of respondent Commission that there was a failure of consideration in a material respect.

We are persuaded that the death of the employee Chavez in no wise affected the consideration which respondent employer and its insurance carrier received. That consideration was a settlement and release of Chavez' right to receive on account of permanent disability a sum substantially in excess of that which the real parties in interest agreed to pay. Both parties knew that the payments to Chavez would probably be made in instalments during his lifetime, and that if he died the right to these permanent disability payments would cease, and must have contracted with that fact in mind. The fact that Chavez died before the right to any permanent disability payments accrued did not affect the fact that he released the right to receive payments had he lived.

[2] We come now to the final contention of respondents that the compromise and release agreement was invalid for the reason that it had not been approved by respondent Commission at the time of the death of the employee Chavez.

Labor Code, Section 5000 provides in part as follows:

> "* * * No contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division, but nothing in this division shall: (a) Impair the right of the parties interested to compromise, subject to the provisions herein contained, any liability which is claimed to exist under this division on account of injury or death * * *".

Insofar as here pertinent, Labor Code, Section 5001, provides:

> "* * * No release of liability or compromise agreement *is valid* unless it is approved by the commission, a pan-

el, commissioner, or referee." (Emphasis added.)

There can be no doubt as to the broad powers of the Commission to withhold approval of a compromise agreement, or to amend or vacate an award based thereon, when the equities of the case require it, but here we are not confronted with a situation wherein the Commission rejected the agreement because of any inequities therein affecting either the employer or employee. The sole and only ground upon which the Commission by its order disapproved the compromise agreement, was, as stated therein, "Applicant having died prior to the approval thereof and good cause appearing therefor". The question naturally arises as to whether the approval procedure prescribed by Labor Code, Section 5001 is an integral part of a compromise agreement and that either party thereto is at liberty to rescind the same or withdraw therefrom at any time prior to approval by the Commission. We are inclined to the view that the question must be answered in the negative. Research by the parties herein has failed to disclose any authorities providing a definitive statement of the effect of the provisions of Labor Code, Section 5001, and independent research by us did not unearth any appellate court decisions as to the immediate question here involved. However, as respondent Commission points out in its answer to the petition for a writ of review, "In actual practice, the parties themselves negotiate their compromises. Occasionally, the Commission has suggested increase of the amount to be paid for a release. This would indicate that the Commission does not adhere to a view that the approval procedure prescribed by the code is an integral part of a compromise, but rather, that the approval procedure is a subsequent step, superimposed on the negotiations of the parties, and intended to accomplish fairness in every case in which experienced adjusting competence is pitted (very often) against its very opposite.

"It is to be noted that the settlement herein was for $2,250.00—a sum very substantially less than the amount the employee would have ultimately received, had he lived. There is therefore no question of over-reaching. The agreement apparently was upon a fair figure, fairly arrived at."

When the aims, purposes and objectives of Labor Code, Sections 5000 and 5001 are considered, we are persuaded that the legislation in question does not contemplate that either party has a right to withdraw from or to repudiate a compromise and release after it has been duly executed, but before the Commission has acted upon it, and that, in the instant case, the facts do not, for the reasons heretofore advanced, support the findings of respondent Commission that under Civil Code, Section 1689, subd. 4, there was a failure of consideration due to the death of the employee Chavez.

The award is annulled.

DORAN and FOURT, JJ., concur.



149 Cal.App.2d 160

George IVANCOVICH and Dorris Ivancovich, as Joint Tenants with Right of Survivorship, Plaintiffs and Appellants,

v.

Katherine SULLIVAN et al., Defendants and Respondents.

Civ. 17066.

District Court of Appeal, First District, Division 2, California.

March 14, 1957.

Action for reformation of deed which sister had executed conveying property to herself, her brother and his wife, as joint tenants for life with remainder to sister's children rather than, as intended, conveying to her brother and wife an undivided one-half and to herself an undivided one-half interest, as joint tenants for life, with remainder to her children. From a

judgment granting reformation rendered by the Superior Court, City and County of San Francisco, Milton D. Sapiro, J., an appeal was taken. The District Court of Appeal, Stone, J. pro tem., held that evidence sustained finding that such deed had been delivered when it had been given by brother, after he and his wife had also signed it, to one of the sons of sister who took it subject to condition that all of sister's children would sign it as they later did.

Judgment affirmed.

1. Reformation of Instruments ⇐16

Court has authority to reform a deed where it does not express intent of parties.

2. Deeds ⇐60

Under statute prohibiting conditional delivery of deeds, where conditions are expressed concurrently with manual delivery of deed, grant is either absolute or void, depending on grantor's intent. West's Ann.Civ.Code, § 1056.

3. Appeal and Error ⇐996, 1010(1)
Deeds ⇐66

Delivery or nondelivery of a deed is a question of fact to be determined by surrounding circumstances of transaction, and where there is substantial evidence or where an inference or presumption may be drawn from the evidence to sustain trial court's finding on issue of delivery, it will not be interfered with on appeal. West's Ann. Civ.Code, § 1056.

4. Deeds ⇐208(1)

In action for reformation of deed which sister had executed conveying property to herself, her brother and his wife as joint tenants for life with remainder to sister's children rather than, as intended, conveying to her brother and wife an undivided one-half and to herself an undivided one-half interest, as joint tenants for life, with remainder to her children, evidence sustained finding that such deed had been delivered when it had been given by brother, after he and his wife had also signed it, to one of the sons of sister who took it subject to condition that all of sister's children would sign it as they later did. West's Ann.Civ.Code, § 1056.

5. Appeal and Error ⇐994(3), 1011(1)

Reviewing court may not pass upon trial court's determination of credibility of witnesses or enter upon a redetermination of facts, where there is simply a conflict in evidence.

6. Deeds ⇐60

Where deed which was unconditional on its face was personally delivered, vesting of title occurred by operation of law, even though there might have been an oral condition invoked by grantor and even though vesting might have been contrary to express oral stipulation of parties. West's Ann.Civ.Code, § 1056.

7. Deeds ⇐60

Where grantor and grantee have entered into oral agreement as to condition upon which deed will become effective, although such condition drops out upon manual conveyance of deed, grantor may nevertheless maintain action for enforcement of agreement, as the dropping out of the condition from the deed does not abrogate the agreement or render it unenforceable. West's Ann.Civ.Code, § 1056.

Young, Rabinowitz & Chouteau, San Francisco, for appellants.

Sullivan, Roche, Johnson & Farraher, San Francisco, for respondent Katherine Sullivan.

Heller, Ehrman, White & McAuliffe, San Francisco, for respondents Harry Ivan Sullivan and others.

STONE, Justice pro tem.

The appellant George Ivancovich is a licensed real estate broker, and the other appellant, Dorris Ivancovich is his wife. George is a brother of the respondent Katherine Sullivan, and the other respondents, Harry Ivancovich Sullivan, William A. K. Sullivan, Katherine Pauline Quinlan and Robert Phillip Sullivan are the children of Katherine Sullivan. For many years George Ivancovich handled certain business

affairs, particularly real estate transactions, for his sister Katherine Sullivan and the Ivancovich Estate, of which Katherine Sullivan owned slightly more than one-half.

In one transaction handled by George, his sister Katherine bought the parcel of real property located at the northeasterly corner of Kearney Street and Pine Street in the City and County of San Francisco. Katherine Sullivan took title to this property in her own name and that property is the subject of this action. George advised Katherine to sell another parcel of real property known as the Fairmont Garage in order to finance the purchase. She took his advice and George, through a series of rather complicated transactions, sold the Fairmont Garage property at a profit. George testified that as an expression of appreciation of his services in selling the Fairmont Garage, respondent Katherine Sullivan agreed to deed him and his wife Dorris Ivancovich as joint tenants an undivided one-half interest in the property at Pine and Kearney Streets. By the same conveyance Katherine was to deed herself as joint tenant the remaining one-half interest in the property. George had Katherine execute a deed dated April 18, 1946, but it conveyed the property to George Ivancovich, his wife Dorris and Katherine Sullivan as joint tenants rather than to George and Dorris as to an undivided one-half and to Katherine as to an undivided one-half interest as joint tenants.

George testified this deed was incorrectly drawn and on April 25, 1946, he had a second deed prepared whereby Katherine, George and Dorris conveyed the property to themselves as joint tenants for life with the remainder interest to the children of Katherine Sullivan, Harry Ivan Sullivan, William A. K. Sullivan, Katherine Pauline Quinlan and Robert Phillip Sullivan in joint tenancy with right of survivorship. George testified he and his wife signed the deed of April 25, 1946, after which he placed it in his file. He denied Katherine Sullivan had signed the deed when he last saw it. Subsequently, on February 10, 1947, George and his wife reconveyed the property to Katherine Sullivan and on February 24, 1947, George had Katherine execute a deed purporting to convey an undivided one-half interest in the property to George and Dorris Ivancovich as joint tenants. George testified that the purpose of the two 1947 deeds was to correct the deed of April 18, 1946, which purportedly conveyed to him and his wife a ⅔rds interest in the property, whereas, they should have received only an undivided one-half interest.

Katherine Sullivan testified she did not read any of the deeds she signed because she relied upon her brother George to see that the documents were properly prepared. She further testified in substance that she wanted George and Dorris to have a life estate in one-half the property but upon the death of the survivor of them she intended to have the property go to her children.

There is sharp conflict in the testimony concerning the delivery of the deed of April 25, 1946. As stated previously, appellant George Ivancovich testified the deed was placed in his file by him and was never given to anyone and that Katherine Sullivan had not signed it. The respondent, Robert Sullivan, testified however that the deed was handed to him by George some time in 1949 at the same time George handed him a type written memorandum from which Robert was to prepare an agreement to be signed by all of the respondents. The memorandum provided for monthly payments of $400 per month to Dorris under certain conditions. An agreement was prepared pursuant to the memorandum and signed by all the respondents and sent to George. He testified he refused to accept the agreement because of a clause which would permit the payments of $400 per month to Dorris to be reduced in the event rentals from the Pine and Kearney Street property fell below $650 per month. Some time later a dispute arose between the parties and George planned to put his and Dorris' one-half interest in the property up for sale. It was at this time he discovered that the deed of April 25, 1946, had been recorded on June

2, 1952, and he thereupon commenced this quiet title action.

The trial court found that a confidential relationship existed between George and his sister Katherine. The court also found that by the deed of April 25, 1946, the grantors intended to grant Katherine Sullivan a life estate in an undivided one-half interest in the property with the remainder to her children as joint tenants, and a life estate in the other undivided one-half interest to George and Dorris Ivancovich as joint tenants with right of survivorship, and upon the death of the survivor the remainder to vest in the children of Katherine Sullivan as joint tenants. The court by its findings and judgment reformed the deed of April 24, 1946, to express the true intent of the parties and found the deed of February 24, 1947, to be of no force or effect. The court further found that the deed of April 24, 1946, was signed by all of the parties prior to its delivery to Robert Sullivan; that George delivered the deed to Robert Sullivan who took it subject to the condition that the respondents sign an agreement incorporating the terms contained in the memorandum regarding payments to Dorris Ivancovich. The court also found that the collateral agreement was prepared and signed by all of the necessary parties and delivered to appellants which fulfilled the condition which was made concomitant with manual delivery of the deed.

[1] Appellants have not seriously questioned the authority of a court to reform a deed to correct the unilateral mistake of a grantor. Both appellants and respondents concede the original deed in the action did not express the intent of any of the parties and that the succeeding deeds were attempts to correct that error. It appears to be settled that a court does have authority to reform a deed under the circumstances. Tyler v. Larson, 106 Cal.App.2d 317, 235 P.2d 39; Nunes v. De Faria, 107 Cal.App. 2d 794, 238 P.2d 106.

The appellants' principal contention is that the trial court erred in finding that the deed of April 25, 1946, was controlling. They argue that the deed was delivered conditionally and that the condition was never complied with which renders the deed legally insufficient and void. Respondents contend that the provisions expressed in the memorandum handed Robert at the time the deed was handed to him were incorporated in a written agreement and delivered to George Ivancovich, thereby fulfilling any condition expressed at the time of the delivery. The trial Judge summarized his views concerning the delivery as follows:

> "I believe—and I am willing to accept the testimony as to the delivery of the joint tenancy deed which was dated April 25, 1946; I believe that it was signed by all parties prior to the delivery, long prior to the delivery, *and that it was delivered some time in the early part of 1950 when Mr. Robert Sullivan visited Mr. Ivancovich, and that he took it subject to the condition that the children would sign this agreement.* The evidence shows that the agreement which is marked Exhibit 10 and dated March blank, 1950, was signed by all of the obligatory parties. *All of the children signed it, and therefore performed their condition; and from that time on any condition in reference to the delivery of the deed of April 25, 1946, had been fulfilled* and the deed was then available for recording." (Italics added.)

In the State of California there cannot be a conditional delivery of a deed to a grantee or his agent as contemplated by appellants, respondents and the trial court. Civil Code section 1056 provides:

> "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

[2] When conditions are expressed concurrently with the manual delivery of a

deed, the grant is either absolute or void. The determination of whether the manual delivery was valid or ineffectual turns upon the question of the grantor's intent. This rule is expressed in the case of Williams v. Kidd, 170 Cal. 631–638, 151 P. 1, 3:

> "It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery."

[3] Thus, the question is one of fact and the rule governing a review of that question on appeal is set forth in the case of Chaffee v. Sorensen, 107 Cal.App.2d 284–288, 236 P.2d 851, 853, wherein the court said:

> "Delivery or nondelivery of a deed is a question of fact to be determined by the surrounding circumstances of the transaction and where there is substantial evidence or where an inference or presumption may be drawn from the evidence to sustain the court's finding of delivery such finding will not be interfered with on appeal."

[4–7] The trial court rejected the testimony of George and found the circumstances of delivery as related by Robert Sullivan to be true. Therefore, when George handed Robert the deed and the memorandum the delivery was complete. In addition to the testimony concerning the circumstances surrounding delivery of the deed, the finding is also supported by the testimony of Robert Sullivan concerning a conversation he had with George regarding the preparation of the agreement, which conversation took place after delivery of the deed. Robert testified, "George said he had delivered the deed, Exhibit A (the deed of April 24, 1946) to me. He said, 'in case anything goes wrong you have got the deed.'" George's belief that the deed would protect Katherine's children "in case anything goes wrong" is consonant with a present valid delivery, otherwise, the deed would have been ineffectual in the event anything went wrong. It is axiomatic that this court may not pass upon the trial court's determination of the credibility of witnesses or enter upon a redetermination of the facts when there is simply a conflict in the evidence. The trial court found that George Ivancovich made a present delivery of the executed deed to Robert Sullivan upon certain express conditions later to be incorporated in an agreement. No condition was expressed in the instrument itself and therefore under Civil Code section 1056 the oral condition was ineffective. Under such circumstances the delivery of the deed and vesting of title occurs by operation of law even though the result may be contrary to the express stipulation of the parties. This proposition of law is clearly stated in Blackledge v. McIntosh, 85 Cal. App. 475, at page 482, 259 P. 770, at page 773:

> "The law is well settled, where a deed, absolute in form, is delivered by the grantor to the grantee personally, title vests in the grantee, discharged of any condition on which the delivery was made." and
>
> "In Devlin on Deeds, section 314, it is said: 'A deed cannot be delivered to the grantee as an escrow. If it be delivered to him it becomes an operative deed, freed from any condition not expressed in the deed. It is and will vest the title in him, although this may be contrary to the intention of the parties.' [Citations.]"

James v. James, 80 Cal.App. 185, 251 P. 666; Lavely v. Nonemaker, 212 Cal. 380, 298 P. 976; 1 So.Cal.Law Rev., 32 p. 38–41; 9 Cal.Jur., 165 § 60. The foregoing principle of law may appear to be harsh and in some cases it certainly is contrary to the wishes and intent of the parties. The reason for the rule appears to be the

reluctance of the law to permit or encourage the conditional manual delivery of a deed to a grantee which upon its face appears valid in all respects and thus open the way for fraud and misrepresentation as well as honest misunderstanding in regard to third parties who have no knowledge of the conditions imposed aliunde. It is not unreasonable to require a grantor making a conditional delivery to withhold transfer of the deed to the grantee or his agent until the conditions have been complied with or if manual delivery isn't to be delayed in that event to incorporate the conditions in the body of the instrument. Actually, the rule is not as harsh as it first appears. A grantor who makes what he deems to be a conditional delivery such as in this case, but which is an actual delivery under the provision of Civil Code section 1056 is not entirely without redress. The mere fact the condition drops out by operation of law insofar as vesting of title is concerned, does not abrogate the agreement nor render it unenforceable. The rights of grantors and grantees under such circumstances are summarized by the court in Lavely v. Nonemaker, 212 Cal. 380, 383, 298 P. 976, 978, as follows:

"The circumstances of the case at bar are not such as to take it out of the general rule. Neither the deed nor the asserted *oral* agreement either expressly or impliedly refers to the defendant's promise to care for the plaintiff as a condition affecting the validity of the deed, and the trial court has not found that it is such a condition. True, such promise constituted the sole and only consideration for the transfer, but in this particular the situation is not unlike that where a conveyance is made solely in reliance upon the grantee's written promise to pay an agreed purchase price, or to subsequently render certain legal services, the breach of each of which promises it has been held gives rise only to an action for damages. Lawrence v. Gayetty, supra [78 Cal. 126, 20 P. 382]; Hartman v. Reed, 50 Cal. 485."

The judgment is affirmed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.



149 Cal.App.2d 151

The PEOPLE of the State of California, Respondent,

v.

Charlie PIERSON, Defendant and Appellant.

Cr. 3257.

District Court of Appeal, First District, Division 1, California.

March 14, 1957.

Incest prosecution. The Superior Court, County of Alameda, Allen G. Norris, J., entered a judgment of conviction, and the defendant appealed. The District Court of Appeal, Peters, P. J., held that testimony of defendant's eleven-year-old daughter and defendant's wife was not inherently improbable.

Affirmed.

1. Criminal Law ⇐1159(2)

Where jury saw and heard witnesses, and jury, properly instructed, elected to believe prosecution's witnesses and to disbelieve defendant, it was jury's province and was not function of the appellate court.

2. Incest ⇐14

In incest prosecution, testimony of defendant's eleven-year-old daughter and defendant's wife was not inherently improbable.

3. Criminal Law ⇐781(2)

In incest prosecution, where defendant admitted being in house when daughter

testified he was there and also admitting going into bathroom where alleged offense occurred, defendant's testimony constituted admissions of fact that contributed in some degree to proof of prosecution's case, and, hence, instruction on legal effect of defendant's claimed admissions was proper.

4. Criminal Law ⇐1037(2)

Generally, when acts of district attorney complained of as prejudicial misconduct are of such character that instruction to disregard them would have obviated any prejudice, failure to request appropriate instruction precludes appellate consideration of alleged misconduct.

5. Criminal Law ⇐1037(2)

Where prosecuting attorney immediately desisted from his course of argument upon defendant's counsel stating that he thought argument was improper and trial court's ruling that argument was beyond bounds of proper analysis, and it did not appear that remarks were seriously prejudicial, error in such argument, if any, was not prejudicial, in absence of request for instruction to disregard such argument.

6. Criminal Law ⇐1037(1, 2)

In incest prosecution, reference by district attorney in his argument to testimony of prosecuting witness' sister as "damaging" to defendant was not prejudicial to defendant, in absence of objection to such argument or a request for an instruction that argument be disregarded, especially where, in a very real sense, sister's testimony was damaging to defendant.

7. Criminal Law ⇐1171(1)

Where all that prosecuting attorney's argument relating to penalties amounted to was a request for jury to forget about the lesser charge, and to concentrate on the more serious charge, argument was not prejudicial.

8. Criminal Law ⇐1086(14)

Failure of record to show a denial of a proper motion to dismiss in trial court amounts to a waiver, and precludes appellate consideration of the point.

9. Criminal Law ⇐576(1)

Where prior trial which resulted in mistrial was commenced within sixty days after filing of amended information and thereafter present trial was commenced within sixty days after the mistrial, defendant was not entitled to a dismissal on ground that he had not been granted speedy trial guaranteed to him by law. West's Ann.Pen.Code, § 1382, subd. 2.

J. Fred Haley, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., of the State of California, Clarence A. Linn, Asst. Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was charged with incest, statutory rape, and contributing to the delinquency of a minor. The last count was later dismissed by stipulation. The jury acquitted the defendant on the rape charge and convicted him on the incest charge. From the judgment entered on the verdict, and from the order denying his motion for a new trial, the defendant appeals.

There were several prior trials resulting in jury disagreements. On the present appeal Pierson challenges the sufficiency of the evidence, challenges one instruction, contends that the prosecuting attorney was guilty of prejudicial misconduct, and urges that he was not granted the speedy trial guaranteed to him by law.

The offense allegedly occurred on Saturday, April 30, 1955, in the home where the defendant lived with his family, including the prosecuting witness, his daughter Ruby, a child then 11 years of age. In the afternoon of that day the mother and father of Ruby left the house, leaving Ruby and the other children at home. Ruby was watching television in the living room. With her was a neighbor boy, her 7-year old brother, and two sisters, aged 10 and 4 years, respectively. Ruby's testimony, on direct examination, was reasonably clear and coherent. She testified that, after her father and mother had left the house, her father returned alone, went into the kitchen,

and beckoned to her to come to that room. She went out to the kitchen, and then her father went into the bathroom, called to her, and she followed. The bathroom door was partly open, and remained so, during the events about to be described. She testified that defendant stood her against the bathroom wall, pulled down her panties, zipped open his pants, and then "put his private parts into mine." In about 10 minutes defendant lifted the witness and sat her on the face bowl with her head against the mirror. She had grease on her hair and some of this came off on the mirror. She was holding the soap dish so hard that it broke.

The witness also testified that when her mother came home later that day the mother asked the witness about the grease on the mirror and the broken soap dish. The witness then denied any knowledge about them, but two days later told her mother all about what had happened.

The witness also testified that on some eight or nine prior occasions the defendant had forced her to have intercourse with him. The first time occurred at some indefinite time in the past when her mother was in the hospital. On that occasion the event had occurred in her mother's bed and she bled on the bed. She testified that the defendant had told her that he would kill her if she told anyone about these events.

On cross-examination some major inconsistencies between her direct examination and her testimony on prior trials were developed. She first said that she did not remember what time it was when her father returned to the house, but later testified that she had looked at the clock, and it was 3 p.m. She also said that her four-year old sister came into the bathroom while intercourse was occurring, and then left. All during the event the bathroom light was on and the door half open. After her father had finished with her she returned and watched television. She did not tell her brother or anyone else about what had occurred until she told her mother two days later.

She was uncertain whether her father had left the house after the events testified to, but in an earlier trial had testified that he did not leave the house. Also on an earlier trial she had testified that she had changed her story about her father staying at home after the intercourse, because her mother had told her that she was wrong.

On a prior trial she had testified that on the day she had told her mother about the events here involved, her mother started to talk to her about sex; that she got the idea about her father from talking with her mother and "adopted all" her mother had then said. On the present trial she could not recollect having so testified.

Although she had testified on direct examination that her father had had intercourse with her on eight or nine prior occasions, until she told her mother about the events of April 30, 1955, she had never told anyone about these occurrences. She admitted that on the day before she told her mother about the assault, she was "angry" with her father, and had argued with him.

The 10-year old sister of Ruby, Barbara, testified that she and the other children were watching television on April 30, 1955, when her father returned to the house, and went into the kitchen; that Ruby then went into the kitchen; that she thereafter looked through the open door to the kitchen and did not see Ruby or her father; that sometime later Ruby appeared and again began to look at television; that then her father left the house, apparently to pick up her mother. On cross-examination she conceded that her view into the kitchen was not completely unobstructed.

Defendant's wife, who had once been convicted of an assault with a deadly weapon, testified that about a year before the alleged offense she had been required to go to the hospital; that when she left, there were clean sheets on her bed; that when she returned the sheets were stained with what looked like blood.

She also testified that on the afternoon of April 30, 1955, her husband had taken her downtown; that shortly after 3 p.m. they

had parted company upon his representation that he would be back in a few minutes; that he failed to return and she took a bus home, and when she got off the bus there was her husband, who rode her and a neighbor home. She immediately discovered the grease on the mirror and the broken soap dish, but no one seemed to know how they had occurred; that she had washed Ruby's hair the night before and there was grease on it. She was by no means clear as to how and when Ruby had first told her of the incident, but was certain that after she talked with Ruby she had called the police. She denied that she and her husband had quarreled prior to the report to the police. She admitted that before she had gone to the hospital she was bleeding from her private parts and was by no means positive that she might not have caused the stain she found when she returned.

A doctor testified that he examined Ruby on May 4, 1955, four days after the alleged offense occurred. He testified that Ruby's "vagina was dilated or enlarged to a size that would indicate that something had dilated the vagina, that is, it was comparable to that of an adult woman"; that the condition he found usually resulted from sexual intercourse; that he found no spermatozoa; that it was "very" possible to find spermatozoa within 4 or 5 days of intercourse, but it was "very frequent" not to find spermatozoa after that length of time. The hymen was not intact.

Appellant admitted that he had left home with his wife on the afternoon of April 30, 1955, leaving the children, including Ruby, at home. He testified that he parted with his wife in downtown Oakland, agreeing to pick her up later; that he picked up 2 neighbors and drove them home and then picked up a boy named "Sonny"; that with Sonny in the car he drove to his own home and went in, leaving Sonny in the automobile with the motor running; that he simply went into the house to urinate, which he did, and came out after being in the house not over 3 minutes. He denied that Ruby was in the kitchen or bathroom with him, and denied ever having had intercourse with her. After leaving the house he testified that he picked up his wife and returned home. It is of some significance that "Sonny" was not produced as a witness by appellant, although, if appellant's story is true, Sonny could have furnished powerful corroboration.

He explained the stained sheets in the bed by testifying that about a year before the alleged offense his wife had gone to the hospital because of a miscarriage, and before she left home she had stained the sheets with her blood. He also claimed that in the week before the alleged offense he had had several arguments with his wife, who had threatened to "fix" him, and had several arguments with Ruby. This was denied by his wife, but partly corroborated by Ruby. He claimed that he had broken the soap dish on the 29th of April.

On cross-examination the prosecuting attorney brought out numerous inconsistencies between appellant's story on the present trial and his testimony on the prior trials.

[1,2] This is a fair summary of the basic evidence introduced. The three major witnesses against appellant were, of course, Ruby, the doctor, and appellant's wife. Appellant argues that Ruby's story was a fabrication dreamed up by his wife, and that the testimony of his wife and Ruby was inherently improbable. It is argued that it is inconceivable that even the most depraved person would commit an act of incest in a bathroom with the light on and the door open when there were several children watching television in an adjoining room. This was, of course, a jury question. We are not permitted to weigh the evidence. The jury saw and heard these witnesses. The jury, properly instructed, elected to believe the prosecution's witnesses and to disbelieve defendant. This was the jury's province and is not the function of the appellate court. People v. Klinkenberg, 90 Cal.App.2d 608, 204 P.2d 47, 613; People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911; People v. Kess-

ler, 62 Cal.App.2d 817, 145 P.2d 656. Under the facts of this case we cannot hold that the testimony of Ruby and of appellant's wife is inherently improbable.

[3] The court gave an instruction on the legal effect of defendant's claimed admission. The instruction reads as follows:

"Evidence has been received in this case tending to show that on occasions other than this trial the defendant himself made statements tending to prove his guilt of the alleged crime for which he is on trial. These are claimed to be admissions.

"An admission is something less than a confession in that it does not concede so much pointing toward defendant's guilt, and does not alone, even if true, support a deduction of guilt. It may consist of any statement or other conduct of a defendant whereby he expressly or impliedly acknowledges a fact that contributes in some degree to the proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial."

Appellant does not object to the form of this instruction but does claim that the giving of it was erroneous and prejudicial because there was no evidence of an admission by him. This contention is erroneous. Appellant, following his arrest, gave a three-page statement to the arresting officers. In this statement he admitted that he returned home on the day of the alleged offense, and admitted that he had come into the house and went into the bathroom. These admissions place appellant in the house when Ruby testified he was there. He admits going into the bathroom where the alleged offense occurred. These were all admissions of facts that contributed, in some degree, to the proof of the prosecution's case. Therefore, the challenged instruction was proper. People v. Powell, 83 Cal.App. 62, 256 P. 561; People v. Hays, 101 Cal.App.2d 305, 225 P.2d 600.

[4, 5] Appellant next contends that the district attorney was guilty of prejudicial misconduct. It is, of course, the general rule that when the acts complained of are of such a character that an instruction to disregard them would have obviated any prejudice, the failure to request an appropriate instruction precludes appellate consideration of the alleged misconduct. People v. Hampton, 47 Cal.2d 239, 302 P.2d 300. This rule precludes consideration of several of the claimed acts of misconduct. For example, the district attorney, in his argument, after reviewing the facts, then asked the jurors what their respective spouses would say to them if they failed to convict under those facts. Appellant's counsel interrupted, stating that he thought this was "improper" argument. The Court stated: "I think it is beyond the bounds of proper analysis." The prosecuting attorney immediately desisted and proceeded to another subject. No instruction to disregard this argument was requested. The remarks were not seriously prejudicial. In the absence of a request for an instruction the error, if any, was not prejudicial.

[6] Appellant also objects to the fact that the district attorney several times referred to the testimony of Ruby's sister, Barbara, as "damaging" to the defendant, and contends that this was a misstatement of the record. Neither objection nor a request for an instruction was made. Moreover, in a very real sense, the testimony of Barbara was damaging to appellant. She placed Ruby and the appellant in the kitchen together when Ruby said they were together, and then testified that the two were at least out of her sight during the period Ruby testified she was with appellant in the bathroom. This was "damaging" to appellant because he had testified that Ruby was in the living room at all times that he was in the house.

[7] The last contention in reference to misconduct has to do with the discussion by the district attorney of penalties during his argument. He stated that appellant conceded he was Ruby's father, which was the fact, and that for that reason a conviction on the rape count would be a com-

promise verdict; that he did not intend to argue on that count; that "for all practical purposes you don't even have to consider the statutory rape"; that a conviction of rape would, in effect, permit the jury to decide the penalty; that "actually * * * there is nothing that would prevent the defendant in a statutory rape from remaining out of jail for any time because, of course, he can be given probation." Appellant's counsel then objected and the court agreed. The district attorney followed with: "Very well. If I am wrong, the Court will instruct you that I am wrong. But I say to you, ladies and gentlemen, that there is nothing in the Penal Code that says that this defendant ever has to spend as much as one day in jail. Now, if that is improper, then I—" Defendant objected again and the judge instructed the jury to "disregard that portion of Counsel's argument."

In view of the instruction given by the court we cannot hold that this argument was prejudicially erroneous. All that the argument amounted to was a request to forget about the lesser charge, and to concentrate on the more serious charge. This could not have been prejudicial.

The last major contention of appellant is that the trial court erroneously denied a motion to dismiss a prior trial which motion was made, so it is claimed, when a prior retrial was continued without good cause more than 60 days after the last mistrial. He states that a mistrial occurred in September, 1955, and he asserts that a motion under section 1382(2) of the Penal Code was made on December 5, 1956, and denied.

These alleged facts are not disclosed by the record on appeal. The record shows that the amended information was filed on October 31, 1955. Arraignment was November 3rd and by consent trial was set for November 16th. Then the record shows there was a trial which ended in a mistrial on December 20, 1955. Another jury was selected on February 20, 1956. Pursuant to motion by the People, and over the objection of defendant, the matter was continued to February 23rd. On that date it appears that, because appellant's wife was ill, the People again moved for a continuance and the case was continued to February 28th. On that date, at the request of appellant's counsel, the trial was continued to February 29th, and commenced on that date. This is all that the reporter's or clerk's transcripts disclose.

[8] The attorney general quite properly pointed out in his reply brief that the record does not show a mistrial in September of 1955, nor does it show any motion to dismiss or its denial on December 5, 1955. No effort to augment the record was made. The attorney general correctly relies on the rule that failure of the record to show a denial of a proper motion to dismiss in the trial court amounts to a waiver, and precludes appellate consideration of the point. People v. Newell, 192 Cal. 659, 221 P. 622; People v. Jordan, 45 Cal.2d 697, 290 P.2d 484.

[9] It should also be pointed out that the record shows the filing of an amended information on October 31, 1955. The challenged December trial was within 60 days of the filing of that amended information. It seems to be the rule that the 60-day period is reinstated not only by a mistrial, Ex parte Ross, 82 Cal. 109, 22 P. 1086, but by the filing of a new or amended pleading, whether or not a new or different charge is involved. See, generally, People v. Dawson, 210 Cal. 366, 292 P. 267; In re Begerow, 136 Cal. 293, 68 P. 773, 56 L.R.A. 528; Muns v. Superior Court, 137 Cal.App. 2d 728, 290 P.2d 951; People v. Vacca, 132 Cal.App.2d 8, 281 P.2d 315; People v. Cryder, 90 Cal.App.2d 194, 202 P.2d 765; People v. Romero, 13 Cal.App.2d 667, 57 P.2d 557; People v. Godlewski, 22 Cal.2d 677, 140 P.2d 381. Thus, even if the record were augmented, it would not appear that a reversal would be required.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

149 Cal.App.2d 125

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Doris OVERMAN, Defendant and Appellant.

Cr. 5693.

District Court of Appeal, Second District, Division 1, California.

March 13, 1957.

Defendant was convicted of bookmaking and accepting bets on horse races. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment of conviction and denied motion for new trial, and defendant appealed. The District Court of Appeal, Fourt, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Gaming ⇐98(3)

Evidence established the corpus delicti of crime of bookmaking and accepting bets on horse races. West's Ann.Pen. Code, § 337a, subd. 1.

2. Gaming ⇐98(3)

Evidence was sufficient to sustain the conviction for bookmaking and accepting bets on horse races. West's Ann.Pen. Code, § 337a, subd. 1.

3. Gaming ⇐98(3)

In prosecution for bookmaking and accepting bets on horse races, purport of telephone talks in which bets were attempted to be placed were not beyond ken of the average layman, and therefore there was no need for expert testimony to explain terms used in such conversation. West's Ann.Pen.Code, § 337a, subd. 1.

4. Criminal Law ⇐1137(5)

Where defendant had prevented prosecution from giving any explanation of certain telephone conversations, defendant could not assert that the lack of explanation made the conversation inadmissible for purpose of proving the corpus delicti.

Forno & Umann, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James and N. B. Peek, Deputy Attys. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction and from the denial of a motion for a new trial. An information was filed in Los Angeles county on February 17, 1956, wherein the defendant was, in substance, charged in count I with a violation of section 337a, subd. 1, Penal Code, in that she did engage in bookmaking of horse races on January 4, 1956; and in count II thereof she was charged with a violation of the same section of the same code, subdivision 6 thereof, in that she did on the same day as above set forth, accept bets and wagers upon horse races. A motion was made to set aside the information, which was denied, and the defendant thereupon pleaded not guilty. A jury trial was waived and it was stipulated that the People's case in chief "be submitted to the Court on the transcript of the evidence taken at the preliminary hearing, the Court to read and consider that transcript as though the witnesses therein named appeared and testified in this court under oath in like manner as their testimony was given at the time of the preliminary, the Court to receive and consider in evidence, subject to objections, the evidence received at the preliminary and that thereafter either side, if they so elect, may present further testimony."

The court found the defendant guilty as charged, and denied a motion for a new trial. Imposition of sentence was suspended and the defendant was placed on probation for three years, a part of the terms of which were that she was to pay a fine of $250 in certain installments, and that she seek reputable employment, and not engage in further bookmaking activities.

The facts of the case are substantially as follows: Officer H. C. King of the Los

Angeles Police Department, who had been with the police department about eight years and was familiar with the manner in which bookmaking was conducted in Los Angeles and had made about 150 arrests for bookmaking, about the middle of December, 1955, received information from a fellow officer that the telephone at the number PL 5-9117 was being used for bookmaking by a person named "Doris". Officer King checked the number through the telephone company records, which showed that it was listed to L. E. Overman, 427 West 91st Street, the defendant's father. In the latter part of December, 1955, King called the telephone number in question twice and asked for Doris on each occasion, and a female voice answered each time, saying, "This is Doris."

On January 4, 1956, at about 2:55 o'clock p. m., King again called the same telephone number and again a female voice, similar to the voice he had heard on the two previous occasions, answered. The following then ensued:

"The Witness: The female voice answered, 'Hello.'

"I said, 'Is this Doris?'

"The female voice then answered, 'Yes.'

"I said, 'Do you have the results of the third race?'

* * * * * *

"The female voice answered, 'Yes. Tall Tree won it.'

"I then stated, 'Who placed?'

"The female voice then answered, 'Tee Man placed, and Bull Bern showed.' She then asked, 'Who is this'

"I stated, 'This is Bill.'

"The female voice then stated, 'O.K., Bill.'

"I then stated, 'In the sixth, give me two across on Full Tide.'

"To this she stated, 'All right, thank you, Bill,' and hung up."

Immediately following the above quoted testimony the deputy district attorney asked: "Now, at this time, Officer King, as you proceeded to the address, and after making that phone call, could you tell the Court what you felt the significance of that phone call was, what it meant?"

Counsel for the defendant then said: "Now, if your Honor please, this is a matter subject to expert testimony. The words are plain English, and he stated they were, and it is outside the purview—the necessity of expert testimony."

It would seem perfectly apparent that the attorney meant to add the word "not" between the words "matter" and "subject".

The magistrate then stated, for some reason, that, "* * * I am receiving the officer's statements solely for the purpose of determining whether or not there was probable cause for him to believe that a felony was being committed, * * *; and not on the actual question of innocence or guilt * * *."

Immediately upon finishing the telephone call just related, King with his partner, Officer Sergeant Stephenson, went to the defendant's house, arriving there in about five minutes. Stephenson knocked on the door, which was very shortly thereafter opened by the defendant's mother. King identified himself and placed her under arrest. She started to close the inner door but King entered by pulling the catch or hook off of the screen door and pushed open the inner door. King found the defendant in the bathroom, where she was standing over the toilet bowl, from which flames were arising. The material which had just been burned was unidentifiable and constituted mere ash residue upon its being burned up. King arrested her for bookmaking and asked her what she was burning, and she answered by saying, "that she was burning some old bills that she didn't want lying around." About twenty to thirty minutes later she told King that she was "getting rid of her own bets; that she knew of a person who was a friend of hers who got in trouble because she had bets written down." She stated that she lived in the house with her mother and father.

King stated that he recognized the defendant's voice as being the voice he had heard on the three telephone conversations. In the house he found the telephone with the number PL 5–9117.

King remained in the house for about an hour, during which time there were about twelve to fifteen telephone calls. On one of the occasions, upon the telephone ringing, King answered it, but the caller, who asked for Doris, became suspicious and hung up. A policewoman was called for and policewoman Campbell came to the house. She was there about half an hour and answered the telephone about five times. The first and third callers asked for Doris, and upon officer Campbell's saying she was Doris, the callers hung up. The second, fourth and fifth callers placed bets or wagers, as is evidenced by the following conversations:

Second Conversation

"A. I answered the phone. The male voice said, 'I would like to speak to Doris.'

* * * * * *

"I said, 'This is Doris,'

"He said, 'It doesn't sound like Doris.'

"I told him that I had laryngitis.

"He stated, after a little bit of discussion about whether I was Doris or not, that he would like to have 'Postillion in the 6th, Grover in the 7th—'

* * * * * *

"'—Grover in the 7th, and Suits Us in the 8th, and ten to win on each.'

"I asked him who this was. He said, 'Oh, you know me, Doris.'

"He then put a child on the phone. It sounded like a little girl. She said, 'Hello, Doris. What are the results?' She said that she hoped I would be feeling better."

Fourth Conversation

"The Witness: At 3:25 a male voice who identified himself as Lee, No. 1—he said—oh, first of all, he asked for Doris. I said that this was Doris. He then said that he was Lee No. 1. In the 6th, he asked for Will Star, two to win two to place.

"In the 8th, he asked for Sunny Khal, two to win, two to place.

"And he wanted a two to win, two to place parlay on both.

"The same voice said that he would like to place a bet for Jim No. 1: In the 6th, Will Star, two across—and that was it.

"That was the end of that conversation."

Fifth Conversation

"A. At approximately 3:27 P.M. a female voice identified herself as Irene, and showed some concern as to whether I was Doris or not. I partially convinced her. She stated that in the 7th she would like to place a bet on Don Lark—however, she became suspicious again and hung up the phone.

"Q. Did you answer any other calls? A. Yes. At 3:29 the same female voice called back and questioned as to whether I was Doris or not."

After the witness Campbell completed repeating the conversations above set forth, Officer King was recalled to the stand and asked whether he had heard the witness relate them, whereupon the following ensued:

"Mr. Huntington (Counsel for appellant): Those are incompetent and immaterial.

"The Court: Yes.

"What is the purpose of that, whether he heard it or not?

"Mr. Klein (Deputy District Attorney): I would like to ask him if he formed any opinion as to what those conversations were about, your Honor.

"The Court: Oh, he had already placed the woman under arrest, hadn't he. What purpose does it serve now?

"Mr. Klein: To prove the commission of a felony, your Honor.

"Mr. Huntington: He is only hearing one side of the conversation.

"The Court: I think that is for the Court to determine. The objection is sustained."

Officer King was then asked the question "* * * did you form any opinion as to

the phone call that you placed prior to the arrest?" which precipitated the following discussion between the Court and both counsel:

"Mr. Huntington: If your Honor please, I object to that as incompetent, irrelevant and immaterial, and no—

"The Court: Sustained.

"It isn't a question of his opinion. It is for the Court—the Court will determine whether the offense was committed or not from the facts.

"Mr. Klein: Officer King, as an expert in bookmaking, is he not allowed to testify that he was placing a bet, or that the phone call concerned the making of a bet? I felt that that was the purpose of expert testimony, your Honor, to assist the Court in arriving at its decision.

"The Court: I do not think that sufficient foundation has been laid here for this, and I do not think that it is necessary to have his opinion on this phone call.

"Mr. Klein: That there was not sufficient foundation for his phone call?

"The Court: Has it been stipulated here yet that the officer is an expert on what constitutes bookmaking practices in Los Angeles County?

"Mr. Huntington: No, I didn't stipulate to that.

"The Court: I did not think you had—I do not think you have.

"Mr. Klein: I believe that the record will show that I asked him some preliminary questions at the beginning in hopes of qualifying him as an expert.

"Mr. Huntington: Well, if your Honor please, your Honor, I believe, correctly stated the proposition. It wasn't subject to, the man said, I did a certain thing. Your Honor is the expert as to whether or not that qualifies—not as to what he thinks it does.

"The Court: I think so.

"Mr. Huntington: It is as if I held up a man, and he saw me do it, and then you were to ask him, 'In your opinion was he holding him up?'

"The Court: Yes.

"Mr. Huntington: I don't think that is subject—

"The Court: I think it is for the Court to determine from the facts.

"The objection is sustained as to his opinion."

King then stated that, among other things, he found the sports section of the Los Angeles Examiner of January 4, 1956, the Mirror-News of January 3, 1956, and the Daily Racing Form of January 4, 1956 on the dining room table. The two newspapers had pages listing the horses entered in various race tracks throughout the country and the form contained the names and past performances of each horse in each race of the day. Officer King testified that he was familiar with the paraphernalia commonly used by bookmakers in Los Angeles county, and expressed the opinion that such papers are used by bookmakers for the purpose of assisting in the making of bets.

The defendant contends that there is no evidence to sustain a finding of guilty on either count; that the corpus delecti was not established, and therefore the opinion of the officers and the admissions of the defendant were improperly received.

The defendant basically asserts that since King was not allowed to explain the significance of his telephone call to the defendant, or those of the policewoman with the third parties, the court cannot conclude that they were bookmaking calls, and therefore there was no corpus delicti shown of bookmaking and of accepting of bets, inasmuch as the only other evidence introduced was that which had to do with the Examiner, Mirror-News and the Daily Racing Form, which, although used by bookmakers, are also generally enjoyed and read in a perfectly legal manner by sportsmen generally.

[1,2] We do not agree with the defendant. In our opinion, the evidence clearly established the corpus delicti of bookmaking and accepting a bet in violation of the section and subdivisions charged. Peo-

ple v. Graff, 144 Cal.App.2d 199, 300 P.2d 837; People v. Tompkins, 109 Cal.App.2d 215, 223, 240 P.2d 356; People v. Bradford, 95 Cal.App.2d 372, 379, 213 P.2d 37. The facts as testified to, together with the defendant's admissions and the exhibits introduced into evidence, amply support the conviction. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Sumner, 117 Cal.App.2d 40, 254 P.2d 598.

It does not appear to us that any explanation of the purport of the telephone talks was required. Almost anyone of adult years, who is even casually acquainted with what goes on in the so-called "sport of kings" at the various race tracks in Southern California and elsewhere would understand what was meant by what was said in the various telephone conversations. With all of the divers advertisements in the various mediums concerning the horse races at the several race tracks, the repeated radio announcements of the results and televising of the different races at least once each week, and with all of the propaganda about how many millions of dollars are given to charity by the race track owners, and all of the news stories of the frailties of the human beings who engage in embezzling money to "play the horses", it would be difficult to avoid coming into contact with, and having an understanding of the incidence of the race tracks and what the words meant. As was said in People v. Larum, 111 Cal.App.2d 732, at page 734, 245 P.2d 323, 324: "The conversations and the passing of the money would be commonly understood as wagers on horse racing, and in the absence of any explanation by defendant that the transactions had a different meaning or purpose, the court could scarcely have failed to find they were wagers. The evidence was sufficient * * *."

Counsel for the defendant obviously thought the words used needed no expert to interpret them when he said, "The words are plain English * * * it is outside the purview—the necessity of expert testimony."

Furthermore, the judge of the municipal court (Vernon W. Hunt) who conducted the preliminary hearing and the trial judge each seemed to know what the words meant without any expert testimony and the members of this court have no doubt as to the meaning of the words without expert testimony.

The distinction between an expert and a non-expert witness has been well put by Mr. Wharton in his work on evidence, where he says: " 'The true distinction is this, the non-expert testifies as to a subject-matter readily mastered by the adjudicating tribunal; the expert to conclusions outside of such range. The non-expert gives the result of a process of reasoning familiar to every-day life; the expert gives the result of a process of reasoning which can be mastered only by special scientists.' (Criminal Evidence, 404.)" People v. Wheeler, 60 Cal. 581, 583.

[3] As heretofore indicated, the judges who had anything to do with the matter in question were qualified from their experiences in the ordinary affairs of life and they duly appreciated the purport and meaning of the words. There was no need for expert testimony. To them it was not "beyond the ken of the average layman."

[4] Moreover, the defendant having prevented the People from giving any explanation, cannot now assert that the lack of explanation makes the conversations inadmissible to prove the corpus delicti. People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535; Credit C. Bureau v. Guaranty Loan Co., 61 Cal.App. 528, 215 P. 104.

The judgment, and the order denying motion for a new trial are, and each is, affirmed.

WHITE, P. J., and DORAN, J., concur.

148 Cal.App.2d 937

Baldwin M. BALDWIN et al., Plaintiffs and Respondents,

v.

Sam KUBETZ et al., Defendants,
Sam Kubetz and Nina Kubetz, Appellants.

Civ. 21956.

District Court of Appeal, Second District, Division 2, California.

March 6, 1957.

Rehearing Denied March 28, 1957.

Hearing Denied May 1, 1957.

Action to declare forfeiture of interest in oil property. From a judgment of the Superior Court, Los Angeles County, Mildred L. Lillie, J., defendant appealed. The District Court of Appeal, Ashburn, J., held, inter alia, that forfeiture of sublessee's interest in oil property for failure to continuously drill oil wells as required by sublease was not precluded on theory that existence of zoning precluded sublessee from performing his continuous drilling obligations, where county zoning ordinance did not prevent drilling but merely attached a condition precedent which was easily fulfilled, and court found that sublessee could have obtained a zone exception to permit drilling of additional wells.

Affirmed.

1. Appeal and Error ⇐901

Appellant challenging sufficiency of evidence to support findings had burden of proving that there was no substantial evidence to support findings.

2. Mines and Minerals ⇐74

Forfeiture of sublessee's interest in oil property for failure to continuously drill oil wells as required by sublease was not precluded on theory that existence of zoning precluded sublessee from performing his continuous drilling obligations, where county zoning ordinance did not prevent drilling but merely attached a condition precedent which was easily fulfilled, and court found that sublessee could have obtained a zone exception to permit drilling of additional wells.

3. Contracts ⇐168

In every contract there is implied covenant of good faith and fair dealing that neither party will do anything that would result in injuring or destroying the right of other to enjoy fruits of the agreement.

4. Mines and Minerals ⇐78(1)

In oil and gas lease there is implied covenant of diligent exploration and operation of any producing wells, including the doing of such incidental or subsidiary acts as may be reasonably necessary to accomplish the major purpose.

5. Mines and Minerals ⇐74

Though oil property sublease did not mention requirements of obtaining zoning exception, sublease having been made before zoning for agricultural use, sublessee acquired sublease with knowledge of necessity of procuring exemption and by conduct placed a practical construction upon sublease to effect that that was his obligation where twice sublessee prepared and presented such applications and also prepared a third which was abandoned without filing.

6. Mines and Minerals ⇐74

A forfeiture of sublessee's interest in oil property for failure to continuously drill was not precluded on ground that no duty rested upon sublessee to obtain drilling permit, since sublessee was subject to implied obligation to obtain necessary drilling permit through a zone variance and his failure to perform such obligation did not justify his falling back on suspension clause.

7. Mines and Minerals ⇐74

An assignee or sublessee of oil property who is in possession is bound to perform terms of principal lease or any sublease under which he holds.

8. Mines and Minerals ⇐74

A sublessee or assignee of oil property could not escape forfeiture for not complying with drilling requirements on ground that he had no privity with plaintiffs and hence owed no drilling obligation to them where sublessee or assignee expressly assumed and agreed to perform obligations of sublease made by plaintiffs as lessors to his

assignor, and that undertaking ran in favor of them as such lessors.

9. Mines and Minerals ⇐78(2)

Equity's frown upon enforcement of forfeitures is not directed at cancellation of an oil lease for failure to perform its express or implied drilling obligations.

10. Mines and Minerals ⇐74

That oil property sublessee made unavailing attempts to induce owners to join in application for a zoning exception to permit the drilling of oil, was not available as defense to forfeiture of sublessee's interest for failure to drill since sublessee could not excuse nonperformance of his obligation by showing that he tried but was unable to perform.

11. Mines and Minerals ⇐74

A general paragraph in sublease of oil property was required to yield to specific provisions of another paragraph to effect that a general forfeiture did not terminate sublessee's rights with respect to a producing well and ten acres surrounding it.

12. Mines and Minerals ⇐74

Where oil property sublessee was wilfully in default in performance of obligation to maintain and operate the well in conformity with customary oil field practices and modern methods and persisted therein despite notices given him by lessors and regardless of pendency of action to declare sublease forfeited, general forfeiture terminated his rights even as regards a producing well.

13. Mines and Minerals ⇐78(1)

Rights granted under oil and gas leases are bestowed for purpose of having property explored and developed to and that lessor will obtain a financial return from his property, and lessee will not be permitted to fail in development of property and to hold lease for speculative or other purposes unless its holding is in strict compliance with contract and for a valuable and sufficient consideration other than such development.

14. Mines and Minerals ⇐78(2)

While forfeitures are not ordinarily favored by chancery court there is an exception when it is against equity to permit a lessee under oil and gas lease to hold possession of property indefinitely without performing any of the duties required of him by contract.

15. Mines and Minerals ⇐74

In action to foreclose sublessee's interest in oil property, a failure to join original lessor as defendant did not result in fatal defect of parties where lessor was not a party to sublease and its termination did not affect lessor's rights.

David H. Caplow, Beverly Hills, for appellants.

Meserve, Mumper & Hughes, Robert A. Stewart, Jr. and Cromwell Warner, Jr., Los Angeles, for respondents.

ASHBURN, Justice.

Defendant Sam Kubetz and wife appeal from a judgment declaring a forfeiture of the husband's interest as sublessee in a certain oil property. The original lease was made by Frank F. Pellissier & Sons, Inc. to the personal representatives of Anita M. Baldwin, deceased, who have been succeeded in ownership thereof by Baldwin M. Baldwin and others as testamentary trustees of said decedent. Those trustees are plaintiffs herein. In 1944 the original lessees made a sublease to Capital Company which assigned to Harry W. Kline and his wife, who expressly agreed to perform all the terms of the sublease.[1] The Klines, on June 14, 1951, made a sublease to Sam Kubetz and one Joel Brandon but excepted 166 feet surrounding two producing wells and reserved an overriding royalty. Kubetz and Brandon expressly took subject to

1. Capital had previously quitclaimed as to all of the leased land except 30 acres, but the entire acreage was restored to the lease by agreement between plaintiffs and the Klines made on October 15, 1948. The total acreage is sufficient for 44 wells.

and agreed to perform all the terms and conditions of the Baldwin sublease. In July, 1952, Kubetz succeeded to the rights of Brandon.

The trustees of the Baldwin estate sued Kubetz, Kline and others for declaratory relief and declaration of forfeiture of their sublease. They alleged violation by Kubetz of (1) a covenant to operate in accordance with customary oil field practices, and (2) continuous drilling requirements of the sublease. The court found these charges to be true. Appellant Kubetz[2] primarily claims insufficiency of the evidence to support the findings.[3]

Concerning the manner of operation paragraph 3 K of the Baldwin sublease provides: "Lessee agrees at all times to use diligence and observe customary oil field practices and modern methods, appliances and equipment to save all oil, gas or other products produced from said premises, which may be saved at a reasonable profit." The court found that Kubetz from time to time and "continuously on numerous occasions since June 17, 1952 * * * violated the provisions of the Los Angeles County Fire Prevention Code, has created and maintained fire hazards, has failed to use and observe oil field practices customary in Los Angeles County, and has failed to use modern methods, appliances and equipment in accordance with standards customary in Los Angeles County. That such actions and course of conduct were wilful and persistent despite repeated warnings and notices." The general nature of appellant's derelictions consisted of inadequacy of equipment to control the flow of oil, thus permitting it to overflow on various occasions; defective electric wiring; inflammable material permitted to collect near the well close to storage tanks and to the liquified petroleum gas tank. These fire hazards existed before and after notice of default and down to the day of trial, and they resulted in conditions which were not in accordance with customary oil field practices and modern methods of operation. They constituted serious threats to the production and even the existence of the Kubetz well, also to two other producing wells in the immediate vicinity.

[1] Appellant asserts that all violations of this sort had been cured before suit was brought. But evidence which the trial judge was entitled to believe and presumably did accept as credible is to the effect that there were only occasional and partial corrections and that the wilful violations of the pertinent clause of the lease persisted to the time of trial. Appellant has not carried the burden that rests upon one who challenges upon appeal the sufficiency of the evidence. "Such contention requires defendants to demonstrate that there is no substantial evidence to support the challenged findings. As was stated in the oft-cited case of Crawford v. Southern Pacific Co., 3 Cal.2d 427, at page 429, 45 P.2d 183, at page 184: '* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' which will support the findings, and when 'two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'" Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552. The efficacy of this type of default as a basis for declaration of forfeiture of an oil lease will be discussed later.

The obligation of continuous drilling is found in paragraph 4A of the sublease and requires (as the court found) the sublessee to "continuously drill additional wells, allowing not more than ninety (90) days between the completion of one well and the beginning of the next well, until an average of one well for each 10 acres of said lands shall be completed thereon, or a total of 44 wells." There is no dispute of the fact

2. We use the singular of plaintiff and appellant, thus referring to Sam Kubetz whose wife appears to be but a nominal party to the action.

3. The only portions of the judgment now under attack are those relating to the Kubetz interest.

that Kubetz drilled but one well (known as Kubetz No. 1) and that his predecessor Kline had brought in two producers, nor is it denied that appellant did no drilling whatsoever after February, 1952. In this connection the court concluded: "That said sublease obligates defendant Sam Kubetz to continuously drill additional wells on said lands, to obtain zone exceptions as may be necessary to permit such drilling, to operate said Kubetz No. 1 will according to customary oil field practices and by the use of modern methods, appliances and equipment, and to keep said well in the most efficient productive state. * * * That defendant Sam Kubetz has not performed said obligations. * * * That none of said obligations has been suspended under the provisions of Paragraph 12 of said sublease, nor has the failure of defendant Sam Kubetz to perform said obligations been excused in any manner."

Appellant would overthrow this ruling by capitalizing paragraph 12 of the sublease which provides that the obligations of the lessee shall be suspended while lessee is prevented from performing by acts, rules or regulations of governmental agencies, or when prevented by other matters or conditions beyond control of the lessee, whether similar or dissimilar to matters or conditions specifically mentioned. The focal point of the argument is an alleged inability to procure a zoning exception which would permit further drilling. The property had been zoned for light agricultural use some three years before appellant acquired the sublease and a zone exception was necessary for oil drilling. Within ten days after he acquired the lease appellant applied for and obtained a permit to drill one well; that he did and placed it on production. About six months later he applied for another exception in order to do further drilling but that application was denied. "That at the time said application was made, heard and denied defendant Sam Kubetz was in violation of the conditions of his first permit, had violated various laws, regulations, or ordinances, and was operating said Kubetz No. 1 well in a manner materially detrimental to the public welfare and the property of other persons in the vicinity, and said application was denied for those reasons." (Finding X.) Appellant waited about a year, prepared a third application which was never filed and let the matter drop about the middle of 1953. Notice of default was served in October, 1954, and suit filed on March 9, 1955, but appellant did nothing further in an effort to drill or obtain permission to drill additional wells.

[2] Appellant claims that there was no obligation to drill additional wells because the existence of the zoning brought the suspension clause into operation and no duty rested on him to procure a zoning exception. First, he argues that the existing state of zoning—for uses exclusive of oil well drilling—precluded him from pursuing that activity, that he was thus prevented from performing his continuous drilling obligation by acts, rules or regulations of a governmental agency. There is no merit in this contention, for the applicable county zoning ordinance provided for the granting of an exception to permit the drilling of an oil well if "it appears probable that there is oil underneath the property under consideration or under adjacent property which oil cannot be otherwise extracted." It required as a condition to the granting of an exception the presentation of an application containing evidence that the applicant, if not the owner of the property, "has the permission of such owner to make such application." The zoning ordinance itself does not prevent drilling; it merely attaches a condition precedent which is easily fulfilled. Appellant says that the signature of the owner is essential but the terms of the ordinance do not so provide, and the practice of the zoning board and the planning commission, as established by undisputed evidence, was to accept a photostatic copy of the lease as evidence of the permission of the owner. Applicant could easily have complied with this requirement. The court found, upon adequate evidence: "That at all times since June 14, 1951, and particularly since Octo-

ber 20, 1954, defendant Sam Kubetz could have applied for and obtained a zone exception to permit the drilling of additional wells on said lands."

[3] Appellant next argues that no duty rested upon him to obtain the drilling permit: "Assuming appellants just did not wish to make application for zone variance, appellants submit that it would then be the obligation of respondents to make such application and then either compel performance of the contract or sue for damages for the breach thereof." As appellant had the exclusive right to drill, this contention, which was also urged at the trial, ignores the basic requirement of fair dealing which is stated thus in Brawley v. Crosby Research Foundation, Inc., 73 Cal.App.2d 103, 112, 166 P.2d 392, 397: "In this, as in every contract, there is the implied covenant of good faith and fair dealing; that neither party will do anything that would result in injuring or destroying the right of the other to enjoy the fruits of the agreement. [Citations.] The law will therefore imply that under its agreement appellant was obligated in good faith and by its reasonable and best efforts to develop, exploit, produce and make sales of the rotary pump in question."

[4] In consonance with this equitable principle it has become accepted law in this state that there is an implied covenant of diligent exploration and diligent operation of any producing wells. Acme Oil and Mining Co. v. Williams, 140 Cal. 681, 685, 74 P. 296; Jones v. Interstate Oil Corp., 115 Cal.App. 302, 308, 1 P.2d 1051; Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 239, 241, 73 P.2d 1163; 8 Cal. Jur. 10-yr. Supp. § 80, p. 688. See also, Sauder v. Mid-Continent Petroleum Corp., 292 U.S. 272, 279, 54 S.Ct. 671, 78 L.Ed. 1255; 2 Summers Oil & Gas, Perm.Ed., § 395, p. 301. Immanent in this implied obligation is that of doing such incidental or subsidiary acts as may be reasonably necessary to accomplish the major purpose, —in this instance the procuring of the drilling permit through an easily obtained zoning exception.

[5] Though the lease does not mention the point (having been made before the zoning for agricultural use) defendant acquired it with knowledge of the necessity of procuring an exception and by conduct placed a practical construction upon the lease to the effect that that was his obligation. (12 Cal.Jur.2d § 129, p. 342). Twice he prepared and presented such applications; also prepared a third which was abandoned without filing.

[6] Appellant was subject to an implied obligation to obtain the necessary drilling permit through a zone variance. Of course, his failure to perform this obligation does not justify his falling back on the suspension clause. See Stockburger v. Dolan, 14 Cal.2d 313, 317, 94 P.2d 33, 128 A.L.R. 83; Watson Land Co. v. Rio Grande Oil Co., 61 Cal.App.2d 269, 273, 142 P.2d 950.

[7, 8] Appellant argues that he, as assignee, had no privity with plaintiffs and hence owed no drilling obligation to them. Actually he seems to be a sublessee rather than an assignee because he did not succeed to the entire estate of the original sublessee. See Hartman Ranch Co. v. Associated Oil Co., supra. 10 Cal.2d 232, 242–243, 73 P.2d 1163. Be that as it may, an assignee or a sublessee who is in possession is bound to perform the terms of the principal lease or any sublease under which he holds. Washburn v. A. F. Gilmore Co., 116 Cal.App. 370, 374, 2 P.2d 506; Carlson v. Lindauer, 119 Cal.App.2d 292, 305, 259 P. 2d 925; Richardson v. Callahan, 213 Cal. 683, 686, 3 P.2d 927; 30 Cal.Jur.2d § 243, p. 388; 8 Cal.Jur. 10-yr. Supp. § 110, p. 722. Moreover, appellant expressly assumed and agreed to perform the obligations of the sublease made by plaintiffs as lessors to Capital Company, and that undertaking runs in favor of them as such lessors. Hartman Ranch Co. v. Associated Oil Co., supra, 10 Cal.2d 232, 244–248, 73 P.2d 1163. There is no merit in appellant's argument in this regard.

[9] We recognize in this state that equity's frown upon enforcement of forfeitures is not directed at cancellation of an oil

lease for failure to perform its express or implied drilling obligations. Acme Oil and Mining Co. v. Williams, supra, 140 Cal. 681, 684, 74 P. 296, 297: "Covenants may be implied, as well as express; and in oil leases, and others of that particular character, where the consideration for the lease is solely the payment of royalties, there is an implied covenant not only that the wells will be sunk, but that if oil is produced in paying quantities, they will be diligently operated for the best advantage and benefit of the lessee and lessor." 140 Cal. at page 685, 74 P. at page 297: "* * * as the sole and only consideration to the lessor for the extension of this lease was the benefit and advantage in royalties which he might derive under it, and as this benefit could only accrue through diligent operation of the wells, the law raises an implied covenant for such diligent operations as of the very essence of the lease. As this covenant was implied from the nature of the lease, it stands upon the same footing as if it was expressly contained therein, and the lessor was warranted, if the condition was not performed, in re-entering and taking possession of the premises, and terminating the lease. While the general rule is that forfeitures are discountenanced in law, there are occasions when the only protection a landlord has is through the exercise of this reserved right, and the case at bar presents one of those occasions. If the right of forfeiture could not be exercised under such circumstances, a lessor would be at the mercy of his lessee. His land would be burdened by a lease which, while it could and should be made profitable through the diligence contemplated, would in fact be profitless through neglect. The lessor could not make other arrangements for the development of his property and his interest in the fee in the oil district might consist of a small holding, surrounding which numerous other operators would be successfully working, drawing off the oil to his irreparable injury. These are some of the peculiar circumstances surrounding leases of this character which favor the right of re-entry for condition broken. Maxwell v. Todd, 112 N.C. [677] 686, 16 S.E. 926." To the same effect are Taylor v. Hamilton, 194 Cal. 768, 779, 230 P. 656; Hall v. Augur, 82 Cal.App. 594, 599–600, 256 P. 232; John v. Elberta Oil Co., 124 Cal.App. 744, 747, 13 P.2d 538; Alexander v. Oates, 100 Cal.App.2d 266, 267–268, 223 P.2d 264; 8 Cal.Jur. 10-yr. Supp. § 60, p. 661, § 95, p. 704. The gist of the decisions is found in this quotation from Watson Land Co. v. Rio Grande Oil Co., supra, 61 Cal.App.2d 269, 275, 142 P.2d 950, 953: "The usual rule that forfeitures are not favored does not apply to a case such as this, where the productive possibilities of plaintiff's property are blocked for a long term by defendant's lack of ability, or desire, to develop them. Slater v. Boyd, 1932, 120 Cal.App. 457, 460, 8 P.2d 182."

[10] The foregoing authorities sustain the right of the court to declare terminated appellant's interest under the sublease with the possible exception of the existing producing well and ten acres surrounding it. They also render unimportant appellant's argument that he made unavailing attempts to induce the Pellissiers, as owners, to join in the application for a zoning exception. In any event that defense could not prevail for defendant cannot excuse nonperformance of his obligation by a showing that he tried but was unable to perform, not unless the impossibility arises out of the nature of the act to be done rather than the inability of the obligor to do it. (12 Cal. Jur.2d § 237, p. 460; § 238, p. 461.)

[11] With respect to the producing well, appellant relies upon paragraph 13A, which says: "If lessee shall fail to comply with any requirements or obligations in this lease contained, and such failure shall continue for a period of thirty (30) days after the receipt by lessee of written notice from lessor specifying the particulars in which the lease shall be in default * * * then, at the election of lessor this lease and all rights of lessee hereunder shall thereupon cease and terminate, except and only that lessee shall have the right to retain, subject

to the terms of the within lease, any wells theretofore completed or on which work is then being done, in good faith at the time of such forfeiture, together with an area of *then* (10) acres of land surrounding each of said wells for the same period and upon the same terms as are set forth and provided in the within lease, hereinabove set out, in respect to wells completed during the term of this lease * * *. The forfeiture provided for in the within paragraph shall be the exclusive remedy of lessor against lessee in the event of failure of lessee to comply with any of the provisions of the within lease designated and relating to drilling requirements hereof." Respondents contend that 13A is not applicable and that the field is covered by paragraph 13B, thus precluding application of 13A. We are unable to agree with respondent in this respect, for 13B is general in its terms and must yield to the specific provisions of 13A to the effect that a general forfeiture does not terminate the lessee's rights with respect to a producing well and ten acres surrounding same.

The judgment as to Kubetz Well No. 1 must be sustained, if at all, upon the finding of defendant's wilful and wilfully persistent default in performance of the obligation to maintain and operate the well in conformity with customary oil field practices and modern methods.

El Rio Oils (Canada) Ltd. v. Chase, 95 Cal.App.2d 402, 212 P.2d 927, was an action for declaratory relief wherein the court relieved plaintiff lessee from default and forfeiture of its oil lease for noncompliance with the terms concerning payment of royalties. Lessee had contended that the defaulted royalties were not due (because of a difference between the parties as to a proper basis for computation); the court held against it on this issue but found lessee had at all times honestly contended that it did not owe and was not obligated to pay the disputed sum, and that an honest dispute existed between lessee and lessors in regard thereto. Lessee was given 15 days after entry of judgment within which to cure the default and, the proper amount having been deposited in court, a final judgment was entered relieving plaintiff of any forfeiture and reinstating the lease. At page 412 of 95 Cal.App.2d, at page 933 of 212 P.2d this court said, in affirming the judgment: "Lessors cite cases in which it is stated that 'the rule that forfeitures are not favored in law does not apply to oil and gas leases.' Although this general language is found in some of the decisions it will be noted that the cause of the forfeiture was failure to comply with drilling requirements. * * * Because of the danger that oil and gas from lessors' property might be withdrawn through wells on adjoining lands the rule as to forfeiture for failing to drill wells is as above announced. No cases have been cited to us in which the courts have departed from the rule that equity abhors a forfeiture and will relieve from it except where the lessee has failed to drill wells according to his contract." The quoted language is perhaps broader than the necessities of the case, for it limits the forfeiture rule of oil litigation to defaults in drilling obligations. It should be noted that the breach giving rise to the forfeiture in Acme Oil and Mining Co. v. Williams, supra, 140 Cal. 681, 74 P. 296, was a failure to operate existing wells, rather than failure to drill new ones.

[12–14] The El Rio Oils case, supra, was cited in Crofoot v. Weger, 109 Cal.App. 2d 839, at page 842, 241 P.2d 1017, at page 1019, the court saying: "In the cited case it was held that the fact a lessee had intentionally failed to pay royalty due under an oil lease did not necessarily mean that the default was wilful within the meaning of Section 3275 of the Civil Code where the trial court had found that the lessee had been honest in its assertion that it did not owe the amount demanded, even though it had been mistaken therein." Crofoot is one of the more recent applications of rules evolved in the line of cases headed by Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367,—principally involving real estate and other installment purchase contracts. Assuming, without deciding, that those cases would apply to the aspect of oil leases now

under discussion it nevertheless appears that the instant decree is correct, for appellant was wilfully in default and persisted therein despite notices given him by respondents and regardless of the pendency of the action to declare the lease forfeited. It is a part of the Barkis v. Scott doctrine that one who is wilfully in default cannot be relieved from a forfeiture, and that Civil Code § 3275 means what it says in this connection. It was so held in Baffa v. Johnson, 35 Cal.2d 36, 39, 216 P.2d 13; Freedman v. Rector, 37 Cal.2d 16, 20, 230 P.2d 629, 31 A. L.R.2d 1. The language of this court in Banks v. Calstar Petroleum Co., 82 Cal.App. 2d 789, 792, 187 P.2d 127, 128, is here pertinent: "The rights granted under such leases as the one involved in this action are bestowed for the purpose of having the property explored and developed to the end that the lessor will obtain a financial return from his property. A lessee will not be permitted to fail in the development of the property and to hold the lease for speculative or other purposes unless such holding is in strict compliance with his contract and for a valuable and sufficient consideration other than such development. Hall v. Augur, supra; Rehart v. Klossner, 48 Cal.App. 2d 40, 45, 119 P.2d 145.

"While forfeitures are not ordinarily favored by courts of chancery there is an exception when it is against equity to permit a lessee to hold possession of property indefinitely without performing any of the duties required of him by his contract."

The trial court properly concluded: "That equity and justice require the termination and forfeiture of said sublease as to the defendant Sam Kubetz."

[15] Failure to join Frank F. Pellissier & Sons, Inc., original lessor, as defendant herein does not result in a fatal defect of parties, as claimed by appellant. The action seeks and results in cancellation of a sublease to which Pellissier is not a party; its termination does not affect Pellissier's rights, for the lease to the Baldwin estate and the sublease to Capital Company, which fix Pellissier's rights, survive in full integrity, all of their obligations being enforcible against the plaintiffs herein, the Baldwin trustees. See Jones v. Feichtmeir, 95 Cal. App.2d 341, 345, 212 P.2d 933; Baines v. Zuieback, 84 Cal.App.2d 483, 493, 191 P.2d 67.

Attacks upon the sufficiency of the complaint are found to be without merit, as are certain other points raised by appellant.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.



149 Cal.App.2d 101

Phyllis B. DENNIS, Plaintiff and Respondent,

v.

Arthur E. OVERHOLTZER et al., Defendants,

Arthur E. Overholtzer and Orpha Overholtzer, Appellants.

Civ. 8921.

District Court of Appeal, Third District, California.

March 12, 1957.

Rehearing Denied April 5, 1957.

Hearing Denied May 8, 1957.

Purchaser's suit for specific performance and for judgment declaring her entitled to rentals. The Superior Court, Sonoma County, Donald Geary, J., granted a preliminary injunction restraining vendors from commencing or maintaining any action to evict tenant, and an appeal was taken. The District Court of Appeal, Van Dyke, P. J., held that, under the circumstances disclosed, it had not been an abuse of discretion for trial court, which had caused rentals to be impounded, to grant preliminary injunction, to prevent multiplicity of actions.

Affirmed.

1. Injunction ⇐144

That no injunctive relief is asked in complaint is not bar to granting preliminary injunction; but if preliminary injunction is sought upon complaint rather than upon affidavits, complaint must state cause of action for such relief.

2. Appeal and Error ⇐954(1)
Injunction ⇐135

Issuance of temporary injunction rests within trial court's sound discretion; and on appeal, order granting such injunction will not be reversed, in absence of plain showing of abuse of discretion.

3. Injunction ⇐137(1)

Under circumstances disclosed, in purchaser's suit for specific performance and for judgment declaring herself entitled to rentals, which court caused to be impounded, it was not an abuse of discretion to issue a temporary injunction restraining vendors from maintaining, during pendency of action, eviction proceeding against tenant.

4. Appeal and Error ⇐447

In purchaser's suit for specific performance and for judgment declaring her entitled to rentals, pendency of appeal from order directing deposit of rents did not deprive trial court of jurisdiction to grant temporary injunction restraining vendors from maintaining any proceeding to evict tenant.

5. Injunction ⇐26(4)

Rule proscribing enjoining of action at law where issues involved in equity suit can be adjudicated in such action does not apply where equity court has first obtained jurisdiction, and it may then, to avoid multiplicity of actions, enjoin initiation and prosecution of action at law involving same issues.

6. Injunction ⇐26(9)

There is nothing sacrosanct about summary proceeding in unlawful detainer which removes it from control of equity in proper case, and injunction will lie, in such proper case, to stay unlawful detainer action.

Howard B. Crittenden, Jr., San Francisco, for appellant.

Otto A. Hoecker and Raymond J. O'Connor, San Francisco, for plaintiff and respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an order granting a preliminary injunction. Plaintiff, Phyllis B. Dennis, filed an action asking the specific performance of an alleged contract whereunder Arthur E. and Orpha Overholtzer had agreed to sell to her certain real property. She prayed for damages in the alternative if specific performance could not be had. She alleged the purchase price of the property to have been $22,000, $1,000 down and the balance on delivery of deed conveying good title, subject only to leases to defendants John W. Bryson and Norman B. Livermore, Jr., as to part of the property and to defendant W. V. Dennis, Jr., as to the rest. She alleged that a title report disclosed a prior recorded lease affecting the property running to defendant A. R. Cornelius and that the lease contained an option whereunder Cornelius could purchase; that the Overholtzers claimed to have terminated that lease and that Cornelius had no real interest. She alleged performance by her of the purchase contract, a tender to the Overholtzers of the balance of the purchase price, and her continuing willingness to pay for the property upon obtaining a deed as agreed upon. She further alleged a refusal of the Overholtzers to perform the purchase agreement. The complaint also set forth that, having tendered performance and being entitled to a deed, plaintiff had demanded of the tenants that rentals be paid to her. Plaintiff alleged that actual controversies existed between herself and the several defendants and between the several defendants among themselves, and she asked a declaratory judgment determining all matters in controversy. W. V. Dennis, Jr., answered, asserting, among other things, that he was a lessee and that conflicting demands had been made upon him for the rent. He asked that declara-

tory relief be accorded him in that respect. Bryson and Livermore interposed the same pleas. Cornelius appeared and cross-complained, setting up a claim adverse to all parties to possession under his recorded lease and asserting an unexpired option to purchase. Dennis, Jr., then cross-complained against the Overholtzers, alleging that he was under suit as their tenant by Cornelius, who sought to oust him with damages for his possession of the property. He sought adjudication of the rights of the parties in respect to the claims of Cornelius and, if ousted, damages from his lessors. The Overholtzers answered, denying they had agreed to sell to plaintiff and alleging they had made the contract she counted on with her husband to whom they had tendered a deed. They acknowledged the lease to Dennis, Jr., and to Bryson and Livermore. They denied the tenancy and option claimed by Cornelius. Plaintiff moved the court for and obtained an order impounding rents pending the outcome of the litigation. The Overholtzers, having made demands upon Dennis, Jr., for the payment of rent to them, served upon him a notice of unlawful detainer and a statement that they intended to institute an action to obtain possession of the property. Thereupon he applied to the court for an order restraining them from pressing their demands on him and from doing anything to interfere with his occupancy and possession of the property and from instituting actions against him pending the determination of the action. The court issued a temporary injunction whereby it restrained the Overholtzers during the pendency of the action and until its final determination or until the court should otherwise order, from commencing or maintaining any action or proceeding in unlawful detainer against Dennis, Jr., or for ejectment or eviction of Dennis, Jr., from the property held by him under the lease or for the recovery of possession of that property from him. From the order granting the injunction the Overholtzers have appealed.

[1–3] The appellants maintain that a preliminary injunction could not be granted in this action because no injunctive relief is asked in the complaint. The contention is not sound. It is true that if a preliminary injunction is sought upon a complaint rather than upon affidavits the complaint must state a cause of action for such relief. Moreno Mut. Irr. Co. v. Beaumont Irr. Dist., 94 Cal.App.2d 766, 778, 211 P.2d 928. However, upon a proper showing in any type of action a court may issue an injunction to maintain the status quo or to prevent irreparable injury during pendency of the suit. 28 Am.Jur. pp. 208–209.

> "* * * The power to make such an order is specifically granted to the courts by the legislature and appears in subdivision 2 of section 526 of the Code of Civil Procedure providing that an injunction may be granted 'When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.'" Smith v. Smith, 49 Cal.App.2d 716, 718–719, 122 P.2d 346, 348.

The issuance of a temporary injunction rests within the trial court's sound discretion and on appeal an order granting such injunction will not be reversed in the absence of a plain showing of abuse of discretion. Daniels v. Williams, 125 Cal. App.2d 310, 312–313, 270 P.2d 556. It is apparent from the statement of the issues involved that the trial court was engaged in adjudicating many real controversies between the parties to the action, all revolving around the title and right to possession of the same land; that it had caused rentals from the tenants to be impounded; that the tenants were paying rentals to the clerk of the court under that order; that in the action before it the Overholtzers' right to repossess the land from Dennis, Jr., could be adjudicated as well as, if not better than, in the proposed unlawful detainer suit. To be sure, the affidavits of the Overholtzers and their counsel in opposition

to the injunctive order appealed from alleged that with respect to Dennis, Jr., the full rental accruing under his lease was not being paid. That lease provided for a percentage of income from a lumber remanufacturing plant upon the leased premises being operated by Dennis, Jr. The lease also contained an undertaking that Dennis, as lessee, would repay to the Overholtzers counsel fees incurred in any litigation resulting from the acts of Dennis, Jr. The Overholtzers, claiming that Dennis, Jr., was responsible for the assertions of claims by Cornelius, had presented him with a bill of more than $2,800 for such counsel fees, which he refused to pay. Nevertheless, under all the circumstances related we think the court was justified in entering the order appealed from. It was exercising jurisdiction competent to determine the various and conflicting rights of all the parties. It could, if necessary, determine the amount of rental accruing against Dennis, Jr., and thus determine whether or not he was in fact in default; and whether or not he was subject to the demands of the Overholtzers for counsel fees and for accounting. It appears to have been a situation where temporary injunctive process ought to have been issued to prevent multiplicity of actions and we find no abuse of discretion in the order appealed from.

[4] Appellants claim further that they had at the time the injunctive order was entered an appeal pending from the order directing deposit of rents; that essentially the two orders covered the same ground; that they had appealed from the first order and that the appeal had thus removed the subject matter from the jurisdiction of the trial court. This contention cannot be sustained. The two orders did not cover the same ground nor were the evils they where aimed at coeval in origin; and in fact an attempted appeal from the order for deposit of rents was dismissed by this court on the ground that the order was nonappealable. Dennis v. Overholtzer, 143 Cal.App.2d 606, 299 P.2d 950.

[5, 6] Appellant further contends that equity cannot enjoin an action at law where the issues involved in the equity suit can be adjudicated in such action. The rule referred to does not apply where the equity court has first obtained jurisdiction. It may then, to avoid multiplicity of actions, enjoin initiation and prosecution of a suit at law involving the same issues. Appellant makes a related contention that in any event injunction will not lie to stay an unlawful detainer action, but there is nothing sacrosanct about the summary proceeding in unlawful detainer which removes it from the control of equity in a proper case.

The order appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.



149 Cal.App.2d 113

The PEOPLE of the State of California, Plaintiff and Respondent.

v.

James KEARNS, Defendant and Appellant.

Cr. 3251.

District Court of Appeal, First District, Division 2, California.

March 13, 1957.

Hearing Denied May 8, 1957.

Defendant was convicted on two counts of robbery committed by means of force and by putting in fear, while armed with a revolver. The Superior Court, City and County of San Francisco, Orla St. Clair, J., entered judgment and an order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Comstock, J. pro tem., held that where defendant testified that he had no revolver on dates of robberies, it was proper for the District Attorney to bring out fact that several weeks before the robberies the police had taken a revolver from

the defendant and had it in their possession continuously from such time.

Judgment and order affirmed.

1. Criminal Law ⇐348

In prosecution on two counts for robbery committed by means of force and by putting in fear, while armed with a revolver, wherein defendant testified that he had no revolver at times when robberies were committed, it was competent for the prosecution to attempt to show by cross-examination or other competent testimony that defendant prior to the robberies had had possession of a revolver similar to revolvers used in the robbery.

2. Criminal Law ⇐692

Where defendant's attorney objected to the introduction of testimony on certain subject by District Attorney, but thereafter defendant's attorney expressly consented to District Attorney's continuing with such line-up testimony, stating that defendant's attorney was going to bring the whole thing out before the jury anyway, there was a clear waiver of the objection by the defendant's attorney.

3. Criminal Law ⇐348

In prosecution on two counts for robbery committed by means of force and by putting in fear, while armed with a revolver, wherein defendant testified that he had no revolver on dates of robberies, it was proper for the District Attorney to bring out fact that several weeks before the robberies the police had taken a revolver from the defendant and had it in their possession continuously from such time.

4. Criminal Law ⇐1169(5)

In prosecution on two counts for robbery committed by means of force and by putting in fear, while armed with a revolver, alleged prejudice which resulted from introduction of evidence that several weeks before the robberies the police took from defendant a revolver and retained possession thereof, was wholly effaced by trial judge's admonition to the jury.

5. Criminal Law ⇐372(1)

In prosecution on two counts for robbery committed by means of force and by putting in fear, while armed with a revolver, trial court properly admitted evidence of previous robberies committed by defendant five or six years prior to the robberies in question, for purpose of showing a similar pattern, scheme, or modus operandi.

6. Criminal Law ⇐1037(1)

If Deputy District Attorney was guilty of prejudicial misconduct in argument to jury, objection to the argument at the time it was made was necessary before the matter could be made a ground for appeal.

7. Witnesses ⇐328, 330(1)

Where defendant relies on defense of alibi, wide latitude should be allowed the prosecution in cross-examination of defendant for purpose of testing the accuracy of defendant's recollection or credibility.

8. Witnesses ⇐328

Where attempted alibi of defendant in robbery prosecution rested heavily on the accuracy of defendant's recollection concerning what he did and what note of time he made between certain hours on date of robbery, trial court did not abuse its discretion in permitting Deputy District Attorney on cross-examination of defendant to test the accuracy of defendant's recollection.

9. Criminal Law ⇐938(4)

Where witness, who testified for prosecution in robbery prosecution to effect that she had seen a revolver in possession of defendant prior to robberies, could have been cross-examined by defendant as to whether revolver, which was in the courtroom and which had been taken by the police from defendant prior to the robberies, was the revolver that witness had seen in possession of defendant, but defendant did not cross-examine the witness as to whether it was the same revolver, trial court properly denied defendant's motion for new trial, on ground of newly discovered evidence that witness was quite sure that the revolver that she had seen in defendant's possession was the same revolver she saw in the courtroom.

10. Criminal Law ⇐938(1)

Motion of defendant for new trial on ground of newly discovered evidence was addressed to sound discretion of trial court.

11. Robbery ⇐24(1)

Evidence sustained convictions for robberies committed by means of force and by putting in fear, while armed with a revolver.

Nathan Cohn, Lawrence Shostak, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of California, Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

COMSTOCK, Justice pro tem.

Defendant was charged in an information with robbery in two counts, committed by means of force and by putting in fear, while armed with a deadly weapon, a gun. The information also alleged that the defendant had previously been convicted of two felonies, to wit, assault with intent to commit robbery, and robbery. Defendant pleaded not guilty to each charge of robbery and admitted having suffered the two prior convictions. Trial was had before a jury which returned verdicts of guilty as to each count and found each offense to be robbery in the first degree. It also found each charge of being armed with a deadly weapon to be true. A motion by defendant for a new trial was denied. Defendant was sentenced to be punished by imprisonment in the State Prison for the term prescribed by law, as to each count, the sentences to run concurrently. This appeal by defendant is from the judgment and sentence of conviction and from the order denying his motion for a new trial.

The following points are urged by the defendant as grounds for reversal: (I) that the trial judge erred to the prejudice of the defendant by admitting evidence regarding possession of guns by the defendant prior to the commission of the crimes alleged; (II) that prejudicial error was committed by the court's admitting evidence of prior robberies by the defendant; (III) that the Deputy District Attorney was guilty of misconduct to the prejudice of the defendant by bringing to the attention of the jury, in argument and in the questioning of witnesses, a gun in a package which had been in the possession of the Police Department of San Francisco continuously from a date prior to the commission of the crimes charged to a date subsequent thereto and could not have been the weapon used in the commission of the crimes; and, further, by having, in company of a police officer, visited a defense witness and frightened him into being hesitant and evasive in his testimony; (IV) that the trial judge erred and prejudiced the defendant by permitting cross-examination of the defendant beyond the scope of the direct examination; and (V) that prejudicial error occurred when the trial judge denied the defendant a new trial based upon newly discovered evidence. We have reached the conclusion that none of these grounds of appeal has merit.

With respect to count one, the essential facts are as follows: Shortly after midnight of October 13, 1955, John M. Johnson who, with a partner, owned and operated a grocery store at 667 Bush Street in the City and County of San Francisco, observed an automobile stop in front of the store. He noticed defendant sitting on the right hand side of the car. Defendant got out of the car, entered the store, shopped around and brought a few items to the counter. He was wearing a long, faded yellow trench coat which was all buttoned up at the neck. Johnson was suspicious because of the way the coat, which looked like a raincoat, was so completely buttoned up "on such a nice evening" so he "kept taking a good look at him." He particularly noticed defendant's eyes; they seemed to him to be different from any he had ever seen. Defendant was bareheaded and his hair was mussed and unruly. After shopping around, defendant came to the check stand, ordered two cartons of cigarettes, said he had forgotten something and went

back for a quart of milk. Johnson rang up the sale on the cash register and put defendant's money on the register, whereupon, defendant reached through the pocket of his coat and stuck what appeared to Johnson to be a blue steel revolver, about a .38 caliber, out through the front of his coat, saying, "This is it; this is a stick up. Put the money in a bag." The contents of the cash register amounting to something in excess of $300 were put in a bag by Johnson and handed to the defendant who ordered Johnson to "keep his nose pointing down at the cash register just like he was and he would be okay." Defendant left; Johnson heard a car pull away. Johnson identified a photograph of defendant made on September 20, 1955, and also identified him in a police line-up five or six days after the robbery and in open court at the trial. He was positive in his identification.

The following facts appear as to the robbery charged in the second count: On October 17, 1955, at about 7:45 p.m., defendant entered the grocery store of Albert Citti at 2260 Van Ness Avenue in San Francisco. Citti described defendant's dress as "a tan coat that could have been used as a raincoat, that was buttoned up to his neck." He was bareheaded and had "unruly hair; wasn't combed back slick or anything at the time." Defendant asked Citti for a fifth of gin and was told that he had only pints. Defendant said that would do. Citti placed a pint bottle of gin on the counter near the cash register and defendant pulled out a gun, menacing Citti with it, and ordered, "Open it up and give me the money." Citti gave him the money. Defendant ordered him to, "Put it in the paper bag." Citti obeyed. Defendant picked up the bag and the bottle, told Citti, "Turn your eyes toward the floor" and departed. The amount of money taken was about $110. Citti testified that he was not at all familiar with guns, but that the weapon used looked to him like a Luger, "sort of a dark gun, brown in color." He said he would not really know whether it was an automatic type gun but defendant did "clip it back" and said, "Hurry it up", so Citti "hurried up." Citti identified defendant from a series of photographs shown him by the police and also identified him later in a police line-up and in court. He had no doubt whatever of the identity of defendant.

[1] Appellant says the court erred in permitting reference by the Deputy District Attorney to a Smith and Wesson .38 caliber revolver taken from defendant by the police on September 20, 1955, and conceded to have been in their possession continuously from that date through the time of trial. Of course, this could not have been one of the weapons used in the robberies. Defendant testified he had no gun on either October 13th or 17th. It therefore was competent for the prosecution to attempt to show by cross-examination or other competent testimony that he had had possession of a weapon similar to either of the guns used in the robberies at a previous date. It is true that both the Deputy District Attorney and the attorney for defendant knew of the gun in the possession of the police. If this had been the only gun of which the prosecution had any knowledge or which it expected to show defendant had previous to the robberies, its good faith in bringing up the subject would have been subject to question. But the gun in the possession of the police was a snub-nosed or short-barreled Smith and Wesson, described by the defendant as "a stub-nosed Colt and Wesson, I believe; I'm not sure. It was a stub-nosed revolver * * * Well, the barrel is short, yes." The prosecution produced a witness, Patricia Adler, a friend of defendant, who testified to the defendant's having shown her a revolver about eight or nine inches long during the month of September, 1955. It was thus necessary, both in fairness to the defendant and in the interest of accuracy, to distinguish the short-barreled gun from the gun which the prosecution sought to prove was similar to one of those used in the robberies. This the Deputy District Attorney did in an eminently fair manner. He first asked the defendant if he had in his possession a .38, possibly a .45 caliber revolver

prior to the dates of the robberies. Following argument out of the presence of the jury on defendant's objection to this question, the court permitted the question, but limited the examination to an attempt to show defendant's possession of a gun similar to one of those testified to in the case. As a proper precaution against the jury being misled or prejudiced, the court gave them the following instruction: "Well, now, ladies and gentlemen, I'm going to permit the District Attorney to ask this series of questions on the theory that—the reason I'm explaining it to you is that it will be up to you to decide. I take it that the District Attorney is going to attempt to prove that this man had in his possession at sometime a gun that was similar to one of the guns that has been testified to here, and I want you to listen to the testimony with the understanding that this has nothing to do with this defendant's general character, or anything like that, and it will be up to you to decide from the evidence whether, first, he did have a gun in his possession prior, and, secondly, if it was in any way similar to either of the two guns that were testified that were used in the two robberies.

[2-4] Now, I'm permitting it on that very narrow ground, and for a very narrow reason, so I want you to keep those things in mind as you listen, and under our methods of procedure, it is necessary for the People, who have to ask him the questions, and presumably will produce their own evidence in an attempt to prove he did have such a gun, but they must ask him first to lay a foundation, as we call it, so, it is a difficult situation, and I want you to approach it thoughtfully and with this narrow issue in mind." The question was then read back by the reporter and defendant answered, "I had a .38." Asked if he had more than one .38, he answered, "No." He was then asked to describe the .38 that he had and did so as above set out. The record then shows the following:

"Mr. Hanley: Do you have the exhibit, Mr. Clerk?

"Q. And, Mr. Kearns, so there will be no misunderstanding, I'm going to show you a gun, but this is the gun that the police—that a police officer took from you under date of September 20th, is that correct?

"Mr. Cohn: Oh, your Honor, I'm going to object to this. This is terrible.

"Mr. Hanley: I wasn't—

"Mr. Cohn: This is terrible misconduct on the part of the District Attorney.

"The Court: Mr. Hanley, we had a distinct agreement what you were to question this man about, and you are now questioning him about something that I construe to be a violation of that understanding.

"Mr. Hanley: Well, your Honor, if the Court feels so, I intended no wise.

"Mr. Cohn: He has got to go through with it now. We are going to bring it out, anyway.

"The Court: Well, I suppose now, but I—

"Mr. Hanley: If the Court feels that what I have done— I thought—

"The Court: How else can I feel? There was a distinct understanding that you were to ask him about one gun, and one gun only; now you are asking about two guns. How else can I feel?

"Mr. Hanley: Well, your Honor, may I approach the bench for a moment, your Honor, with Mr. Cohn?

"The Court: No. What do you want to do, Mr. Cohn?

"Mr. Cohn: I don't know. We might as well continue on with this. I'm going to bring the whole thing out with the jury, anyway. Might as well lay it out there, but I think the jury should be admonished that the man is on trial for two robberies. He is not on trial for possession of the gun. As I informed your Honor yesterday, the man had a gun previous to this. He has been charged with that crime. I advised your Honor that he is going to plead guilty to that crime. The gun was in the possession of the police at the time this robbery took place; couldn't possibly have been used in the robbery.

"Mr. Hanley: Which is exactly the point I was attempting to bring out. He said he had a .38, and I was going into what I believe was a second .38, but I wanted to establish, in fairness, that this is not the gun.

"The Court: Go ahead, Mr. Hanley.

"Mr. Hanley: All right.

"Q. It is a stub-nosed barrel, or it is a short gun? A. Yes, sir.

"Q. Now, do you know Patricia Adler? A. Yes, sir.

"Q. She is a friend of yours? A. Yes, sir.

"Q. You have known her for some months? A. Yes, sir.

"Q. Now, on one occasion, and I can't fix the date other than to say that it was during the month of September, did you show Pat Adler a gun, the only description I could give is about that length (indicating)?

"The Court: Well, let's have, for the record,— What would you estimate that to be?

"Mr. Hanley: Well, I would estimate about eight or nine inches, your Honor. The Witness: I did not.

"Mr. Hanley: Q. You did not? A. I did not.

"Q. Specifically, a dark gun? A. I did not show her a dark gun, no.

"Q. And you did not show her a gun about that size, about eight or nine inches, or the size that I'm indicating here (indicating)? A. I did not show her a gun that size, no." Here the court specifically asked counsel for defendant what he wanted to do about the alleged misconduct of the Deputy District Attorney. There was open to the defendant the choice of pressing an objection, a motion to strike, with proper admonitions to the jury to disregard all reference to the gun in the possession of the police, or a motion for a mistrial, or, on the other hand, to agree that the subject might be pursued with such advantage to the defendant as might accrue from a showing that the only revolver he admitted having had prior to the robberies had been taken from him by the police and retained by them, so he could not have used it, and had no gun left with which to have committed the crimes. He chose the latter course and expressly consented to continuing with this line of testimony, stating he was "going to bring the whole thing out with the jury, anyway." This was a clear waiver of objection. People v. Westlake, 62 Cal. 303; People v. Pratt, 77 Cal.App.2d 571, 175 P.2d 888. Moreover, it was proper to bring out facts tending to prove prior possession by defendant of a weapon similar to that used in one of the robberies. People v. Bolton, 215 Cal. 12, 8 P.2d 116; People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44; People v. Beltowski, 71 Cal. App.2d 18, 162 P.2d 59; People v. Hightower, 40 Cal.App.2d 102, 104 P.2d 378; People v. Bonner, 5 Cal.App.2d 623, 43 P.2d 343; People v. Abbey, 124 Cal.App. 412, 12 P.2d 655. Defendant, not the People, created the situation which made it inevitable that competent cross-examination would disclose the facts relative to the short barreled Smith and Wesson seized by the police. There was no error in the ruling of the trial court. Indeed, if any basis for claim of prejudice existed, we are of the opinion that it was wholly effaced by the admonition delivered by the trial judge to the jury in the following language: "The Court: Before you question him about the guns, let me speak to the jury for a moment.

"Now, this throws a pretty heavy burden on you, the jury, for this reason: The second gun to which the District Attorney referred was in the hands of the police at the time that these robberies occurred, so it couldn't possibly have been used in this— in these robberies. However, it is a simple fact, to those of us who lead normal lives, that the bare fact of the possession of the gun is sometimes injurious to the defendant. That is, the knowledge by the jury, the bare fact of the possession of the gun, is inclined to prejudice a jury against a defendant, and that is why I didn't want—you are a perfectly good jury, but that is just the way human beings work. So, now you are

going to have to work, and be sure in your minds that the fact that this man possessed a gun earlier, even though it was in the possession of the police at the time of the commission—be sure that that doesn't prejudice you against this man in any way, because it has no bearing. The gun that is here in the courtroom has no bearing on this case at all. It couldn't have been used in the robberies. Whatever explanation he has as to why he had it really has no bearing, and whether his counsel desires to lead him through an explanation is up to his counsel. As far as I'm concerned, you must work very hard to be sure that the bare fact of the existence of that gun doesn't prejudice you against this man. Go ahead."

[5] The second item of claimed error relates to the admission of evidence of previous crimes committed by defendant some five or six years prior to the robberies involved here. This evidence was admitted over objection as tending to show a similar pattern, scheme or modus operandi to that employed in this case under the rules applied in People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Morani, 196 Cal. 154, 236 P. 135; People v. Grimes, 113 Cal.App.2d 365, 248 P.2d 130; People v. Burns, 109 Cal.App.2d 524, 241 P.2d 308, 242 P.2d 9; People v. Miner, 96 Cal.App.2d 43, 214 P.2d 557, and People v. Hall, 25 Cal.App.2d 336, 77 P.2d 244. Remoteness of five or six years in point of time does not affect the admissibility of the evidence, but at most affects only its weight. Frank Joseph Oneto testified that the defendant entered his liquor store at 5170 Mission Street, San Francisco, on two occasions, one in 1949 and one in 1950; that he threatened him with what appeared to be a revolver held beneath a long coat and robbed him, causing him to take the money from a cash register, place it in a paper bag and hand it to him, then turn his eyes downward toward the cash register or the floor while he departed. In arguing that the conduct of defendant on these occasions was dissimilar to that involved in the instant case, defendant points out many differences of specific detail and urges that the asserted similarity exists only in general phases of conduct which would be likely in any robbery. However, various points of similarity, some general, and some quite remarkable, existed in all four instances. In each, the defendant was positively identified. Each offense was at night. Defendant used or simulated the use of a pistol or revolver. Each time, he wore a long, light-colored coat and no hat. On the earlier occasions, his hair appeared quite long; in the instant robberies, the hair was unruly or mussed. Oneto's store was a liquor store; Johnson's and Citti's were grocery stores which had liquor departments. Each incident was a holdup. Defendant in each instance shopped around and brought articles to or near the cash register. Each time, the contents of the cash register were demanded and the victim was ordered to put the money in a paper bag and to keep looking at the cash register, or at the floor, or downward, while the defendant departed. We think there was no error in admitting the evidence of the former crimes with these points of similarity present.

[6] Appellant's third claim of error has been disposed of by what we have said concerning the propriety of going into the question of prior possession of a revolver similar to one used in the offenses on trial. Since there was no error in pursuing that subject and developing facts tending to show the probability of defendant's having had a gun or guns different from the only one admitted by him, there was no misconduct in the Deputy District Attorney arguing this phase of the evidence. It had distinct relevancy, as defendant admitted only his possession of the short-barreled Smith and Wesson and was asserting the impossibility of its use by him in the crimes charged. If, however, there was to be any claim of prejudicial misconduct in this regard, objection should have been raised and a request should have been made for the court to admonish the jury. Objectionable conduct of this nature, if such it be, must be opposed at the

time before it can be made ground for appeal. People v. Sampsell, 34 Cal.2d 757, 214 P.2d 813; People v. Codina, 30 Cal.2d 356, 181 P.2d 881; People v. Cuevas, 148 Cal.App.2d 331, 306 P.2d 510.

The assertion that the Deputy District Attorney intimidated the witness Raymond Choy into changing his testimony is devoid of merit. It rests upon the naked assertion of defendant's attorney. The record furnishes no support for the argument either that this witness changed his story or was frightened by being interviewed by the Deputy District Attorney.

[7, 8] The scope of the cross-examination of defendant by the Deputy District Attorney permitted by the court over objection by defense counsel was well within proper bounds. Defendant had purported to have a rather definite recollection of time and events covering the period related to the alleged time of the robbery on the evening of October 17. His attempted alibi rested heavily upon the accuracy of his recollection concerning what he did and what note of time he made from around seven until after eight o'clock that evening. It thus became extremely important to test recollection by questioning him concerning his actions at other times that day and evening. Wide latitude should be allowed in cross-examination for the purpose of testing accuracy of recollection or credibility in a situation like this. There was no abuse of the court's discretion. People v. Watson, 46 Cal.2d 818, 299 P.2d 243; People v. Whitehead, 113 Cal.App.2d 43, 247 P.2d 717; People v. Tou Jue, 66 Cal. App. 235, 225 P. 759.

[9–11] Finally, appellant urges that the trial judge erred in denying the motion for a new trial. The claim that defendant was denied a fair and impartial trial is based upon the grounds of appeal of which we have already disposed. We need not consider the alleged errors previously discussed beyond saying that none of them, either considered alone or collectively, deprived appellant of his right to a fair trial. As to the affidavits of alleged newly discovered evidence, that of Patricia Adler is stressed. She stated she was shown the revolver in the possession of the police on March 27, 1956, after the trial, and was quite sure it was the same one she saw in defendant's possession in late August or early September, 1955. This witness testified for the prosecution. She could have been cross-examined as to whether the gun in court was the one she had seen earlier. The trial judge was quite correct in rejecting the claim that her testimony, as outlined in the affidavit, was newly-discovered evidence sufficient to justify a new trial. People v. Poor, 52 Cal.App.2d 241, 126 P.2d 146; People v. Gist, 28 Cal.App. 2d 287, 82 P.2d 501; People v. Elder, 55 Cal.App. 644, 204 P. 29. The affidavits of the driver of the Luxor Cab and the manager of the Luxor Cab Company tend to show that one of their cabs made but one call at Cooper and Varni's Bar the night of October 17; that the driver picked up one passenger there and took him to the vicinity of Post and Mason Streets; that the call was the first of five calls made between eight and nine p.m. and was probably shortly after eight. This was evidence which could have been produced by the exercise of due diligence at the trial. It tended to contradict defendant's own testimony that he joined a friend and went to dinner with him at that time. It was on a subject presumably within defendant's knowledge at the trial. Other affidavits were to facts which tended to add credence to the stories of the alibi witnesses, but these were of a cumulative nature and did not tend to fix the crucial time element any more definitely than the testimony of witnesses at the trial. One affidavit was that of Attorney Shostak, associated with appellant's counsel, Nathan Cohn. This affidavit contains much hearsay. Among other things, it says affiant heard Mr. Cohn interview the witness Choy before the trial and heard Choy say that the defendant had been in his establishment at 7:40 or 7:45 on the evening in question. No explanation is offered why this subject was not pursued during the

trial where Choy was a witness for the defendant. Tne motion for a new trial was addressed to the sound discretion of the trial court and the elements of the standard by which such motion should be judged when newly-discovered evidence is claimed are well established. People v. McGarry, 42 Cal.2d 429, 267 P.2d 254; People v. Sutton, 73 Cal. 243, 15 P. 86; People v. Richard, 101 Cal.App.2d 631, 225 P.2d 938. On the record before us, we are unable to say that the alleged newly-discovered evidence would have rendered a different verdict reasonably probable upon a retrial or that the court in any way abused its discretion. People v. Poor, 52 Cal.App.2d 241, 126 P.2d 146. The defendant was convicted upon positive evidence. The attempt to establish an alibi did no more than raise a conflict which the jury resolved against the defendant as not creating a reasonable doubt of his guilt. The evidence was sufficient to sustain the verdict.

The judgment and the order denying the motion for a new trial are affirmed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.

Hearing denied; CARTER, J., dissenting.



149 Cal.App.2d 171

James B. McCLANAHAN and Leona G. McClanahan, Plaintiffs and Appellants,

v.

TRANS-AMERICA INSURANCE COMPANY, a corporation, Defendants and Respondents.

Civ. 8945.

District Court of Appeal, Third District, California.

March 14, 1957.

Action to recover on a liability policy after defendant corporation failed to pay the judgment recovered by plaintiff against insured. From an order quashing service of summons on the defendant in the Superior Court, Shasta County, Richard B. Eaton, J., the plaintiffs appealed. The District Court of Appeal, Peek, J., held that the evidence established that the foreign insurance company was doing business within the state so as to be subject to service of process upon the Secretary of State.

Order reversed.

1. Corporations ⇐642(1)

The rule regarding "doing business" within the state so as to subject a foreign corporation to local process has substituted a "qualitative" criterion for the "quantitative" concept.

2. Corporations ⇐642(1)

In determining whether a foreign corporation is "doing business" within this state so as to be subject to local process, it is the combination of local activities conducted by the foreign corporation, the manner, nature and extent thereof, which is determinative.

3. Corporations ⇐642(1)

The essence of "doing business" so as to subject a foreign corporation to local process, is that the corporation is present within the state sufficiently to constitute it just and equitable, that it be amenable to process within the state, and the test is not confined to a mechanical weighing, of whether the activity is a little more or a little less than the minimal activity necessary to come within the rule. West's Ann.Corp.Code, § 6501.

See publication Words and Phrases, for other judicial constructions and definitions of "Doing Business".

4. Insurance ⇐16

A foreign insurance company in retaining investigators, doctors and other persons necessary properly to defend the case brought by plaintiffs against the insured was "doing business" in California so as to be subject to service of process upon the Secretary of State, it being immaterial that the activities of the insurer

were a little more or a little less than the minimal activity necessary to come within the rule, respecting "doing business". West's Ann.Corp.Code, § 6501.

Daniel S. Carlton, Robert A. Haughwout, Redding, for appellants.

Burton, Lee & Hennessy, Yreka, for respondents.

PEEK, Justice.

This is an appeal by plaintiffs from an order quashing service of summons on defendant insurance company, a foreign corporation not qualified to do business within this state.

Plaintiffs, residents of the State of Washington, recovered a judgment for personal injuries and damages arising out of an automobile collision in Shasta County against J. F. and Leila Galloway, husband and wife residents of Colombia, South America, who were insureds of defendant corporation. The defendant corporation failed to pay the judgment, and this action was brought against it under the terms of the policy. Defendant was served by substitute service upon the Secretary of State pursuant to section 6501 of the Corporations Code. It thereafter appeared specially for the purpose of moving to quash the service. The motion was supported by affidavits of one L. H. Walden, defendant's president, and Michael T. Hennessy, one of the attorneys who represented defendant in the original proceeding. In opposition to the motion, affidavits were filed by Daniel S. Carlton, attorney for plaintiffs.

[1–3] Recently the reviewing courts of this state, in the cases of Kneeland v. Ethicon Suture Laboratories, 118 Cal.App. 2d 211, 257 P.2d 727, and Jeter v. Austin Trailer Equipment Co., 122 Cal.App.2d 376, 265 P.2d 130, had occasion to discuss at length the changing concepts regarding "doing business" within this state so as to be amenable to local process and consistent with due process. No useful purpose would be served by reviewing these exhaustive decisions at length. It is sufficient to note that as presently conceived, the rule has substituted a "qualitative" criterion for the "quantitative" concept. International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. It is the combination of local activities conducted by the foreign corporation, the manner, nature and extent thereof, which is determinative. West Publishing Co. v. Superior Court, 20 Cal. 2d 720, 728, 128 P.2d 777. Stated otherwise, "The essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state." Fielding v. Superior Court, 111 Cal.App.2d 490, 494, 244 P.2d 968, 970. And in this regard the test is not confined to a mechanical weighing of whether the activity is "a little more or a little less", 326 U.S. 319, 66 S.Ct. 159, than the minimal activity necessary to come within the rule. Since it is apparent that no hard and fast rule can be adopted which would apply to all cases, it is obvious that the final determination must be predicated upon the peculiar facts of each individual case.

In the present case the complaint and affidavits upon which the case was heard show the following uncontradicted facts:

Defendant Trans-American Insurance Company is an Alabama corporation, created and existing under the laws of that state; its principal office and place of business is at Montgomery, Alabama; it was and is engaged in the insurance business, including the solicitation and issuance of automobile liability insurance policies in at least three states of the United States; it has never qualified to do business in California; it has written no insurance policies and maintains no office or place of business in this state; it has no agents, jobbers or independent contractors who solicit business for it here; its policyholders operate motor vehicles in California at various times throughout the year; by the terms of its policies, de-

fendant insures its policyholders, within policy limits, against loss as a result of claims or actions brought against them for personal injury, death or property damage arising out of automobile accidents occurring anywhere in the continental United States; also under the terms of its policies defendant obligates itself, as a part of its business, to investigate accidents in which its policyholders are involved within this state or elsewhere, to employ local attorneys, investigators and adjustors for that purpose, to adjust and negotiate claims, defend actions, and to pay judgments if any arise out of actions against its policyholders in this state; said policies further provide that if judgments should be obtained against the insureds, the judgment creditors may bring an action directly against the company to recover the amount of the judgment; the defendants J. F. and Leila Galloway reside in Colombia, South America, and at the time of the automobile collision here in question were operating a 1954 Ford automobile insured by the defendant insurance company under an automobile insurance policy issued to them in the State of Alabama; in connection with the present action, the defendant's activities extended from June 29, 1954, to May 6, 1955; during that period of time it employed an adjustment service agency located in Dunsmuir, California, to investigate the claims arising out of the accident; it settled one claim; it employed attorneys in this state; it engaged a doctor to examine the plaintiff Leona G. McClanahan and engaged a second doctor who testified at the trial; through its attorneys it had the action removed to the United States District Court for the Northern District of California, Northern Division, and through the same attorneys resisted plaintiffs' motion to remand the cause to the superior court of Shasta County; and defendant's secretary conferred with and attempted to effect a settlement with plaintiffs' counsel at his office in Redding, at which time an offer of $5,000 was made which was refused, as was the second offer of $12,500 which was made through defendant's counsel.

[4] From the record as summarized, it would appear that the defendant, in retaining investigators, doctors and other persons necessary to properly prepare and defend the case brought by plaintiffs, was doing precisely what it contracted to do on behalf of each of its policyholders whether in California or elsewhere within the continental United States. In fact, in the affidavit filed by plaintiffs' counsel it was alleged, and it is not denied, that many of defendant's policyholders travel the highways of this state, and that defendant has adjusted and defended numerous cases in California.

It could be said that from the very nature of defendant's business, the insuring of automobile owners, that whenever it issued a policy of automobile insurance, the defendant contemplated that the holder thereof might at some time be a user of the highways of this state, subject to all of the hazards of such use, and hence knew it would be necessary to come into the courts of this state to assert its rights and defend its obligations under such policies. And in line with the comment of the court in the International Shoe case, such activities could not be gauged by a little more or a little less than the minimal activity necessary to come within the rule; that is it would appear to be of small consequence whether 25 of its insureds traveled the highways of this state and all had accidents or a thousand did likewise and only one accident resulted, the present. Again we may note that by the very terms of the policy, it was the defendant insurance company which, upon notice of the accident, for all practical purposes became a real party in interest—it took over the complete control of all aspects of the case from a defense standpoint. In fact, had not the Galloways placed the entire case in defendant's hands to compromise or defend as it saw fit, such action on their part could well have resulted in a breach of the contract of insurance. The activities of the defendant

under the circumstances shown cannot be gauged, as did the trial court, on the basis of one lawsuit or one visit by a corporate agent, or the fact that the defendant carried on no solicitation in this state.

The order is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



John F. THORMAN, Respondent,

v.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF the UNITED STATES AND CANADA, et al., Defendants and Appellants.*

No. 16816.

District Court of Appeal, First District, Division 2, California.

March 13, 1957.

Rehearing Denied April 12, 1957.

Hearing Granted May 8, 1957.

Moving picture machine operator, who was a member of international union and subsidiary local union, but not a member of local union, brought action against unions to recover damages because local union denied his application for membership with result that he was unable to obtain work, and he sought a writ of mandate to compel his admission to local union. The Superior Court, City & County of San Francisco, Thomas F. Foley, J., entered judgment adverse to unions, and they appealed. The District Court of Appeal, Draper, J. pro tem., held that alleged cause of action of operator for an injunction requiring local union to admit him to membership was exclusively within jurisdiction of the National Labor Relations Board and was not the proper subject of action in state court, where interstate commerce was affected, but that operator could maintain an action in state court against union for damages, and was not required to resort to the National Labor Relations Board, since federal statute did not give him any right to recover damages.

Judgment reversed with directions for new trial.

1. Labor Relations ⇐510

Alleged cause of action of moving picture machine operator for an injunction requiring local union to admit him to membership in local union was exclusively within jurisdiction of the National Labor Relations Board and was not the proper subject of action in state court, where interstate commerce was affected. National Labor Relations Act, §§ 8(b) (2), 10(a, c) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 158(b) (2), 160 (a, c).

2. Labor Relations ⇐510

Moving picture machine operator, whose application for membership in local union was alleged to have been wrongfully denied so as to prevent him from obtaining work, could maintain an action in state court against local union for damages, and was not required to resort to the National Labor Relations Board, since federal statutes did not give him any right to recover damages. National Labor Relations Act, §§ 8(b) (2), 10(a, c) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 158(b) (2), 160(a, c).

3. Labor Relations ⇐115

A union member must first exhaust remedies available within union before resorting to the court.

4. Courts ⇐488(1)

After transfer of a cause from District Court of Appeal to Supreme Court, no part of the opinion of the District Court of Appeal is of any authority as a precedent.

5. Labor Relations ⇐765

In action by moving picture machine operator, who was a member of international union and subsidiary local union but not a member of local union, against unions to recover damages because local union denied

* Opinion vacated 320 P.2d 494.

his application for membership with result that he was unable to obtain work, trial court should have admitted evidence that international union had entertained appeals of applicants rejected in many other similar cases, where constitution of international union was ambiguous with respect to right to appeal.

6. Labor Relations ⇐765

In action by moving picture machine operator, who was a member of international union and subsidiary local union but not a member of local union, against unions to recover damages because local union denied his application for membership with result that he was unable to obtain work, unions were entitled to prove that operator was in poor physical condition, though he had filed required doctor's certificate, if unions could show that local union had a general policy not to accept persons whose ill health would adversely affect their occupational fitness.

7. Labor Relations ⇐765

In action by moving picture machine operator, who was a member of international union and subsidiary local union but not a member of local union, against unions to recover damages because local union denied his application for membership with result that he was unable to obtain work, evidence concerning alleged incompetence of operator would be admissible, if a general policy of rejection by local union on ground of incompetency as a projectionist should be shown.

8. Labor Relations ⇐765

In action by moving picture machine operator, who was a member of international union and subsidiary local union but not a member of local union, against unions to recover damages because local union denied his application for membership with result that he was unable to obtain work, evidence to prove that operator had reflected discredit on local union by remarks made after his application was denied, was properly rejected.

9. Labor Relations ⇐768

In action by moving picture machine operator, who was a member of international union and subsidiary local union but not a member of local union, against unions to recover damages because local union denied his application for membership with result that he was unable to obtain work, the somewhat speculative character of the operator's damages, as measured by difference between his actual earnings and earnings of union member who replaced him, was not ground for their denial.

10. Labor Relations ⇐768

In action by moving picture machine operator, who was a member of international union and subsidiary local union but not a member of local union, against unions to recover damages because local union denied his application for membership with result that he was unable to obtain work, wherein damages of operator were measured by difference between his actual earnings and earnings of union member who replaced him, consideration should have been given to fact that union member who replaced him earned overtime, whereas operator was unwilling or unable to perform overtime work.

11. Labor Relations ⇐768

In action by moving picture machine operator, who was a member of international union and subsidiary local union but not a member of local union, against unions to recover damages because local union denied his application for membership with result that he was unable to obtain work, wherein damages of operator were measured by difference between his actual earnings and union member who replaced him, earnings of operator as a projectionist of films for others than theaters should have been included in the computation.

12. Damages ⇐71

In action by moving picture machine operator, who was a member of international union and subsidiary local union but not a member of local union, against unions to recover damages because local union denied his application for membership with

result that he was unable to obtain work, attorneys fees were not allowable to operator.

Tobriner, Lazarus, Brundage & Neyhart, Mathew O. Tobriner, Irving S. Rosenblatt, Jr., San Francisco, 4, for appellants.

Pembroke Gochnauer, San Francisco, 4, for respondent.

DRAPER, Justice pro tem.

Defendants appeal from a judgment granting a peremptory writ of mandate compelling admission of plaintiff to membership in Moving Picture and Projecting Machine Operators, Local 162, retroactively to March 5, 1953, and granting plaintiff damages for loss of earnings and $1,500 as damages for attorney's fees necessarily incurred by him.

The findings on which the judgment appealed from is based are in part to the following effect:

Local 162 is a constituent local of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (hereinafter called I.A.T.S.E.) and has jurisdiction over and members among employees in the theatrical and picture industries in San Francisco. Local 162 has contracts with at least sixty-six of the seventy motion picture theaters of San Francisco to employ in said theaters only projectionists dispatched by Local 162, so that a projectionist like plaintiff cannot obtain employment as such in said theaters without obtaining membership in Local 162 or being dispatched by its office. For many years only a limited number of journeyman members (at the time 112) have been admitted to Local 162; they possess the primary security of employment and seniority, and are the only ones who have voting power as to the organization of the local, its contracts and working conditions. They are all employed and the remainder of the approximately 175 jobs available are filled by members of other locals of I.A.T.S.E. and members of Local B18, a subsidiary local whose membership includes certain machine operators and projectionists. The latter are required to pay, over and above the dues to Local B18, a "working fee" to Local 162 in the same amount as the journeymen members thereof.

Plaintiff is a competent and qualified moving picture machine operator and projectionist who entered the jurisdiction of Local 162 in February 1942, and work as such in San Francisco ever since, except that from October 1942 until February 1946, he was a motion picture machine operator in the United States Army. On his return from army service plaintiff applied to Local 162 for work assignment. He was told to join Local B18. He joined that local and the I.A.T.S.E. in February 1952 and ever since has been dispatched to work by Local 162. In January 1953, plaintiff filed with Local 162 his written application for journeyman membership accompanied by half of the initiation fee, all as required by its constitution, after having been informed by an office employee that his application would be entertained by the Executive Board. He was notified in writing to take the entrance examination conducted by the local, passed it, filed a doctor's certificate showing good physical condition, and appeared at the next regular membership meeting (on March 5, 1953). When his application was put to a vote on March 12, 1953, it did not receive the favorable two-thirds vote of the members voting, required by the constitution of the local. Plaintiff meets all lawful and reasonable requirements for membership in Local 162 and has performed or offered to perform all that the constitution and by-laws of that local require for admission to journeymen membership, except the required membership vote. Since March 5, 1953, defendants have arbitrarily refused to admit plaintiff to journeyman membership in Local 162. The court also found that there is no right of appeal within I.A.T.S.E. and Local 162 from the rejection of plaintiff's application for membership.

There are also findings as to plaintiff's damage by loss of earnings when defendants dispatched a newly admitted journey-

man on March 12, 1953, to take over the job in which plaintiff had been regularly employed. Thereafter, plaintiff was dispatched for occasional employment only.

From the conclusions of law we note the following: Local 162 has a monopoly in San Francisco of the work of motion picture machine operators and projectionists in motion picture theaters. Since 1946 it has maintained an arbitrarily closed union. The requirement that a candidate for membership must receive a favorable two-thirds vote of the members voting is contrary to public policy, arbitrary and illegal and deprives plaintiff of his right to earn a livelihood in his trade.

Appellants attack the judgment on a number of grounds. They urge that the trial court lacked jurisdiction of the subject matter since exclusive jurisdiction for relief rests with the National Labor Relations Board (further called the N.L.R.B.).

It is undisputed that respondent's action is based on the principle of James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900, and Dotson v. International A.T.S.E., 34 Cal.2d 362, 210 P.2d 5, that a labor organization may not properly maintain both a closed shop and an arbitrarily closed or partially closed union. It is appellant's contention that the violation of this rule constitutes an unfair labor practice as meant in the Labor-Management Relations Act. Taft Hartley Act, 29 U.S.C.A. §§ 160 (a) and (c); 158(b) (2); that since the enactment of said Act, exclusive jurisdiction of the matter if its affects interstate commerce, has been given to the N.L.R.B.; that part of the theaters from the employment in which plaintiff is excluded in the manner here attacked belong to interstate theater chains operating all over the United States so that the unfair practice affects interstate commerce, and that therefore the state court lacks jurisdiction. Respondent does not dispute that interstate commerce is affected, but contends that nevertheless the state courts have jurisdiction, because the action is based on a rule of state law and the relief granted differs from that which the N.L.R.B. can provide. Both principles on which the parties rely have mainly been developed in recent cases. The leading case for the exclusive jurisdiction of the N.L.R.B. is Garner v. Teamsters Union, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228, and the one for the restriction on which respondent relies, United Construction Workers v. Laburnum Corporation, 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025. It may be doubted whether all the recent cases in this field are consistent and whether the exact borderline between the applicability of said principles has been clearly and definitely drawn. However, recent California cases establish the rule for decision of our question.

In International Sound Technicians v. Superior Court, 141 Cal.App.2d 23, 296 P.2d 395, like issues were presented upon a petition for writ of prohibition seeking to restrain the Superior Court's proceeding with an action against a labor union. The court there held that the cause of action for an injunction requiring plaintiff's admission to membership in the union was exclusively within the jurisdiction of the N.L.R.B., and therefore was not the proper subject of action in the state courts. That decision held, however, that plaintiff's action for damages was one for violation of his fundamental right to work, a right not founded solely in the Taft-Hartley Act. The court pointed out that, in the absence of application to the N.L.R.B. for preventive relief, the federal act does not attempt to provide any means for recovery of damages by one in plaintiff's position. (No application to the N.L.R.B. was made in the case at bar). It concluded, therefore, that the action for damages may properly be maintained in the courts of this state.

[1, 2] Each party attempts to distinguish the portion of the International Sound decision unfavorable to him. These attempted distinctions are based largely upon consideration of cases in the federal courts. But all this material is the subject of full discussion in the case just discussed, and the application of the current federal rule is there determined. Upon the authority of International Sound Technicians v. Superior Court, supra, we conclude that the de-

cree for injunctive relief here must be reversed. Under the same authority, however, the claim for damages is cognizable, and we therefore review appellant's other assertions of error upon that issue.

[3] Respondent did not attempt to resort to any remedies within the I.A.T.S.E. before filing the present action. Appellants assert that, in this situation, judicial relief cannot be granted. The rule is clear that a union member must first exhaust the remedies available within the union before resorting to the courts. Holderby v. International Union etc. Eng'rs, 45 Cal.2d 843, 846, 291 P.2d 463.

[4] The principal question presented upon this point is whether, under applicable regulations of I.A.T.S.E., respondent had a remedy within the union. Appellants rely upon the decision of a District Court of Appeal in Dotson v. International A.T.S.E. Local 162, 191 P.2d 778. However, that decision did not become final. The Supreme Court granted a hearing and its opinion 34 Cal.2d 362, 210 P.2d 5, expressly refrains from discussion of the question of failure to exhaust remedies within the union. After transfer of a cause to the Supreme Court, no part of the opinion of the District Court of Appeal is of any authority as a precedent. Ponce v. Marr, 47 Cal.2d 159, 301 P.2d 837. Thus, this decision cannot be relied upon here.

[5] Review of the constitution of I.A.T.S.E. indicates that under Article 17, Section 1, respondent, as a member of constituent Local B 18, may have the right to appeal to the International President; from him to the General Executive Board, and from that board to the Alliance in convention assembled. Appellants offered evidence that I.A.T.S.E. had entertained appeals of applicants rejected in many other similar cases. The trial court sustained objection to such offered evidence, on the ground that the constitution and laws of the union speak for themselves. But the provisions of Art. 17, Sec. 1, considered in the light of several other provisions of the constitution, are by no means free from ambiguity. The constitutions and laws of private organizations require construction as much as do those of the state and its subdivisions. It has been held that the practical and reasonable construction of the laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts. DeMille v. American Federation of Radio Artists, 31 Cal.2d 139, 147, 187 P.2d 769, 175 A.L.R. 382. Thus, the offered evidence should have been admitted, and the judgment for damages must be reversed to permit consideration of these facts upon the issue of the existence of a remedy within the union.

There remain several questions which should be discussed for the benefit of the court below upon retrial. Appellants contend that evidence offered as to the physical condition of respondent should have been admitted for its bearing upon the issue whether respondent's rejection by the membership was arbitrary.

[6] It is undisputed that respondent filed the required doctor's certificate, and that he was present at the meeting of March 5, 1953, where he was presented to the membership. However, he became ill immediately thereafter, underwent abdominal surgery March 7th (5 days before the vote by the members upon his application), and was unable to work for one and one-half months thereafter, and as late as October, 1953, and January 1954 he asked for time off or for change of assignment, relying on doctors' certificates specifying the state of his health as the ground for such requests. Appellants offered to prove that his poor physical condition was known to the membership when it voted on March 12th and was a reason for his rejection, and that the Executive Board had, in June 1953 invited him to appear before it for the purpose of clarifying his physical condition and to inform him that, in the event of his recovery, reapplication by him would be entertained. The evidence was denied admission. We cannot accept respondent's view that by filing the medical certificate he had complied with all requirements as to health, thus rendering the offered evidence irrelevant. The con-

stitution does not affirmatively require that all persons presenting satisfactory medical certificates must be admitted to membership. It can hardly be contended that if an applicant becomes totally and permanently incapacitated after the date of the certificate and before balloting his rejection upon that ground would be arbitrary as a matter of law. Provided the local can show that it had a general policy not to accept persons whose ill health would adversely affect their occupational fitness such evidence should be admitted at retrial.

[7, 8] Similarly, if a general policy of rejection upon the ground of incompetence as a projectionist is shown, evidence of such incompetence should be admitted. The mere fact that respondent had passed an examination does not bar all proof of incompetency. However, the offer to prove that respondent had reflected discredit upon the local by remarks made after the balloting was properly rejected. The issue is whether the rejection in March, 1953 was arbitrary. Statements made a year after that event can hardly be relevant.

[9–12] Several points are raised as to the award of damages. In general, the court awarded respondent the difference between his actual earnings from June 7, 1953 to April 7, 1954, and the earnings of the union member who replaced him on the former date. The somewhat speculative character of these damages is not ground for their denial, Harris v. National Union etc., 98 Cal.App.2d 733, 738, 221 P.2d 136. However, this computation included overtime earned by Forde, whereas respondent was unwilling or unable to perform overtime work during this period. Consideration should be given to this factor upon retrial. Also, appellants were refused credit for respondent's earning as a projectionist of 16 mm. films for others than theaters. At least to the extent that respondent performed this work at times when his replacement worked at the theater, and thus was work which could not have been performed by respondent if he were dispatched by the local, these items should have been included in the computation. Appellants complain also of the allowance of attorneys' fees paid or to be paid by respondent for representation in this action. Generally, such fees are not recoverable, Viner v. Untrecht, 26 Cal.2d 261, 272, 158 P.2d 3. We find no express statutory or contractual authority for such an award here. Attorneys' fees should not have been allowed.

Judgment reversed, with directions for new trial in accordance with the views expressed in this opinion.

NOURSE, P. J., and DOOLING, J., concur.



149 Cal.App.2d 75

Luella J. DE WIT, Plaintiff and Appellant,

v.

McCleery GLAZIER, M.D.; J. H. Gifford, M.D.; W. H. Olds, M.D.; and Stanley Edwards, M.D., Defendants and Respondents.

Civ. 21819.

District Court of Appeal, Second District, Division 2, California.

March 11, 1957.

Hearing Denied May 8, 1957.

Action against physicians for alleged malpractice causing plaintiff's husband's death. The Superior Court of Los Angeles County, Frederick F. Houser, J., rendered judgment on jury verdict for defendants and denied plaintiff a new trial. Plaintiff appealed. The District Court of Appeal, Fox, J., held that affidavits of plaintiff, and three jurors, filed on her motion for new trial on asserted ground that prejudice of certain jurors had denied her a fair trial, did not conclusively establish bias and prejudice in favor of physicians by certain jurors voting against her, in view of controverting affidavits filed by nine other jurors, and revealed no abuse of discretion in denying her a new trial.

Judgment affirmed.

1. New Trial ⇐142

On motion for new trial, it is proper for court to receive affidavits of jurors relating to occurrences during deliberations of jury tending to establish bias of juror existing at time of his impanelment which was concealed during voir dire examination directed to that point.

2. New Trial ⇐144

In action against physicians for alleged malpractice causing death of plaintiff's husband, affidavits of plaintiff, and three jurors, filed on her motion for new trial on asserted ground that prejudice of certain jurors had denied her a fair trial, did not conclusively establish bias and prejudice in favor of physicians by certain jurors voting against her, in view of controverting affidavits filed by nine other jurors, and revealed no abuse of discretion in denying her a new trial.

3. Appeal and Error ⇐920(1)

On appeal from order based on affidavits and involving determination of fact questions, reviewing court is bound by same rules that control where oral testimony is presented for review, that if there is any conflict in affidavits, those favoring prevailing party are to be accepted and that, since all intendments are in favor of action taken by lower court, affidavits in behalf of successful party are deemed to establish all facts reasonably to be inferred from those stated.

4. Appeal and Error ⇐933(5)

In reviewing propriety of trial court's denial of new trial, it was to be presumed that conflicts among affidavits filed were resolved in favor of successful parties on motion, and court's implied findings therefrom could not be disturbed.

5. Appeal and Error ⇐977(3)

The granting of a new trial rests so completely within discretion of trial judge that reviewing court will not interfere with his action unless a patent abuse of discretion appears.

Randolph Karr, San Francisco, John H. Gordon, E. A. Hume, Los Angeles, for appellant.

DeForrest Home, Los Angeles, for respondents.

FOX, Justice.

After trial by jury in a malpractice action, a verdict was rendered in favor of the defendant doctors, upon which judgment was entered. A motion for new trial was denied. In her appeal from the judgment plaintiff seeks a review of the propriety of such order.

The limited record before us for purposes of this appeal consists of the clerk's transcript, a partial reporter's transcript comprising the *voir dire* examination of the prospective jurors, and a transcript of the proceedings at the hearing of the motion for new trial.

Although the record of the trial is not before us, the clerk's transcript discloses that defendants were charged with negligence in examining and diagnosing plaintiff's decedent, Mr. DeWit, and of performing an operation on Mr. DeWit which caused peritonitis to set in, which in turn is alleged to have been the cause of death.

Plaintiff's[1] contention is that she was denied a fair trial because of the misconduct of several jurors, as set out in affidavits filed in support of her motion for new trial. Defendants assert the question to be resolved is whether the trial court abused its discretion in denying plaintiff a new trial.

During the impanelment of the jury, plaintiff's counsel propounded questions to each of the jurors voting in favor of defendants, seeking to elicit their general views concerning the moral and legal right of a party to bring a malpractice action and inquiring about their feelings towards, and experiences with, and relationship to doctors. Inquiries were made as to the jurors' sympathy for doctors, whether they would apply any different standard to doc-

1. The cause of action of co-plaintiff Jacqueline DeWit was dismissed, leaving Luella DeWit as sole plaintiff.

tors charged with negligence simply because of their particular professional status; whether they understood that the action being tried was neither a prosecution nor a disciplinary proceeding; whether they could judge the case on the evidence adduced, divorced from personal feeling, as well as other questions of like import. These veniremen denied they had any prejudice along the lines asked which would preclude an objective consideration of the case. The tenor of their statements was that they felt a party had legal as well as moral right to bring a malpractice action and that they could try such an action with an open mind regardless of the fact that doctors were defendants.

Mrs. Klein, sitting as juror #2, was asked on *voir dire* whether she had a specialized knowledge of peritonitis "beyond what all of us laymen have" which she would substitute for such knowledge as she would apprehend from the evidence. She replied in the negative. Juror #3, Mrs. Hutson, disavowed on *voir dire* that there was anything in her medical history, or that of her husband, that would cause her to have any adverse feelings toward a plaintiff in a malpractice action.

In support of her motion for a new trial, plaintiff filed her own affidavit, an affidavit of Lionel T. Campbell, her attorney, and the affidavits of three jurors, Mrs. Armendariz, Mr. Koechling, and Mr. Rush. These juror-affiants averred that after the jury had retired and before any nine jurors had expressed themselves in favor of defendants, certain other jurors, in the hearing of the panel, made statements substantially as follows: It would be too bad to hold these doctors, it would ruin their reputations if found guilty; these doctors would not do anything wrong, and if they did they would have been expelled from the staff of the hospital; it wouldn't be right to ruin their professional careers for just one error, and these doctors could not do any wrong with all their education and experience. The Armendariz affidavit also states that during the deliberations, before nine jurors had indicated any decision, (1) juror Klein remarked in the presence of all the jurors that some 20 years before her husband developed peritonitis after an appendectomy and was still alive, that peritonitis is not fatal and that she could not see how the peritonitis in the case of plaintiff's decedent could have had any effect on his death; (2) that Donald Lewis, juror #10 and foreman of the jury, stated he gambled on horses and plaintiff was just gambling in court for $200,000; (3) that juror #6, Mrs. Oliver, stated plaintiff should not have brought her action because she knew she was going to lose it; (4) that Mrs. Hutson informed the jurors that her husband had been operated on by a doctor two years previously without her knowledge, that she had not been consulted about it, that "it didn't bother her and she didn't see why it should have bothered Mrs. DeWit." Mr. Koechling's affidavit also refers to the remark attributed to Mrs. Oliver, and Mr. Rush's affidavit asserts one juror (presumably Mr. Lewis) stated plaintiff was just gambling in court for $200,000 and that Mrs. Klein referred to someone in her family who had peritonitis some years ago.

Plaintiff and her attorney, Mr. Campbell, submitted affidavits to the effect that they were ignorant of the facts constituting the claimed misconduct until after the rendition of the verdict.[2] The Campbell affidavit asserts that he accepted the jurors solely on their answers made on their *voir dire* examinations and had he known of a pre-existing bias and prejudice as disclosed by the matter contained in the affidavits of Armendariz, Rush and Koechling and not revealed on *voir dire*, he would have challenged the jurors in question.

In a supplemental affidavit filed by Mrs. Armendariz, she asserts that while she was seated in the courtroom waiting to enter upon the deliberations in the jury room,

2. A like affidavit was filed by Jacqueline DeWit, originally a co-plaintiff, as appears from footnote 1.

juror #1, Mrs. Newcomb, handed her a box and stated: "* * * don't open it here. I don't want anyone to see what I bought you. It's a little necklace to wear with your dress * * *" Later, according to Mrs. Armendariz, while the jury was deliberating, Mrs. Newcomb remarked to her in a low voice, in effect, that "it would be nice to have all of us vote in favor of the doctors."

Each of the other nine jurors filed counter-affidavits. In his, affiant Donald Lewis, the foreman of the jurors, categorically denied making the statement with reference to gambling imputed to him by Mrs. Armendariz and denied hearing any juror make any of the other statements alleged in the Armendariz, Rush and Koechling affidavits. He asserted that he viewed the case with an open mind, that he saw no evidence of prejudice or bias in favor of either plaintiff or defendants and that the deliberations were conducted conscientiously and fairly, in accordance with the evidence and instructions of the court.

Juror Klein stated in her affidavit that she made a reference to the fact that her former husband had peritonitis 20 years ago and was still alive. She described the circumstances as follows: Mrs. Armendariz, in the course of the deliberations, had remarked that someone she knew had died of peritonitis less than two weeks after an operation and that Mr. DeWit might have died of the same cause. Thereafter, while the jury was getting ready for lunch, Mrs. Klein spoke to Mrs. Armendariz alone and outside the hearing of other jurors. In answer to Mrs. Armendariz' example, Mrs. Klein referred to the fact that her ex-husband lived for 20 years after developing peritonitis following surgery, and that it was not necessarily fatal, and in view of the fact that Mr. DeWit had lived some two and a half months after the surgery, affiant couldn't see any connection between peritonitis and his death. Mrs. Klein stated that her statement was not the basis of her decision in the case, but was used simply as a contrary example to the instance cited by Mrs. Armendariz. Mrs. Klein stated she entered the case without any prejudice and kept an open mind until the case was submitted and deliberations began and that the jury made every effort to arrive at a fair decision.

Juror Oliver's affidavit states she does not recall making the statement that plaintiff should not have brought the action because she knew she was going to lose; that if such statement was made by her, it was not the result of prejudice against plaintiff nor because of any belief that doctors could do no wrong, or of any consideration of injury to their reputations as the result of an adverse verdict. She averred that the evidence convinced her that the defendants were not negligent in relation to their treatment of Mr. DeWit, that she had no recollection of hearing the remarks attributed to the jurors in the affidavits supporting the motion, and in her opinion the jury considered the case impartially.

Juror Hutson likewise averred she heard no statements on the part of any jurors indicating that consideration should be given the doctors because an adverse result would ruin their professional careers. She stated she entered upon her duties with an unbiased mind and formed no opinion on the case until after deliberations began. With reference to the statement attributed to her that her husband had been operated on without her consent, which did not bother her, and she saw no reason why Mrs. DeWit should be bothered, Mrs. Hutson disclaimed the accuracy of this statement. She averred that in discussing the evidence, she had pointed out that the hospital record showed Mr. DeWit had given written consent to the operation and the evidence made it appear that plaintiff was complaining because she had not been asked for her consent. Then, as a matter of argument, Mrs. Hutson stated that she had not been asked to give consent when her husband was operated on and that she felt "that it was Mr. DeWit's bladder and Mr. DeWit's surgery, and that he was the one who had the right to say whether he wanted it or not."

Juror Newcomb's affidavit denies that she made the statements attributed to her indicating sympathy for the doctors and denies that she heard any of the other jurors so express themselves. She stated she tried the case with an unbiased mind. She avers that during the course of the deliberations she expressed the opinion that the evidence showed defendants had had a good medical education and wide experience. This statement was based wholly on the evidence and not on any preconceived idea that a verdict should be returned in favor of defendants because they were doctors and their medical careers should be protected. With reference to the incident of the gift, Mrs. Newcomb stated that she and Mrs. Armendariz frequently rode home together on the street car and became friendly; that during the course of the trial they exchanged books and reading matter; that Mrs. Armendariz had presented her with over 20 paper-backed mystery books; that in appreciation, Mrs. Newcomb gave a necklace costing 79 cents and a bottle of cologne, both of which had been unused in her home for a considerable period of time; that it was not true that Mrs. Newcomb told Mrs. Armendariz not to open the gift in the presence of the other jurors or that the gift was made to influence her vote.

The remaining jurors, all men, filed affidavits which declared, in substance, that they saw or heard nothing in the jury room to indicate any jurors were motivated by bias or prejudice during the deliberations and that the case received a fair and open-minded consideration from the jury.

[1, 2] Plaintiff correctly states the well-established rule that upon motion for a new trial it is proper for the court to receive affidavits of jurors relating to occurrences during the deliberations of the jury tending to establish the bias of a juror existing at the time of his impanelment which was concealed during the *voir dire* examination directed to that point. Forman v. Alexander's Markets, 138 Cal.App.2d 671, 674, 292 P.2d 257; Pollind v. Polich, 78 Cal.App.2d 87, 92, 177 P.2d 63; Williams v. Bridges, 140 Cal.App. 537, 35 P.2d 407. Plaintiff is mistaken, however, in her suggestion that the affidavits before the court *conclusively* established bias and prejudice on the part of certain jurors voting against her and that she is entitled to a new trial. While plaintiff's affidavits, standing alone, concededly would be impressive, it cannot be ignored that nine jurors filed answering affidavits sharply challenging and contravening plaintiff's charges, putting some of the facts alleged in a different focus and stripping others of the sinister implications drawn by plaintiff. Certain jurors accused of making improper statements directly denied that many of the utterances attributed to them were actually spoken; others denied hearing such statements made; some denied the statements in the form or character alleged and described what was actually said or done in factual context; and all denied entertaining either a bias in favor of defendants or a hostile animus towards plaintiff at the time of their impanelment. A factual conflict existed as to whether certain statements were made at all, and a question existed as to whether other statements made, when seen in complete perspective, manifested a prejudice concealed on *voir dire*.

[3, 4] In considering an appeal from an order which is based on affidavits and which involves the determination of a question of fact, an appellate court is bound by the same rule that controls where oral testimony is presented for review, namely: (1) if there is any conflict in the affidavits, those favoring the prevailing party are accepted as true; and (2) since all intendments are in favor of the action taken by the lower court, the affidavits in behalf of the successful party are deemed not only to establish the facts directly stated therein, but all facts reasonably to be inferred from those stated. Doak v. Brunson, 152 Cal. 17, 91 P. 1001; West Coast Securities Co. v. Kilbourn, 110 Cal. App. 293, 297, 294 P. 57. In passing upon the motion for a new trial, it must be presumed that conflicts among the affidavits filed were resolved by the court in favor

of the defendants, and its implied findings cannot be disturbed on appeal. MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 468, 271 P. 509; Ham v. County of Los Angeles, 46 Cal.App. 148, 154, 189 P. 462. Plaintiff makes much of the fact that juror Klein answered in the negative when questioned about whether she had a specialized knowledge of peritonitis "beyond what all of us laymen have" and further answered on *voir dire* that she would not substitute any knowledge that she might have for what she might get from the witness stand. However, there is no showing that Mrs. Klein had any specialized knowledge of peritonitis, as distinct from what any layman might know of this malady. The fact that a member of her family once had peritonitis does not, without more, suggest that she had any specialized or technical knowledge beyond that of a lay person and that she suppressed such knowledge. Her affidavit reveals that her reference to a case of peritonitis within her knowledge was made in private to Mrs. Armendariz only in answer to a like reference postulated by the latter, and had no bearing on her approach to the issues presented by the evidence. Mrs. Hutson's affidavit with reference to the matter of a plaintiff's irritation at not being consulted about her husband's operation does not necessarily suggest any bias whatsoever antedating the trial and the court could reasonably find that her affidavit completely dispelled any question as to her bias in favor of defendants or against plaintiff. The trial court could also reasonably conclude that the gifts made by Mrs. Newcomb to Mrs. Armendariz were simply the outgrowth of their fraternization, that they were made in return for books given to her and without insidious implications. The trial court was not required to find this incident bespoke bias concealed on *voir dire*. In short, it was the function of the trial court to determine as a matter of fact where the truth lay on the conflicting evidence before it, and we can no more disturb the implied finding against plaintiff than if the question arose on a finding in the trial of the facts of the case.

[5] The case of Shipley v. Permanente Hospital, 127 Cal.App.2d 417, 274 P.2d 53, 48 A.L.R.2d 964, is of no assistance to plaintiff. In that case, the court *granted* a new trial after receiving affidavits which parallel those here presented, and this action was affirmed on appeal. Had the court below granted the motion for a new trial, we would likewise be bound to presume that he accepted the veracity of the movant's affidavits; but as it denied a new trial, we must assume the facts most strongly against plaintiff. As the Shipley case emphasizes 127 Cal.App.2d at page 425, 274 P.2d 53, the granting of a motion for a new trial rests so completely within the discretion of the trial judge that a reviewing court will not interfere with his action unless a patent abuse of discretion appears. The underlying fallacy of plaintiff's reliance on an authority such as the Shipley case, where a new trial was granted, is aptly epitomized in Lynn v. Knob Hill Improvement Company, 177 Cal. 56, 169 P. 1009, which involved an appeal from an order denying a motion to be relieved of default. The Supreme Court stated, 177 Cal. at page 62, 169 P. at page 1011: "The appellant makes the common mistake of citing to us cases where orders granting such motion have been sustained on appeal, and endeavoring to apply those precedents to the present case, where the relief is denied. The matter being discretionary and reviewable only for abuse, it may well be that this court would sustain an order denying such relief in one case and deny it in another, where the facts presented to the lower court were precisely the same in both, because this court could not say there was an abuse of discretion in either event." In People v. Webb, 143 Cal.App.2d 402, 300 P.2d 130, where the court reviewed an order denying a motion for new trial based on a juror's misconduct, the Shipley case was likewise distinguished as one in which the motion for new trial had been granted. The court then stated the rule here germane, 143 Cal.App.2d 419, 300 P.2d at page 142: "The trial court by its ruling denying the motion for a new trial necessarily

impliedly found that Bradley did not misrepresent his state of mind on the *voir dire* examination. This finding cannot be reversed in the absence of a showing of a clear abuse of discretion. No such showing was here made [citations]."

Since the order in the instant case was made after the trial court considered conflicting affidavits and is supported by substantial evidence therein, the implied finding in defendants' favor will not be disturbed.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

Hearing denied; CARTER, J., dissenting.

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48 Cal.2d 93

CITY OF GLENDALE, a municipal corporation, Plaintiff and Appellant,

v.

Christine TRONDSEN, Defendant and Respondent.

CITY OF GLENDALE, a municipal corporation, Plaintiff and Appellant,

v.

Charles JARMER, Defendant and Respondent.

CITY OF GLENDALE, a municipal corporation, Plaintiff and Appellant,

v.

R. E. TISDALE, Defendant and Respondent.

L. A. 24116–24118.

Supreme Court of California, In Banc.

March 12, 1957.

Actions brought by municipality to recover exactions imposed upon occupancy within city pursuant to ordinance. The Superior Court, Los Angeles County, Jerold E. Weil, J., entered judgment for defendants, and plaintiff appealed. The Supreme Court, Carter, J., held that Glendale ordinance, imposing charge upon building occupants for rubbish collections service, without regard to whether service was used, could be upheld as service charge, under police power, or as an excise tax on right of occupancy or upon privilege of accumulating rubbish and having collection service available.

Reversed.

Opinion, 300 P.2d 235, vacated.

1. Municipal Corporations ⇐956(1)

The levy and collection of taxes by city having charter under constitution is municipal affair; and such power is broad, being limited only by charter and constitution. Const. art. 11, § 6.

2. Municipal Corporations ⇐956(4)

Glendale charter provision, authorizing city council to submit to voters proposition providing for a "special tax", has reference only to property tax, and an excise tax may be imposed without vote.

3. Municipal Corporations ⇐607

Glendale charter provision for financing rubbish removal by assessment is permissive only and not a limitation on other methods.

4. Municipal Corporations ⇐607

Municipality has power to pass police regulations on subject of rubbish.

5. Municipal Corporations ⇐607

Glendale ordinance, imposing service charge for rubbish collection upon building occupants could be upheld as police measure, even though occupants were required to pay charges without regard to whether they used collection service.

6. Municipal Corporations ⇐589, 956(1)

Ordinance may perform both function of taxing and function of regulating, and may be upheld as valid under either or both powers.

7. Municipal Corporations ⇐607

Glendale ordinance, imposing charge upon building occupants for rubbish collections service, without regard to whether service was used, could be upheld as ex-

cise tax on right of occupancy or upon privilege of accumulating rubbish and having collection service available.

Henry McClernan, City Atty., John H. Lauten, Asst. City Atty., and Joseph W. Rainville, Deputy City Atty., Glendale, for appellant.

Roger Arnebergh, City Atty., Bourke Jones and James A. Doherty, Asst. City Attys., and Moses A. Berman, Deputy City Atty., Los Angeles, as amici curiae on behalf of appellant.

Jack B. Tenney, and Cecil W. Collins, Los Angeles, for respondents.

CARTER, Justice.

Plaintiff, a chartered city, enacted an ordinance pertaining to rubbish. It provides that rubbish includes combustible and non-combustible material.[1] Every person having "charge or control" of any place where any rubbish accumulates shall cause it to be placed in specified receptacles and shall not permit it to accumulate for over certain periods of time (combustible—one week; non-combustible—one month). The city shall provide for its collection at certain intervals. No person who pays the "minimum charge for collection" shall set out for collection more than a specified quantity; if additional quantities are to be collected extra charge shall be made. By section 8 the city council "* * * finds that the periodic collection of rubbish from all places in the City benefits all occupants of places and premises in the City * * * and therefore all such occupants are made liable for the rubbish collection fees prescribed by this ordinance." (Ordinance 1764, § 8.) There are then set forth a schedule of "fees" varying according to the nature of the use of the premises occupied, such as 75¢ per month for "single family dwellings," and a different amount for apartments or places of business. The fees are added to the electric light bills of the occupant. Extra charges are made for rubbish in excess of the amounts specified. "A fee imposed by * * * [the] ordinance shall be a civil debt owing to the City * * * from the occupant of the property receiving the service." (§ 9(e).) Compliance with the ordinance necessary to procure the collection and removal thereof shall be a defense to any prosecution for failure to remove or dispose of rubbish. A violation of the ordinance shall be a misdemeanor punishable as specified.

The plaintiff City commenced three actions which were considered together on demurrer against each of three persons for the several months that they had not paid the charge levied by the ordinance. It is alleged that the person named as defendant occupied a single-family residence in the city; during his term of occupancy defendant "enjoyed the use and occupancy of the said premises and the privilege of the use, accumulation, and storage of combustible and non-combustible rubbish and refuse thereon"; that plaintiff's agents have called regularly at the homes of defendant to collect rubbish "to the general

1. Rubbish includes "* * * paper, leaves, Christmas trees, chips, grass, pasteboard, carpets, clothing, magazines, books, straw, packing material, barrels, boxes, crates, cartons, rags, furniture and all other similar articles or materials which will burn by contact with flames of ordinary temperature, which are rejected by the owner or producer thereof as worthless, or useless, but shall not include 'garbage' as that term is defined in the ordinance of the City providing for collection thereof, or materials or quantities thereof determined by the City Manager to be too large or too hazardous to burn in the City's incinerator. * * * 'Non-combustible Rubbish' shall include ashes, broken glass and crockery bottles, tin cans and containers, metals, all other similar articles or materials and not to exceed three (3) cubic feet of non-combustible building materials which are rejected by the owner or producer thereof as worthless or useless, and for the purposes of this ordinance shall include those materials or quantities thereof determined by the City Manager to be too large or too hazardous to burn in the City's incinerator." (Ordinance 1764, § 1).

benefit of the community at large in the prevention of unhealthful conditions, the lessening of fire hazard and the diminution of the presence of air pollutants (smog) in said City." The charges made under the ordinance have not been paid. There is no allegation that defendants had any rubbish to be collected or that any was collected from them. Defendants' general demurrers for failure to make such allegations were sustained with leave to amend but plaintiff failed to amend and judgments of dismissal of the actions were entered. Plaintiff appeals.

Plaintiff contends that the rubbish ordinance is both a police and taxing measure and valid in both respects; that the tax portion does not violate the city charter. Defendants assert that the charge made against occupants is not a valid tax nor special assessment, property, excise or license tax, nor is it a proper charge for police regulation; that it is for the service of having rubbish removed and there is no allegation here that any rubbish was removed from their property by plaintiff. If it is a tax of any kind it is on the occupancy of property and beyond the power of the city to levy under its charter.

No contention is made by plaintiff that it is a property tax and hence possibly subject to the provisions of the Constitution on property taxation.[2] Nor is there any contention that it is a special assessment levied on property according to the benefits received from the use of the money thereby raised, or license tax for revenue or regulation. It is not claimed that the charge is for services performed, that is, the collection of rubbish, inasmuch as there is no allegation in the complaint that any rubbish was collected from defendants and the charge fixed by section 8 of the ordinance, supra, applies generally to all occupants whether or not rubbish is collected, although it is alleged that the service was available to defendants who enjoyed the privilege of using the premises for the accumulation of rubbish and plaintiff's agent has regularly called for rubbish at the premises occupied by defendants.

[1] The levy and collection of taxes by a city having a charter under our Constitution is a municipal affair. The power is broad, being limited only by the charter and the Constitution. Fox Bakersfield Theatre Corp. v. City of Bakersfield, 36 Cal.2d 136, 222 P. 2d 879. It is said in Ainsworth v. Bryant, 34 Cal.2d 465, 469, 211 P.2d 564, 566: "It is well settled that the power of a municipal corporation operating under a freeholders' charter * * * to impose taxes 'for revenue purposes, including license taxes, is strictly a municipal affair' pursuant to the direct constitutional grant of the people of the state, Const., art. XI, sec. 6; West Coast Advertising Co. v. City and County of San Francisco, 14 Cal.2d 516, 524, 95 P. 2d 138, 143, and that *'the restrictions* on the exercise of that power *are only the limitations and restrictions appearing in the Constitution and in the charter itself'*. Ibid., 14 Cal.2d at page 526, 95 P.2d at page 144. So it was said in the earlier case of Ex parte Braun, 141 Cal. 204, at pages 209–210, 74 P. 780, at page 782, quoting from Mr. Justice Field in United States v. New Orleans, 98 U.S. 381, 25 L.Ed. 225: 'A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose. When such a corporation is created, the power of taxation is vested in it, as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of these purposes, its authorities, however limited the corporation, must have power to raise money and control its expenditure.'" (Emphasis added.) And further: "* * * that by accepting the privilege of autonomous rule the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the *clear and explicit* limitations and restrictions contained in the charter. *The charter*

2. All property in the state shall be taxed in proportion to its value. Cal.Const. art. XIII, § 1.

operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and *the enumeration of powers does not constitute an exclusion or limitation.* West Coast Advertising Co. v. [City and County of] San Francisco, 14 Cal.2d 516, 521–522, 525, 95 P.2d 138, and cases cited; City of Oakland v. Williams, 15 Cal.2d 542, 550, 103 P.2d 168; City and County of San Francisco v. Boyd, 17 Cal.2d 606, 617–618, 110 P.2d 1036; Kennedy v. Ross, 28 Cal.2d 569, 575, 170 P.2d 904; Ayres v. City Council of City of Los Angeles, 34 Cal.2d 31, 37, 207 P.2d 1 [11 A.L.R.2d 503]. Thus in respect to municipal affairs the city is not subject to general law except as the charter may provide. Heilbron v. Sumner, 186 Cal. 648, 650, 200 P. 409; Muehleisen v. Forward, 4 Cal.2d 17, 19, 46 P.2d 969. As recognized in the West Coast Advertising case, the levy of taxes for city purposes is a municipal affair; the collection, treatment and disposal of city sewage and the making of contracts therefor are likewise municipal affairs, Loop Lumber Co. v. Van Loben Sels, 173 Cal. 228, 232, 159 P. 600, and *neither may be held to be circumscribed except as expressly limited* by the charter provisions. *All rules of statutory construction as applied to charter provisions* * * * are subordinate to this controlling principle. The former guide that municipalities have only the powers conferred and those necessarily incident thereto * * *. A construction in favor of the exercise of the power and against the existence of any limitation or restriction thereon which is not *expressly* stated in the charter is clearly indicated. So guided, reason dictates that the full exercise of the power is permitted except as *clearly and explicitly* curtailed. Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied." Emphasis added; City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 598–599, 212 P.2d 894, 896.

[2] It is not necessary, therefore, that there be specific authority for the charge (the nature of the charge is discussed later) here levied. By virtue of its power as a chartered city plaintiff has power to make it unless it is expressly denied such power by the charter or Constitution. Defendants assert that there are such limitations in the charter. Section 12 of article XI thereof provides that whenever the city council determines that public interest requires an expenditure for a municipal purpose which cannot be provided out of the ordinary city revenue, it "may" submit to the voters a proposition providing for a "special tax" or the issuing of bonds. No election was held for the adoption of the ordinance in question. This contention is correctly met by City of Glendale v. Crescenta Mutual Water Co., 135 Cal.App.2d 784, 798, 288 P.2d 105, where it is pointed out that an excise tax may be imposed without a vote as section 12 of article XI referred only to property taxes, the court stating: "Respondent asserts a violation of section 12, article XI of the charter, claiming this is a special tax which is invalid for failure to submit to the electors. That section must be construed in the light of related provisions. Section 11 says: 'The total tax rate for any one year shall not exceed one per cent of the assessed valuation, unless a special tax be authorized, as provided in this chapter; * * *' And section 12: 'Whenever the Council shall determine that the public interest demands an expenditure for municipal purposes, which cannot be provided for out of the ordinary revenue of the City, it may submit to the qualified voters at a regular or special election, a proposition to provide for such expenditure, either by levying a special tax, or by issuing bonds, but no such special tax shall be levied nor any such bonds issued, unless authorized by the affirmative votes of two-thirds of the electors voting at such election.' * * * Sections 9, 10 and 11 are so worded as to refer exclusively to ad valorem property taxes. Section 11 says in effect that the basic rate of one per cent of assessed valuation may be increased to the extent of a special tax voted by the people. This could mean only a property

tax. Section 12 implements the phrase of 11, 'unless a special tax be authorized, as provided in this charter; * * *' It does so by submitting to the voters at a general or special election a proposal to provide for an expenditure which ordinary revenues cannot meet—to provide for same 'either by levying a special tax, or by issuing bonds'; same must be approved by two-thirds vote. Section 22 of the same article authorizes payment, at the election of the council, of all or any part of the Metropolitan tax out of the public service surplus fund. This was done by amendment in 1941, later than the passage or amendment of section 11 or section 12. It would be unduly straining the meaning of section 12 to hold that it requires a special election to raise funds for any part of the Metropolitan tax which is not to be paid out of the surplus fund. Section 12 relates only to property taxes."

[3] Defendants also point to section 6 of article XXIII of the charter.[3] Obviously this is nothing more than a permissive method by which rubbish may be required to be removed and not a limitation on other methods when we consider the nature of the power of chartered cities as shown by the Ainsworth and Walkinshaw cases and other cases and authorities cited therein.

[4, 5] Defendants' chief contention is that the charge made by the ordinance is not a tax but merely a fee for services rendered and that since it is not alleged that they received the services, the complaint fails to state a cause of action; that a charge for services not rendered is invalid presumably as a taking of property without due process of law.

It is not questioned that provisions with respect to rubbish are a proper exercise of the police power. See, In re Zhizhuzza, 147 Cal. 328, 81 P. 955; California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 26 S.Ct. 100, 50 L.Ed. 204; In re Pedrosian, 124 Cal.App. 692, 13 P.2d 389; Glass v. City of Fresno, 17 Cal.App.2d 555, 62 P.2d 765; Ponti v. Burastero, 112 Cal. App.2d 846, 247 P.2d 597; Davis v. City of Santa Ana, 108 Cal.App.2d 669, 239 P.2d 656. The power of the city to pass police regulations on the subject of rubbish being clear, we must look to see if there is any constitutional objection to the charge here imposed. The case is analogous to the requirement by a city that all premises connect with the city sewer system at the expense of the property owners or making a charge therefor even though the premises have other adequate sewer facilities. There is no constitutional objection to such a requirement. See, Sanitation Dist. No. 1 of Jefferson County v. Campbell, Ky., 249 S.W.2d 767; District of Columbia v. Brooke, 214 U.S. 138, 29 S.Ct. 560, 53 L.Ed. 941; Hutchinson v. City of Valdosta, 227 U.S. 303, 33 S.Ct. 290, 57 L.Ed. 520; Farquhar v. Board of Sup'rs, 196 Va. 54, 82 S.E.2d 577; Fenton v. Atlantic City, 90 N.J.L. 403, 103 A. 695. And the same is true of a city water system to which premises must connect and pay the rates although they have other water supplies. Weber City Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E.2d 153. It is said in Farquhar v. Board of Sup'rs, 196 Va. 54, 82 S.E.2d 577, 587: "Lastly it is contended that the enforcement of sewerage connections, the collection of charges and the creation of a lien therefor * * * may deprive land-

3. It provides the council may adopt a procedure "* * * for the improvement of streets, alleys or other public places, or for the removal of dirt, rubbish, weeds and other rank growths and materials which may injure or endanger neighboring property or the health or the welfare of inhabitants of the vicinity, from buildings, lots and grounds and the sidewalks opposite thereto, and for making and enforcing assessments against property benefited or affected thereby or from which such removal is made, for the cost of such improvements or removal, and may make such assessments a lien on such property superior to all other claims on liens thereon, except State, County and Municipal taxes, but no such ordinance shall prevent the Council from proceeding under general laws for said purposes." (Glendale Charter, Stats. 1921, p. 2204 as amended.)

owners of their property without due process of law. These sections provide that the owner, tenant or occupant of a parcel of land upon which is a building for residential, commercial or industrial use, which parcel abuts upon a street containing a sanitary sewer which is part of or served by the sewer system, may be required, with the consent of the local government, to connect his building with the sewer and cease to use any other method of sewage disposal. If the charges for the use of the system are not paid within 30 days after becoming due, the Authority may disconnect the premises from the water and/or sewer system, or otherwise suspend services and recover the amount due in a civil action. * * *

"Such provisions are necessary implements of a sanitary system constructed and operated by an agency of the State which was created and organized for the public good. * * * We hold the provisions in question to be constitutional as being a reasonable exercise of the police power of the State and bearing a substantial relation to the protection and preservation of the public health. 39 C.J.S., Health, §§ 2, 21, pp. 811, 835; 25 Am.Jur., Health, § 3, p. 287. Like provisions have been frequently upheld against the charge of being an invasion of constitutional rights." In the instant case the ordinance is in many respects a police measure. Section 8, supra, in effect provides that every occupant of buildings must pay the charges for rubbish collection which means that they must pay whether or not they use the collection service. This is, so far as the constitutional question is concerned, if anything, less stringent than the requirement that they use the service as held in the authorities, *supra*, dealing with sewer and water. In those cases it was held that a charge could be made for the service even though the occupants did not want it. In most of those cases the charge was said not to be a tax but rather a service charge but it is not important whether, on this phase of the case, it be called a tax or a service charge; it is justified under the police power. As long as there is no restriction in the Constitution or charter the ordinance must be held valid. It is not claimed that the charge is excessive or discriminatory (a denial of equal protection), and it appears that a benefit is received by the occupants of all property as all the probabilities point to the existence of the accumulation of rubbish described in the ordinance on all occupied property. The benefit is the availability of the collection service to all occupants—the regular service of collection and the right to accumulate rubbish, like the benefit of sewage facilities although the occupant does not choose to use them. As said in Carson v. Brockton Sewerage Commission, 182 U.S. 398, 405, 21 S.Ct. 860, 862, 45 L.Ed. 1151; "Notwithstanding the former case we think the court was correct in holding in this case that the petitioner and other property owners whose lots abutted on this public sewer did receive a benefit not common to the inhabitants of the city generally, in being permitted to discharge into it the contents of their private sewers, that the amount of such benefit was determinable by the city council, and that in its action there was nothing violative of the Federal Constitution." See, Patterson v. City of Chattanooga, 192 Tenn. 267, 241 S.W.2d 291; Sharp v. Hall, 198 Okl. 678, 181 P.2d 972.

County Com'rs of Anne Arundel County v. English, 182 Md. 514, 35 A.2d 135, and Rapa v. Haines, Ohio Com.Pl., 101 N.E.2d 733, are not in point as they involved a tax for revenue purposes.

[6, 7] In the foregoing discussion we have assumed that the charge for the rubbish collection system is a charge for a service under the police power and valid as such but it is also valid if designated as a tax. As seen, the city has powers of taxation except as limited by its charter and the Constitutions, state and federal. While the ordinance has many police regulations as above shown, there is no obstacle to it performing both functions, taxation and regulation, and it may be upheld as valid under either or both powers.

See, Redwood Theatres v. City of Modesto, 86 Cal.App.2d 907, 196 P.2d 119; Gundling v. City of Chicago, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725; Bradley v. City of Richmond, 227 U.S. 477, 33 S.Ct. 318, 57 L.Ed. 603. Considering the charge as a tax, it is more like an excise tax than any other kind. It is not a property tax because it is not on an ad valorem basis. It does not purport to tax property or any interest therein, possessory or otherwise. The charge is made against "occupants" of property graduated according to the nature of the buildings occupied. The charge is not against the property. We do not have, therefore, any question of double taxation or possible invalidity for a failure to assess it according to value. See, Fox Bakersfield Theatre Corp. v. City of Bakersfield, supra, 36 Cal.2d 136, 222 P.2d 879. It is similar to an excise tax as it is laid on the occupant for the accumulation and having available to him the regular collection of rubbish which may be referred to as a privilege. It is said: "It is, however, difficult to arrive at any all-inclusive definition of the term 'excise tax,' since it has long since been changed from its original connotation of an impost upon a privilege. In its modern sense an excise tax is any tax which does not fall within the classification of a poll tax or a property tax, and embraces every form of burden not laid directly upon persons or property." (51 Am.Jur., Taxation, § 33.) And: "Taxes fall naturally into three classes, namely, capitation or poll taxes, taxes on property, and excises. In general, it may be said that all taxes fall into one or the other of the foregoing classes, any exaction which is clearly not a poll tax or a property tax being an excise." (Id., § 24.) It should be observed that a right may be subject to an excise tax even if the right of occupancy rather than of the accumulation and use of a collection service is involved, although it is a right which cannot be prohibited under the Constitution. It is said in Steward Machine Co. v. Davis, 301 U.S. 548, 578, 57 S.Ct. 883, 887, 81 L.Ed. 1279, involving the social security tax on employers: "We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. Appeal is made to history. From the precedents of colonial days, we are supplied with illustrations of excises common in the colonies. They are said to have been bound up with the enjoyment of particular commodities. Appeal is also made to principle or the analysis of concepts. An excise, we are told, imports a tax upon a privilege; employment, it is said, is a right, not a privilege, from which it follows that employment is not subject to an excise. Neither the one appeal nor the other leads to the desired goal.

"As to the argument from history: Doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. [Citations.] But in truth other excises *were* known, and known since early times. Thus in 1695 (6 & 7 Wm. III, c. 6), Parliament passed an act which granted 'to His Majesty certain Rates and Duties upon Marriages, Births and Burials,' all for the purpose of 'carrying on the War against France with Vigour.' See Opinion of the Justices, 196 Mass. 603, 609, 85 N.E. 545, 547. No commodity was affected there. The industry of counsel has supplied us with an apter illustration where the tax was not different in substance from the one now challenged as invalid. In 1777, before our Constitutional Convention, Parliament laid upon employers an annual 'duty' of 21 shillings for 'every male Servant' employed in stated forms of work. [Citation.] The point is made as a distinction that a tax upon the use of male servants was thought of as a tax upon a luxury. [Citation.] It did not touch employments in husbandry or business. This is to throw over the argument that historically an excise is a tax upon the enjoyment of commodities. But the attempted distinction, whatever

may be thought of its validity, is inapplicable to a statute of Virginia passed in 1780. There a tax of three pounds, six shillings, and eight pence was to be paid for every male tithable above the age of twenty-one years (with stated exceptions), and a like tax for 'every white servant whatsoever, except apprentices under the age of twenty one years.' [Citation.] Our colonial forbears knew more about ways of taxing than some of their descendants seem to be willing to concede.

"The historical prop failing, the prop or fancied prop of principle remains. We learn that employment for lawful gain is a 'natural' or 'inherent' or 'inalienable' right, and not a 'privilege' at all. *But natural rights, so called, are as much subject to taxation as rights of less importance. An excise is not limited to vocations or activities that may be prohibited altogether.* It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. * * * Whether the tax is to be classified as an 'excise' is in truth not of critical importance. If not that it is an 'impost'. * * * A capitation or other 'direct' tax it certainly is not. 'Although there have been, from time to time, intimations that there might be some tax which was not a direct tax, nor included under the words "duties, imposts, and excises," such a tax, for more than 100 years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.' Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 557, 15 S.Ct. 673, 680, 39 L.Ed. 759. There is no departure from that thought in later cases, but rather a new emphasis of it. Thus, in Thomas v. United States, 192 U.S. 363, 370, 24 S.Ct. 305, 306, 48 L.Ed. 481, it was said of the words 'duties, impost and excises' that 'they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like.'" (Emphasis added.) Such charges as here involved have been called taxes: "* * * a large part of the cost of the sewer system of the City of Philadelphia was raised by assessments against abutting property owners. Being imposed without any regard whatever to the extent or value of the use made of the sewer facilities, or whether any use is made, the charge provided for by the ordinance is, in legal effect, undoubtedly a tax, and the obligation to pay it could be created only by the City's exercise of its general taxing power." In re Petition of City of Philadelphia, 340 Pa. 17, 16 A.2d 32, 35. And a charge somewhat analogous to that here involved has been upheld as a valid excise tax, Rapa v. Haines, Ohio Com.Pl., 101 N.E.2d 733, affirmed Ohio App., 113 N.E.2d 121, involving a fixed tax on auto trailers used for human habitation. A contrary result was reached in County Com'rs of Anne Arundel County v. English, Md., supra, 35 A.2d 135, but it was based on a denial of equal protection of the law where a flat tax was placed on auto trailers with the wheels off but none on other habitations and that it was a property tax not based on value. Those things are not present here. The tax is on the factors mentioned and is not discriminatory. On the contrary, reasonable classifications are made.

Since the charge may be called an excise tax on the occupants of real property for the privilege of accumulating rubbish and having available collection service therefor and is thus not a tax on their interest in the property as an occupant or possessor thereof, and there is no unjust classification, we find no constitutional or charter provision which invalidates such a tax.

The judgments are reversed.

GIBSON, C. J., and TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

SHENK, Justice (concurring).

I concur in the opinion and the judgments of reversal. The opinion contains a well considered discussion of the subject of mu-

nicipal affairs as applied to a municipality operating under a freeholder's charter. If the same consideration had been given to that subject and been applied in the case of Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789, the judgment in that case would have been affirmed in its entirety.



48 Cal.2d 107

In the Matter of the Application of E. P. O'MALLEY, Secretary, Local 128, Oil Workers International Union, CIO, for an Order Confirming Arbitrator's Award.

E. P. O'MALLEY, Secretary, Local 128, Oil Workers International Union, CIO, Applicant and Respondent,

v.

PETROLEUM MAINTENANCE COMPANY, W. A. Thompson, Jr. and Louis B. Minter, Defendants and Appellants.

L. A. 24302.

Supreme Court of California,
In Bank.
March 12, 1957.

Rehearing Denied April 10, 1957.

Proceeding by union for either arbitration of grievance of discharged employee or arbitration of question whether the employee's discharge was subject to arbitration. The Superior Court ordered only arbitration of merits of the discharge but thereafter union and employer agreed to submit to arbitration question whether discharge was arbitrable and whether discharge was proper. From a judgment of the Superior Court, Los Angeles County, Beach Vasey, J., confirming the arbitration award the employer appealed. The Supreme Court, Carter, J., held that the arbitrators who determined that the employee's discharge was improper also determined that the controversy was arbitrable notwithstanding their statement that they would have declined jurisdiction had it not been for court's order requiring arbitration on merits and that the merits of the controversy were not subject to judicial review.

Affirmed.

Schauer, Spence, and McComb, JJ., dissented.

Opinion, 299 P.2d 1051, vacated.

1. Labor Relations ⇐454

Powers of arbitrator are limited and circumscribed by collective bargaining agreement or stipulation of submission.

2. Labor Relations ⇐465

Where court ordered only arbitration of merits of employee's discharge but union and employer thereafter agreed to submit to arbitration questions whether discharge was arbitrable and whether discharge was proper, employer was bound by terms of submission and could not, after adverse decision of arbitrators, relitigate question of arbitrability, notwithstanding submission agreement provided that neither party waived any rights given them by law. West's Ann.Code Civ.Proc., § 1293.

3. Arbitration and Award ⇐63

Arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision.

4. Labor Relations ⇐462

Where court ordered only arbitration of merits of employee's discharge but union and employer thereafter agreed to submit to arbitration questions whether discharge was arbitrable and whether discharge was proper, arbitrators who determined that employee had been improperly discharged also decided that the controversy was arbitrable even though they stated that they would have declined jurisdiction had it not been for court's order requiring arbitration on merits, and merits of controversy were not subject to judicial review. West's Ann.Code Civ.Proc., § 1293.

Madden & McCarry, Long Beach, for appellants.

Wirin, Rissman & Okrand, Fred Okrand, Los Angeles, for respondent.

CARTER, Justice.

This is an appeal by Petroleum Maintenance Company (hereinafter referred to as "Company") from a judgment of the superior court confirming an arbitration award in favor of Oil Workers International Union, CIO, Local 128 (hereinafter referred to as "Union").

On July 16, 1947, the Company entered into a collective bargaining agreement with the Union. On October 5, 1951, Company discharged one Frank J. Semmett, a member of Local 128. On April 10, 1952, the Union filed a petition for an order directing arbitration of Semmett's discharge. On June 20, 1952, the trial court granted the petition and ordered the matter arbitrated. Company appealed from the order, but the District Court of Appeal dismissed the appeal, Corbett v. Petroleum Maintenance Co., 119 Cal.App.2d 21, 258 P.2d 1077, on the ground that section 1293 of the Code of Civil Procedure was controlling and that section did not provide for an appeal from an order directing arbitration.

The Union's petition to the superior court was for either arbitration of the grievance of Semmett, or arbitration of the question whether the Semmett discharge was subject to arbitration. The superior court ordered only arbitration of the merits of the discharge.

Union and Company on January 22, 1954, entered into a submission agreement and pursuant thereto three arbitrators were selected. The submission agreement, signed by both Company and Union, provided that the parties agreed to submit to arbitration (1) whether the discharge of Semmett was arbitrable and (2) whether the discharge of Semmett was proper. Paragraph (4) of the submission agreement provides that "In submitting this matter to arbitration neither party shall be deemed to have waived any rights given them by law." Company at all times contended that the discharge of Semmett was not subject to arbitration.

The collective bargaining agreement does not specifically mention the discharge of any employee. The agreement provides for a union shop, deductions from wages for union dues, strikes and lockouts, hours of work, holidays, transportation, contract work as related to subcontracts let by Company, meals, safety, clothing allowance, classification of work, and grievance procedure.[1] It also provides under the article entitled "Seniority" for promotions, lay-offs, and re-hiring. Vacations, illness, accidents, insurance, overtime, and wages and leaves of absence, assignability of the agreement and notices under it are also provided for.

Article XI, entitled "Grievance Procedure" provides: "For the purpose of handling disputes arising over the performance of this Agreement, there will be committeemen elected by the Union members for the various departments or crafts. These committeemen will be recognized by the Company in the first step of adjusting such a complaint, which will be with the man involved, his foreman, and the committeemen for such group or any other committeemen.

"If they cannot settle the dispute, then it shall be reduced to writing and a committee of five (5) shall meet with a representative of the Company to try to settle the dispute. The committeemen shall have fifteen (15) days to investigate such complaint after they are aware of their occurrence. The Company shall have seven (7) days to reply to the Committee. If the reply does not meet with the committee's approval, they may ask the Union to discuss the dispute with a representative of the Company and try to reach settlement, if, in the opinion of Union officials, the dispute warrants such meeting. This meeting to be held within fifteen (15) days after Company's reply to committee. If an Agreement cannot be reached the Company and Union shall select a third party to sit with a Company official as a Board of Arbitration

1. This article will be set forth in full.

with a decision of any two to be binding on the Company and the Union. The expense of such a third party shall be borne equally by the company and the Union."

Union contends that the discharge of Semmett was arbitrable in that the collective bargaining agreement impliedly provides only for discharge upon a proper showing of cause for such discharge. Company, on the other hand, contends that nothing in the agreement relates to the discharge of any employee. Union also argues that Company by its conduct in taking the first two steps under the grievance procedure up until the point of arbitration recognized that discharge was a proper subject for arbitration under the collective bargaining agreement and is now estopped to claim that the arbitration procedure does not apply. It is also argued by Union that Company, having submitted the arbitrability of the discharge to the arbitration committee, when the court order did not require such arbitration, has waived its right to object to the arbitrability of the question.

The three arbitrators concurred in holding that the dispute was not arbitrable under the collective bargaining agreement and that they would have declined jurisdiction had it not been for the order of the court requiring arbitration on the merits. A majority of the arbitrators then concluded that Semmett had been improperly discharged and ordered his reinstatement with full seniority rights as of the date of his discharge and "made whole for all wages which he would have earned from July 8, 1952, less any wages received from any other source and any unemployment compensation."

[1, 2] We are of the opinion that Company is bound by the terms of the submission to arbitration agreement. It is the rule that "The powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission. Bierlein v. Johnson, 73 Cal.App.2d 728, 733, 166 P.2d 644." Pacific Fire Rating Bureau v. Bookbinders', etc., Union, 115 Cal.App.2d 111, 114, 251 P.2d 694, 696. See, also, Stenzor v. Leon, 130 Cal.App.2d 729, 732, 279 P.2d 802; Flores v. Barman, 130 Cal.App.2d 282, 286, 279 P.2d 81; Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 186, 187, 260 P.2d 156; 30 Cal.Jur.2d, § 133, p. 84. In the case at bar, although the trial court merely ordered arbitration of the merits of Semmett's discharge, Company agreed, in the submission agreement to the arbitration of the two questions: Whether Semmett's discharge was arbitrable and to the arbitration of the discharge of Semmett. This it was not bound to do since the arbitrability of the question could have been considered after the judgment confirming the arbitrator's award on the merits of the controversy. Sjoberg v. Hastorf, 33 Cal.2d 116, 118, 119, 199 P.2d 668. With respect to Company's argument that it had specifically provided that it was not to be deemed "to have waived any rights given them by law" it appears that Company may not agree to arbitrate a question and then, if the decision goes against it, litigate the question in another proceeding. In Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 186, 187, 260 P.2d 156, 172, the court had much the same problem under consideration. It was there held: "The whole spirit of the agreement is that these parties, when the agreement was executed, wanted to settle the many court actions then pending between them, carefully selected a competent and impartial arbitrator, and were then content, as long as the arbitrator acted within the limitations of the arbitration statute, to accept his determination as final, both as to law and facts. Now that such determinations have not turned out as this appellant hoped, he is attempting to secure a complete reconsideration of many legal (and some factual) determinations in this court. Under his agreement and the provisions of the law, except where permitted to do so by statute, this he cannot do." It was then said that "If the arbitrator in fact created causes of action not within the arbitration agreement, and then decided these unsubmitted issues, that would require a vacation of the award as being in excess of the arbitrator's powers within the meaning of

section 1288 of the Code of Civil Procedure." As we have heretofore pointed out the arbitrators in the case at bar decided the issues submitted to them by the parties.

[3] It is of course well settled that arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision. Southside Theatres v. Moving Picture Projectionists, Local, 131 Cal. App.2d 798, 803, 281 P.2d 31; McKay v. Coca Cola Bottling Co., 110 Cal.App.2d 672, 243 P.2d 35; Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 189, 260 P.2d 156. In Southside Theatres v. Moving Picture Projectionists, Local, supra, 131 Cal. App.2d at pages 802, 803, 281 P.2d at page 34 the court said: "Any controversy under a collective bargaining contract which requires first a determination that the contract does or does not define the rights or duties of the parties in an existing situation is subject to arbitration if the agreement provides for the arbitration of disputes that arise out of the contract.

[4] "The foundational questions are: What was submitted to the arbitrators and what did they decide?" The arbitrators here decided that the controversy was arbitrable and that Semmett's discharge was improper. The merits of the controversy between the parties are not subject to judicial review. Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 233, 174 P.2d 441; Sapp v. Barenfeld, 34 Cal.2d 515, 523, 212 P.2d 233; Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 185, 260 P.2d 156; Myers v. Richfield Oil Corp., 98 Cal.App.2d 667, 671, 220 P.2d 973; Riley v. Pig'n Whistle Candy Co., 109 Cal.App.2d 650, 651, 241 P.2d 294.

The trial court did not err in refusing to receive in evidence two exhibits offered by Company. These exhibits tended to show that despite the submission agreement, Company did not intend the arbitrability of the question to be decided by the arbitrators. We have heretofore discussed the effect of the submission agreement which defined the scope of the arbitrators' powers and that the award made by the arbitrators was clearly within the issues submitted to them.

The judgment confirming the award is affirmed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

SCHAUER, Justice (dissenting).

In my opinion, on any fair view of the record before us, the arbitrators did not decide against the company, but rather refused to decide at all, the question whether the discharge of an employe was an arbitrable matter. As stated in the majority opinion (48 Cal.2d 107, 308 P.2d 10), the original petition of the union to the superior court "was for either arbitration of the grievance of Semmett, or arbitration of the question whether the Semmett discharge was subject to arbitration. The superior court [on July 8, 1952] ordered only arbitration of the merits of the discharge."

The company throughout these proceedings has consistently taken the position that the question of discharge was not an arbitrable matter under the collective bargaining agreement between the company and the union. The original appeal of the company from the order directing arbitration was dismissed by the District Court of Appeal of its own motion, in Corbett v. Petroleum Maintenance Co. (1953), 119 Cal.App.2d 21, 22, 258 P.2d 1077, on the ground that the order directing arbitration was not appealable. But as the District Court of Appeal points out, the company's ground of appeal was that "the [collective bargaining] agreement is silent as to any restriction upon the employer's right to discharge and, therefore, the matter of the discharge of the employee is not within the scope of the agreed arbitration procedure."

After dismissal of this former appeal, the company and the union in writing "submit-[ted] to arbitration * * * the following dispute:

"(1) * * * Company, the Employer, asserts that the matter of the discharge of

an employee is not subject to arbitration. * * * Union, * * * representing the Employee, Frank Semmett, asserts that the matter of the discharge of an employee is subject to arbitration. The Union asserts that its position has been upheld by the Superior Court [by the above mentioned order of July 8, 1952] * * *

"(2) The Company asserts that if the matter of discharge is subject to arbitration, the discharge of Frank Semmett, the employee, was proper. The Union asserts that the discharge was improper * * *

"(4) In submitting this matter to arbitration neither party shall be deemed to have waived any rights given them by law."[1]

The majority of the arbitrators, in their opinion filed after the arbitration hearing, announced that they believed that they were bound by the superior court order of July 8, 1952, based on the "conclusion of law that a question of discharge is arbitrable and is within the grievance procedure of the [collective bargaining] agreement between the parties"; the majority opinion of the arbitrators further set out in detail the reasons why the majority would have determined that the question was not arbitrable had they believed that such question was open.

The opinion of the dissenting arbitrator states, "It is axiomatic that arbitration can be compelled only where parties have agreed to this method of settling disputes, and then only to the extent provided. The discharge in question was therefore not subject to arbitration and, in my view, the decision of the Superior Court to the contrary is erroneous.

"The majority concurs in this conclusion. It, however, holds that the Superior Court judgment is nevertheless binding upon this Board. The majority states that absent such judgment, it would hold the dispute not to be arbitrable. The anomalous position in which this places the majority is well shown by the result in this case. The very factors which go into the question of arbitrability are the ones upon which the decision upon the merits must be based. Thus, it is conceded that the collective bargaining agreement only provides for the arbitration of disputes concerning the performance of the agreement and that therefore disputes concerning discharges are not arbitrable. Yet, assuming arbitrability, the Company's action can only be upset if it is in violation of the agreement. But it cannot be in violation of the agreement since there is no limitation upon the right to discharge; if there were the matter would be arbitrable. But the majority says it is not arbitrable, and to be consistent it would have to hold that for the same reasons the Company's action was not in violation of the agreement. However, it has not done so."

The award of the arbitrators decides that the superior court order of July 8, 1952, "renders this dispute arbitrable" and that "Semmett shall be reinstated."

When the union moved the superior court to confirm the arbitrators' award, the company, although it did not move to vacate the award, took the position by its answer to the union's application for confirmation that "the arbitrators were without jurisdiction and had no authority to make the award herein sought to be enforced for the reasons that [the collective bargaining agreement] * * * contains no restrictions or limitations on the defendants'

1. A transcript of the proceedings before the arbitrators, lodged with this court, shows that, at the beginning of the hearing before the arbitrators, counsel for the company and also counsel for the union made clear their position that they were submitting to the arbitrators the question whether the right to discharge was arbitrable. Counsel for the company took the position that under the collective bargaining agreement there was no provision for arbitration concerning discharges, and on this ground claimed that the arbitrators had no "jurisdiction." Counsel for the company appears mistaken in his claim that the arbitrators were without "jurisdiction" to determine arbitrability, for that question had been expressly submitted to the arbitrators, but he was correct in his position that the question whether discharge was an arbitrable issue was open.

[company's] right to discharge an employee. That the Arbitrators exceeded their powers in making the award * * *"

In my opinion there was presented to the superior court by the foregoing allegations of the company's answer (perhaps ineptly but with sufficient certainty to make necessary a ruling thereon) the following question of law: Have the arbitrators "exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made"? (Code Civ.Proc., § 1288, par. (d), which requires vacation of an award in the quoted situation.) In my further opinion, the arbitrators did imperfectly execute their powers because they made it clear (by their majority opinion and award) that they thought that because of the superior court order of July 8, 1952, the question of the arbitrability of discharges, although it had been submitted to them, was not properly before them and that they were bound to rule that such question was arbitrable. In fact the question of arbitrability was before the arbitrators and their refusal to decide it was an imperfect exercise of their powers and duties.

Here the arbitrators did not, as the majority opinion of this court states, decide the question of arbitrability against the company; rather, upon a reasonable interpretation of the record, they refused to decide that question in the erroneous belief that it was not open. I recognize and accept the rule, quoted in the majority opinion from Pacific Fire Rating Bureau v. Bookbinders', etc., Union (1952), 115 Cal.App. 2d 111, 114, 251 P.2d 694, that "The powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission." But when the arbitrators refuse to decide a question submitted to them, it seems to me that they are improperly and insufficiently exercising their powers and duties.

The end result of affirmance of the present superior court judgment which confirms the arbitrators' award is that the company, despite all its attempts to keep the matter open, has never had an opportunity either to litigate on appeal or to arbitrate the question determined against it by the original superior court conclusion of law that "a question of discharge is arbitrable."

For the reasons above stated, I would reverse the order confirming the award.

SPENCE and McCOMB, JJ., concur.

Rehearing denied; SCHAUER, SPENCE and McCOMB, JJ., dissenting.



48 Cal.2d 116

ESTATE of Jack R. RADOVICH, etc., Deceased.

Robert C. KIRKWOOD, as State Controller, Appellant,

v.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, and George Radovich, Respondents.

L. A. 24034.

Supreme Court of California,
In Bank.
March 15, 1957.

Rehearing Denied April 10, 1957.

Estate proceeding. From a judgment of the Superior Court, Los Angeles County, Victor R. Hansen, J., sustaining objections to an inheritance tax appraiser's report fixing the inheritance tax on the estate, the state controller appealed. The Supreme Court, Carter, J., held that a final decree in heirship proceeding by one of objectors that he had equitable status of adopted son of decedent and was entitled to entire estate except sum which he agreed to transfer to decedent's relatives in foreign country was a conclusive adjudication in rem binding on whole world including estate, though it was not proper party to heirship proceeding, so that trial court properly determined that such objector was Class A transferee, not a Class B transferee subject to inherit-

ance tax at rate of stranger in blood to decedent.

Judgment affirmed.

Schauer and McComb, JJ., dissented.

Opinion, 301 P.2d 73, vacated.

1. Descent and Distribution ⇐71(7)

An heirship proceeding is not an ordinary civil action but a specialized proceeding in rem wherein the res is right of heirship and distribution; as to that issue the court's decree is binding on whole world.

2. Descent and Distribution ⇐71(7)

A decree in heirship proceeding is conclusive against all persons as basis for distribution decree to follow and settles rights of all persons claiming as decedent's heirs, whether or not they are named in complaint or personally served with summons.

3. Descent and Distribution ⇐71(7)

A decree in heirship proceeding is not one in personam in favor of one of the parties against another; rather, as founded in a specialized proceeding in rem, it is against or upon the thing or subject matter itself; the decree, when rendered, is a solemn declaration of the status of the thing, and ipso facto renders it what the decree declares it to be.

4. Descent and Distribution ⇐71(7)

While justice and sound policy require distribution of decedents' estates to persons rightfully entitled thereto and probate court's every concern and endeavor should be to accomplish such purpose, a valid final decree determining rights of distribution cannot be disturbed at behest of any rightful claimant, known or unknown, when decree was rendered, as policy of law is to preserve inviolability of final judgments and decrees of courts of law and equity, and valid decree of probate court partakes of the nature of such a judgment.

5. Courts ⇐198
Descent and Distribution ⇐71(1)
Executors and Administrators ⇐224

The probate court's jurisdiction is in rem, the res being decedent's estate, which must be administered and distributed with regard to rights of creditors, devisees, legatees and entire world, which is called before court by giving statutory notice, and court acquires jurisdiction over all persons for purpose of determining their rights to any portion of estate, so that every person asserting any right or interest therein must present his claim to court for determination.

6. Executors and Administrators ⇐315(6)

The probate court's decree in proceeding for administration and distribution of decedent's estate is conclusive on every person asserting any right or interest therein, whether or not he appears and presents claim, subject only to being reversed, set aside or modified on appeal.

7. Taxation ⇐856

The inheritance tax is on right to succeed to property of decedent's estate rather than on property itself.

8. Taxation ⇐886½

As one adjudged by final decree in heirship proceeding to be in equity the decedent's adopted son and hence entitled to succeed to his property as heir of decedent though not formally adopted by him, took decedent's estate only by reason of such adjudication, state controller could not claim that such heir inherited as stranger in blood to decedent for inheritance tax rate purposes. West's Ann.Rev. & Tax.Code, §§ 13307(b), 13310, 13407, 14510.

9. Descent and Distribution ⇐71(7)

The final decree of Superior Court sitting in probate, that person filing petition to determine his heirship in decedent's estate had right to inherit entire estate as decedent's adopted son though not formally adopted by him, was conclusive adjudication in rem binding on whole world, even if erroneous.

10. Descent and Distribution ⇐71(7)
Taxation ⇐886½

A superior court's probate decree adjudging in heirship proceeding that petitioner had right to inherit decedent's entire

estate as decedent's adopted son though not formally adopted was binding on state as well as all others, though state was not proper party to such proceeding, so that he was not subject to inheritance tax at rate of stranger in blood to decedent but was Class A transferee within inheritance tax law. West's Ann.Prob.Code, § 1080 et seq.; West's Ann.Rev. & Tax.Code, §§ 13306, 13307, and subd.(b), 13308, 13310.

11. Taxation ⇐856, 887

Death is generating source of operation of inheritance tax which is imposed on right to receive a decedent's property. West's Ann.Rev. & Tax.Code, § 13301 et seq.

12. Taxation ⇐875(1), 886½

On inheritance taxes assessed on value of decedent's property transmitted to heir, rates and exemptions are based on recipient's relationship to decedent. West's Ann. Rev. & Tax.Code, §§ 13301 et seq., 13307, 13308, 13310.

13. Taxation ⇐856

A cardinal purpose of inheritance tax law is to coordinate assessment of tax as closely as possible with substantive probate law regulating distribution of decedent's estate. West's Ann.Rev. & Tax. Code, § 13301 et seq.

James W. Hickey, Chief Inheritance Tax Atty., Sacramento, Walter H. Miller, Chief Asst. Inheritance Tax Atty., Los Angeles, William R. Elam, Los Angeles, and Milton A. Huot, Asst. Inheritance Tax Attys., Sacramento, for appellant.

Louis Thomas Hiller, Nat Wilk, Los Angeles, Scudder & Forde and George A. Forde, Pacific Palisades, for respondents.

CARTER, Justice.

This is an appeal by the Controller of the State of California from a judgment of the superior court, sitting in probate, which sustained respondent George Radovich's objections to the report of the inheritance tax appraiser and which fixed the inheritance tax on the estate of Jack R. Radovich, deceased.

The facts are not in dispute.

In 1934, when George Vukoye (now legally known as George Radovich) was 17 years of age, his natural parents entered into an oral agreement with the decedent, Jack R. Radovich, whereby George was to live with Jack who promised that he would consider George his son and would adopt him. George lived with Jack until Jack's death in October, 1953, changed his name to George Radovich and was publicly acknowledged by Jack as his son and the heir to his estate. During the time George lived with Jack, he worked in Jack's liquor store, conducted himself as a natural child and considered himself the son of Jack. Jack died intestate without having married or leaving issue of his body. He left no father or mother surviving him but did leave some blood relatives in Yugoslavia.[1] Jack had not, during his lifetime, instituted formal proceedings for the adoption of George.

On the death of Jack, the Citizens National Trust and Savings Bank of Los Angeles and Novak D. Novcic, a nephew of the decedent, were appointed as co-administrators of Jack's estate. On June 14, 1954, George filed a petition in the probate proceeding to determine his heirship in the estate of Jack. After a hearing, Judge John Gee Clark made findings (which included the facts heretofore set forth) and concluded that "George Radovich occupies in equity the equitable status of an adopted son and by reason thereof is entitled to distribution of all of the Estate of the decedent." A decree was then entered on the findings of fact to the effect that George had the equitable status of an adopted son of the decedent and was entitled to all of the estate (with the exception of the sum transferred to the relatives in Yugoslavia). Although the heir-

1. George agreed in writing to transfer and assign $55,000 of the estate to the blood relatives in Yugoslavia.

ship proceeding was contested no appeal was taken and that decree is now final.

Subsequent to the decree of the probate court, an inheritance tax appraiser was appointed who filed his report claiming that George Radovich was a stranger in blood to the decedent and that he should be allowed a specific exemption of $50 as a Class D transferee and computing the inheritance tax due at the rate of a stranger under sections 13310 and 13407 of the Revenue and Taxation Code. The bank, Novak Novcic, and George filed objections to the report of the inheritance tax appraiser under section 14510 of the Revenue and Taxation Code. A hearing was had before Judge Hansen who filed findings of fact, conclusions of law and a memorandum opinion and signed a judgment determining that George was a Class A transferee (adopted child). This appeal followed that judgment.

The only question involved here and one which is of first impression in this state is whether under the facts presented George is a Class A transferee. Section 13307 of the Revenue and Taxation Code provides that a Class A transferee is "(b) A transferee whose relationship to the decedent is that of a child adopted by the decedent in conformity with the laws of this State, provided such child was under the age of 21 years at the time of such adoption."

It is contended by appellant that since George was not adopted in conformity with the statutory requirements of this state that he takes as a stranger and only because of the contract made by his natural parents with the decedent. Respondents contend that the heirship proceeding in which it was declared that George was, in equity, the adopted son of the decedent is a final judgment *in rem* which is binding on the appellant and all others. It is also argued by respondents that the words of the statute "adopted by the decedent *in conformity with the laws of this state*" (emphasis added) should be construed to mean not only in conformity with the *statutory* law of this state but the law as set forth by a decision of a court of competent jurisdiction. Respondents also argue that George took the money by *inheritance;* that a stranger may not *inherit;* that it was only by reason of his inheritance that George is subject to an *inheritance tax.*

[1–4] This court has held In re Estate of Wise, 34 Cal.2d 376, 210 P.2d 497, 502, that the jurisdiction of the probate court is a jurisdiction *in rem;* that an heirship proceeding is not an ordinary civil action, but a specialized proceeding *in rem.* The *res* is the right of heirship and distribution and as to that issue the decree is binding on the whole world. We said there that "So it has been said that such heirship 'decree (is) conclusive against all persons' as the 'basis for the decree of distribution which (is) to follow', In re Estate of Blythe, 110 Cal. 231, 234, 42 P. 643, 644; it settles 'the rights of all persons claiming as heirs of the decedent, whether or not they are named in the complaint or personally served with summons', Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 307, 88 P. 356, 359, 8 L.R.A.,N. S., 682, 119 Am.St.Rep. 199 * * *. The decree is not one *'in personam* in favor of one of the parties against another.' Edlund v. Superior Court, 209 Cal. 690, 695, 289 P. 841, 843. Rather, as founded in a specialized proceeding in rem—'not against persons as such, but against or upon the thing or subject matter itself'—the decree, when rendered, 'is a solemn declaration of the status of the thing, and ipso facto renders it what the (decree) declares it to be.' 11A Cal.Jur. sec. 73, p. 135, and cases there cited. While it may 'not be questioned that justice and sound policy require that the estates of decedents be distributed to persons rightfully entitled thereto, and that every concern and endeavor of a probate court should be to the accomplishment of that purpose', that does not mean that a 'valid decree' determinative of rights 'of distribution * * * when once final, may be disturbed at the behest of any rightful

claimant, known or unknown, when the decree was rendered, for it is the well-settled policy of the law to preserve the inviolability of final judgments and decrees of courts of law and equity, and a valid decree of a court of probate partakes of the nature of such judgments.' Edlund v. Superior Court, supra, 209 Cal. 690, 695, 289 P. 841." (See, also, 29 Cal.Jur.2d § 294, p. 273.)

[5, 6] Section 1908, subd. 1 of the Code of Civil Procedure provides that the effect of a judgment or final order is as follows: "In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person." In Abels v. Frey, 126 Cal.App. 48, 53, 14 P.2d 594, 596, it was held: "The jurisdiction of the probate court is a jurisdiction *in rem*, the *res* being the estate of the decedent, which is to be administered and distributed with regard to the rights of creditors, devisees, legatees, and all the world. Warren v. Ellis, 39 Cal.App. 542, 179 P. 544; Nicholson v. Leatham, 28 Cal. App. 597, 153 P. 965, 155 P. 98. By giving the notice prescribed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate, and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appears and presents his claim, or fails to appear, the action of the court is equally conclusive upon him, '"subject only to be(ing) reversed, set aside, or modified on appeal"'. The decree is as binding upon him if he fails to appear and present his claim, as if his claim, after presentation, had been disallowed by the court. William Hill Co. v. Lawler, 116 Cal. 359, 48 P. 323; Mulcahey v. Dow, 131 Cal. 73, 63 P. 158; Hanley v. Hanley, supra [114 Cal. 690, 46 P. 736]." (See also, Bath v. Valdez, 70 Cal. 350, 361, 11 P. 724; Barnard v. Wilson, 74 Cal. 512, 516, 16 P. 307; Howell v. Budd, 91 Cal. 342, 349, 350, 27 P. 747.

[7–9] In the heirship proceedings, it was adjudged that George was entitled to inherit all of Jack's estate, and for the purposes of probating the estate he was adjudged to be in equity "an adopted son." That determination has long since become final.

In Re Estate of Bloom, 213 Cal. 575, 580, 2 P.2d 753, it was held that the tax imposed by the Inheritance Tax Law is on the right to succeed to the property of the estate, rather than upon the porperty itself. In re Estate of Letchworth, 201 Cal. 1, 255 P. 195. The heirship decree adjudging that George was, in equity, the adopted son of Jack, and therefore entitled to succeed to his property, as an heir, was the basis for the imposition of the inheritance tax. Inasmuch as George takes Jack's estate only by reason of the adjudication of his status as Jack's adopted son and heir, it appears that appellant may not claim that he *inherits* as a stranger. The conclusion of the trial court sitting in probate as to George's right to inherit as the adopted son of Jack may have been erroneous but it was an action *in rem* which is now final. In re Estate of Daughaday, 168 Cal. 63, 141 P. 929, it was held that even if a decree establishing title under the McEnerney Act, Code Civ.Proc. § 1855a, was mistaken in fact, it nevertheless stood as a conclusive adjudication *in rem* binding upon the whole world. In Woods v. Security-First Nat. Bank, 46 Cal.2d 697, 703, 704, 299 P. 2d 657, 661, where the plaintiff had instituted heirship proceedings and where the court's decision had become final "long before the commencement of the present action," we held that "Whatever reasoning prompted the court in arriving at its conclusion that the plaintiff was entitled to one-half is not now important. The court had the right to decide the question at is-

sue, as the plaintiff is asserting that he was an heir was thereby claiming through the estate and not adversely to it. Central Bank v. Superior Court, 45 Cal.2d 10, 16–17, 285 P.2d 906. It mattered not whether the court sitting in probate found the property to be community or separate. It had the power to decide the question of heirship presented in the petition and the determination therein is res judicata."

[10–13] Appellant contends that the probate decree as to George's right to inherit as an adopted son is not binding upon the state inasmuch as the state could not have been a party to the heirship proceeding. Appellant's argument that the state was not a proper party to the heirship proceeding is quite correct, Prob. Code, § 1080 et seq., but it appears, also, that the appellant's argument is inconsistent with its attempt to tax the inheritance here involved by classifying George as a stranger, Rev. & Tax.Code, § 13310. Section 13306 defines "transferee" as any person to whom a transfer is made, and includes any legatee, devisee, heir, next of kin, grantee, donee, vendee, assignee, successor, survivor, or beneficiary. Section 13307 defines Class A transferees as a husband, wife, lineal ancestor, or lineal issue of the decedent, or an adopted child, or a transferee to whom the decedent stood in the mutually acknowledged relationship of a parent for not less than ten years prior to the transfer if the relationship commenced on or before the transferee's fifteenth birthday, or the lineal issue of a child of the adopted child, or the mutually acknowledged child of the decedent. Section 13308 defines Class B transferees as the brother, sister, or descendant of a brother or sister of the decedent, or the descendant of a brother or sister of the father or mother of the decedent. Class D transferees are defined by section 13310 as any transferee who is not in any of the classes above mentioned. Since only an heir may inherit and since George was not a grantee, donee, vendee, assignee, or beneficiary of Jack, it follows that in view of the probate decree he took Jack's estate as his adopted child and heir, § 13307(b), and appellant's argument must fail.

Although no case directly in point has been cited to us, nor has independent research revealed any, it has been held in a proceeding under the act of 1889 which supplemented the Wright Irrigation Act, that the confirmation of the validity of an organization of an irrigation district and *the bonds issued thereby was a proceeding in rem* and that the judgment therein bound the whole world, including the state. People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 P. 86. See, also, People ex rel. Fogg v. Perris Irrigation District, 132 Cal. 289, 64 P. 399, 773; and 29 Cal.Jur.2d § 296, p. 276. It has also been held, Brooks v. United States, D.C., 84 F.Supp. 622, that the decree of a California court of general jurisdiction which found that half of the community property was the property of the decedent and that the other half should be distributed to his surviving widow as her half, was binding on the Commissioner of Internal Revenue in determining plaintiff's community interest. It clearly appears that since the inheritance tax to be levied depended in the first instance on the probate court's findings as to heirship and George's right to succeed to the property, In re Estate of Letchworth, 201 Cal. 1, 255 P. 195, such finding must be binding on the state as well as on all others. We said in In re Miller, 31 Cal.2d 191, 199, 187 P.2d 722, 727, in speaking of the Inheritance Tax Act of 1935, that "As with a succession statute, death is the 'generating source' for the operation of the inheritance tax, consistent with the commonly accepted theory that such tax is imposed on the right to receive a decedent's property. 28 Am. Jur. secs. 9 and 10, p. 12. While such tax is assessed upon the value of property so transmitted, the rates and exemptions are based upon the relationship of the recipient to the decedent. 28 Am.Jur. sec. 4, p. 9. Accordingly, a cardinal purpose of the inheritance tax law would be to co-ordinate its assessment as closely as possible with

the substantive probate law regulating the distribution of the decedent's estate."

It follows from what we have heretofore said regarding the conclusive nature of the decree with respect to the status of George in the heirship proceeding, that the judgment appealed from must be, and is, affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

In my view the majority opinion errs in holding that the decree in the so-called heirship proceeding is conclusive as to the tax proceeding and that the argument of the state controller constitutes an attack on the heirship decree. Because such opinion may well be cited for far-reaching effects in the future I deem it proper to record here the principal arguments against it.

If established principles were adhered to, this appeal should be resolved primarily by application of pertinent sections of the California Inheritance Tax Law (Rev. & Tax. Code, § 13301 et seq.) and secondarily on the statutory and decisional law of adoption. Applying the tax law consistently with the adoption law leads to the conclusion that George Radovich should be regarded, for purposes of assessing the inheritance tax, as a Class D rather than a Class A transferee. More specifically, it will appear from the facts and law hereinafter elucidated, that the very decree which George relies on as adjudicating his Class A status, conclusively establishes facts leading to the conclusion that he is in Class D. Hence, the judgment appealed from should be reversed.

Following the death of Jack Radovich, George Radovich petitioned the probate court for a "Decree Determining Interests" in the decedent's estate. The court in that proceeding found that the decedent had died intestate, and had left no surviving spouse, *issue,* descendants of any deceased child, or parents; however, that decedent had left surviving him certain brothers and sisters and their descendants, all but one of whom are residents of Yugoslavia.

The court further found that "the decedent and the natural parents of George Radovich, and George Radovich, then known as George Vukoye and 17 years of age, entered into an oral agreement in the year 1934 * * * [under the terms of which] the decedent promised and agreed that if said George Radovich would go to live with decedent and be decedent's son, decedent would give to said George Radovich all of the rights of a natural son of decedent and would regard said George Radovich as decedent's own son and that he would adopt said George Radovich"; that George's natural parents, in reliance upon the agreement, relinquished to decedent all of their rights in George as natural parents; that George accepted the oral agreement and immediately went to live with decedent and thereafter, until decedent's death in 1953, performed all of the duties of a child towards a parent; that during the period in which George resided with the decedent, the decedent publicly acknowledged George as his own son and heir to his estate, *but he "did not institute any statutory proceedings for adoption of said George Radovich; * * ** [and that] *pursuant to said oral agreement* and his [George's] performance thereof, *and by reason of the failure of decedent to fully perform the obligations assumed by him to be performed under said oral agreement, George Radovich occupies in equity the equitable status of an adopted son and by reason thereof is entitled to distribution* of all of the Estate of the decedent, except that portion thereof which [George agreed to transfer to the Yugoslavian relatives]." (Italics added.) The court ordered a distribution of the estate in accordance with this latter finding. Such distribution was made, and the court order has since become final.

The inheritance tax appraisers determined that George is a stranger to the blood of the decedent, and assessed the

inheritance tax based on the amount of the estate passing to George at the rate and with the exemption applicable to strangers in blood. George, claiming to be entitled to the more beneficial tax rate and exemption accorded to an adopted child, objected to this assessment, and instituted the present proceeding. The trial court found (more accurately, concluded, in the proceeding now before us on direct attack) that under the decree of the probate court, "George Radovich was able to succeed to the decedent's estate and be distributed the property of said estate, only by virtue of the establishment of his status as an adopted son, and that the said George Radovich inherited the property from the said estate as a result of having the status of an adopted son"; and that "the determination of the Probate Court that said George Radovich had the status of an adopted son of the decedent was the determination that said George Radovich was adopted by the decedent in conformity with the laws of this state when under the age of 21 years." The court concluded that George, as an adopted son, was a Class A transferee under the inheritance tax statutes and should be taxed accordingly.

As is hereinafter developed, the "findings" of the trial court in this proceeding that the court sitting in exercise of probate jurisdiction had decreed that George had been adopted in conformity with the laws of this state while under the age of 21 years, that his status as a lawfully adopted son was established, and that he inherited the decedent's estate as an adopted son, are untenable as a matter of law. Moreover, the following analysis of the controlling inheritance tax statutes, in the light of the findings and decree in the heirship proceeding, appears to me to demonstrate that George has the status of a Class D, rather than a Class A, transferee.

Inheritance tax is imposed upon the right to succeed to the property of the estate rather than upon the property itself (In re Estate of Bloom (1931), 213 Cal. 575, 580 [4], 2 P.2d 753), and is imposed not merely upon the passing of property by inheritance or under a will, but upon "every transfer" subject to the inheritance tax statutes (Rev. & Tax.Code, § 13401). It is intended that the passing of "any property" from the estate of a decedent be subject to the tax imposed (see Rev. & Tax.Code, § 13304), and the amount of tax is determined by the relationship of the transferee to the decedent (In re Miller (1947), 31 Cal.2d 191, 199 [4], 187 P.2d 722). A transferee is "any person to whom a transfer is made, and includes any legatee, devisee, heir, next of kin, grantee, donee, vendee, assignee, successor, survivor, or beneficiary." (Rev. & Tax.Code, § 13306.) The statute specifies four different classes of transferees; a Class A transferee includes one "whose relationship to the decedent is that of a child adopted by the decedent in conformity with the laws of this State, provided such child was under the age of 21 years at the time of such adoption." (Rev. & Tax.Code, § 13307(b).)

George Radovich was a transferee within the meaning of the above stated rules, and as such the transfer to him was subject to the tax. Under the facts of this case it is clear that if George is not a Class A transferee as an adopted son then he is a Class D transferee as a stranger to the blood of the decedent. Thus, the sole question to be determined is whether, within the meaning of the controlling tax statute, George can be classified as an adopted son for purposes of computation of the applicable tax.

A statutory grant of exemption from taxation is "strictly construed to the end that such concession will be neither enlarged nor extended beyond the plain meaning of the language employed." (Cedars of Lebanon Hosp. v. County of L. A. (1950), 35 Cal.2d 729, 734 [1], 221 P.2d 31, 15 A.L.R. 2d 1045; see also Cypress Lawn C. Ass'n v. San Francisco (1931), 211 Cal. 387, 390 [1], 295 P. 813.) While it has been held that the rule of strict construction of statutory exemptions in favor of the state does not apply to the rate sections of the Inheritance Tax Law (Rev. & Tax.Code, §§ 13401–13404) (In re Estate of Morris

(1943), 56 Cal.App.2d 715, 727 [5], 133 P.2d 452), such rule does apply to the exemption sections (Rev. & Tax.Code, §§ 13801–13804) (In re Estate of Steehler (1925), 195 Cal. 386, 396 [3], 233 P. 972). Since the various classes of transferees are accorded different tax treatment under both the rate and exemption statutes (e.g., a transferee included in Class A is taxed in accordance with both the Class A rates (Rev. & Tax.Code, § 13401) and the Class A exemption (Rev. & Tax.Code, § 13801)), it follows that the two types of statutes should be construed *in pari materia* (see In re Newberry's Estate (1953), 138 W.Va. 296, 75 S.E.2d 851, 852 [1], 40 A.L.R.2d 624), and the same rule (whether of strict or of liberal construction) should be applied to each type.

It is established that succession to the property of a decedent is a privilege, not an inherent right, and that the various states have plenary power over property subject to inheritance. (See Stebbins v. Riley (1925), 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884; Magoun v. Illinois Trust & Savings Bank (1898), 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037; United States v. Perkins (1896), 163 U.S. 625, 629–630, 16 S.Ct. 1073, 41 L.Ed. 287.) Thus a succession tax statute may constitutionally impose a tax on transfers in which the rate does not vary with the relationship of the transferee to the decedent, and which does not allow any exemptions at all based on relationship. (E.g., see the statutes of Arizona (Ariz.Rev.Stats. § 42–1510); Florida (Fla.Stats. § 198.02, F.S.A.); and Mississippi (Miss.Code, § 9264).) Since the fixing of different rates and exemptions among classes based on degree of relationship is thus a matter of legislative grace, not required by or obnoxious to either federal or state Constitutions (see In re Estate of Watkinson (1923), 191 Cal. 591, 597–598 [3–5], 217 P. 1073; In re Estate of Potter (1922), 188 Cal. 55, 63 [6–7], 204 P. 826), it follows that both the rate and exemption statutes should properly be considered as subject to the rule that statutory tax concessions are to be construed liberally in favor of the state and strictly against these claiming the indulgence offered.

Were it not for the specific provisions of section 13307(b) of the Revenue and Taxation Code (quoted 308 P.2d 21), classifying a child adopted in conformity with the laws of this state as a Class A transferee, such adopted child would be subject to inheritance tax at the rates and exemption applicable to strangers. (See In re Strunk's Estate (1952) 369 Pa. 478, 87 A.2d 485, 487; 28 Am.Jur. 102, § 196.) Although the beneficial tax status of a natural child has been extended in California to children legally adopted while under the age of 21, neither this extension nor the actual adoption can obliterate the fact that genetically such children are strangers to the blood of the foster parents. (See In re Estate of Kruse (1953), 120 Cal.App. 2d 254, 257, 260 P.2d 969; see also In re Darling's Estate (1916), 173 Cal. 221, 159 P. 606.) Indisputably, an adjudication that a child bears the equitable status of an adopted child does not effect a change in the child's actual status of a blood stranger to the adoptive parent. The provisions of section 13307(b) extend the beneficial rates and exemptions of sections 13401 and 13801 only to children *adopted in conformity with California law.* Adoption is purely statutory in origin and nature, and there cannot be an adoption without compliance with the statutory requirements. (Matter of Cozza (1912), 163 Cal. 514, 522, 126 P. 161.) There can be neither an equitable adoption (see In re Olson's Estate (1955), 244 Minn. 449, 70 N.W.2d 107, 110) nor an adoption by estoppel (In re Adoption of Parker (1948), 31 Cal.2d 608, 617 [9], 191 P.2d 420). If the rule of strict construction of tax exemption statutes is applied here, then it must be concluded that the Class A exemption and rate statutes cannot be extended to include a child not legally adopted, even though he bears the "equitable status" of an adopted child.

It appears to me, from the foregoing discussion, that the only way George Radovich could lawfully become entitled to the

status of a Class A transferee would be to establish that he was "adopted by the decedent in conformity with the laws of this State, provided [he] was under the age of 21 years at the time of such adoption." (Rev. & Tax.Code, § 13307 (b).) As noted above, adoption is purely statutory in origin and to be valid must conform to the applicable statutes; here the findings and decree relied on by George to establish his equitable right to the transfer of decedent's property likewise establish that decedent "did not institute any statutory proceedings for adoption." The only proceeding relied on to give George the status of an adopted child is the probate proceeding to determine interests in the estate of the decedent. That decree was not entered until George was 37 years of age.

It is urged that the "laws of this State" contemplated by section 13307(b) of the Revenue and Taxation Code include not only the statutory law but also the decisional law, and that the decree of the probate court therefore satisfies the requisites of the tax statute. Even assuming that the probate decree declaring that George had the equitable status of an adopted son was tantamount to a decree of adoption in conformity with the laws of this state, it is obvious that George still does not qualify for Class A exemption status within the terms of section 13307(b) because the proceeding relied on to give George an adopted status does not bring him within the age-at-adoption qualification. Manifestly, the conclusion that George at the age of 37 was by virtue of private contract in the equitable position of an adopted son, cannot accomplish his legal or equitable adoption before the age of 21.

No California case directly in point has been cited by the parties, nor has any been discovered by independent research, on the question of the effect of an equitable decree such as in the present case on the status taxwise of the child involved. However, there is substantial authority from other jurisdictions which supports the conclusion that the probate decree did not adjudicate that George was either the adopted son or the legal heir of the decedent. These authorities establish the following general principles:

"[A]n adoption can be brought about only by a following of the statutory procedure therefor; consequently, a mere executory agreement to adopt, with nothing more, is not an adoption, and the child is not an heir of the parties agreeing to adopt it" (2 C.J.S., Adoption of Children, p. 399, § 27; Parnelle v. Cavanaugh (1941), 191 Ga. 464, 12 S.E.2d 877, 878 [1]; Malaney v. Cameron (1916), 99 Kan. 424, 161 P. 1180, 1181 [1]), for the right to take as an heir exists only by operation of law (O'Connor v. Patton (1926), 171 Ark. 626, 286 S.W. 822, 826; Jordan v. Abney (1904), 97 Tex. 296, 78 S.W. 486, 489), and cannot be created by contract (Wiseman v. Guernsey (1922), 107 Neb. 647, 187 N.W. 55, 56 [1]; Couch v. Couch (1951), 35 Tenn.App. 464, 248 S.W.2d 327, 334 [5]) or by estoppel (Glass v. Glass (1952), Ohio App., 125 N.E. 2d 375, 377 [3, 4]). However, under the principle that equity will consider that done which ought to have been done, it is generally held that a contract by a person to adopt the child of another as his own, accompanied by a virtual, although not a statutory adoption, may be enforced upon the death of the obligor by adjudging the child entitled to a natural child's share in the property of an obligor dying intestate. (2 C.J.S., Adoption of Children, p. 400, § 27 and cases cited therein.) "In upholding such a remedy, the courts do not hold that the child is entitled to the right of inheritance as an heir. They do not undertake to change the status of either party, but merely to enforce a contract which has been fully performed on one side." (2 C.J.S., Adoption of Children, p. 401, § 27; In re Painter's Estate (1954), 246 Iowa 307, 67 N.W.2d 617, 619; Hickox v. Johnston (1923), 113 Kan. 99, 213 P. 1060, 1061, 27 A.L.R. 1322; Starnes v. Hatcher (1908), 121 Tenn. 330, 117 S.W. 219, 223; but see Crawford v. Wilson (1913), 139 Ga. 654, 78 S.E. 30, 32 [1], 44 L.R.A.,N.S., 773; Lynn v. Hockaday (1901), 162 Mo. 111, 61 S.W. 885, 889.) When the child takes property in such a

case it is as a purchaser by virtue of the contract (Couch v. Couch (1951, Tenn.), supra, 248 S.W.2d 327, 334 [6]) and by way of damages or specific performance (Minetree v. Minetree (1930), 181 Ark. 111, 26 S.W.2d 101, 104 [3]; Miller v. Elliot (1943), 266 App.Div. 428, 42 N.Y.S.2d 569, 570). The child does not become, in a legal sense, the child of the adopting parents except for the purpose of receiving title to their property (Besche v. Murphy (1948), 190 Md. 539, 59 A.2d 499, 504 [9, 10]) and is not entitled to letters of administration (State ex rel. Bolshaw v. Montgomery (1940), 237 Mo.App. 678, 146 S.W.2d 129, 132). The child shares in the estate of the deceased foster parent *as though* his own child but not as such. In order to do justice and equity, as far as possible, to one who, though having filled the place of a natural born child, through inadvertence or fault has not been legally adopted, the court enforces a contract under which the child is entitled to property declaring that as a consideration on the part of the foster parents a portion of their property will pass on their death to the child. (Chehak v. Battles, (1907), 133 Iowa 107, 110 N.W. 330, 335, 8 L.R.A.,N.S., 1130.) And in such case, property recompense is generally measured in the amount fixed by the statutes of descent and distribution. (Caulfield v. Noonan (1940), 229 Iowa 955, 295 N.W. 466, 471 [1]; Hickox v. Johnston (1924), 115 Kan. 845, 224 P. 905, 907; 1 Am.Jur. 631, § 20.) But in the absence of statutory adoption, it cannot be held that by enforcing such a contract a legal adoption was effected (Roberts v. Sutton (1947), 317 Mich. 458, 27 N.W.2d 54, 57–58 [3, 4]; In re Olson's Estate (1955), 244 Minn. 449, supra, 70 N.W.2d 107, 110 [2–4]; Franks v. Horrigan (1930), 120 Neb. 1, 231 N.W. 27, 29), or that the child became an heir, even where the contract provided for a right of inheritance (Caulfield v. Noonan, supra; Chehak v. Battles, supra). (For compilation and analysis of authorities from many jurisdictions on the subject of "Specific performance of, or status of child under, contract to adopt not fully performed," and the possible applicability therein of the doctrine of estoppel, see notes in 171 A.L.R. 1315, 1326; 142 A.L.R. 84, 122; 27 A.L.R. 1325, 1365.)

Applying the foregoing principles to the present case, it becomes clear that the order of the probate court adjudicated no more than that by reason of the contract between the decedent and George's natural parents, and what was done by the latter and by George toward performing it, George became entitled to succeed to the decedent's estate to the same extent that he would have taken had he been legally adopted. In order to do equity, the probate court enforced the contract insofar as property rights were concerned, but the order did not declare George to be an heir or purport to change his *legal* status; George remained a legal stranger for such things as inheritance tax. The "finding" of the trial court in this proceeding that the only way George could inherit was as an adopted child, and that he must therefore be treated as such for inheritance tax purposes, falls because George does not either in fact or in law take as an heir. He takes because of the contract performed by him and his parents and the breach thereof by decedent.

Despite the fact that approximately 40 other jurisdictions have inheritance tax statutes similar to those in California, whereby a legally adopted child is allowed a higher exemption and taxed at a lower rate than ordinarily applies to strangers to the blood of the decedent, only three cases have been found which have considered a problem similar to that before us here. All three of those cases support the conclusions heretofore reached.

In the case of In re Clark's Estate (1937) 105 Mont. 401, 74 P.2d 401, 412 [18], 114 A.L.R. 496, there had been a contract to adopt the child, but the legal adoption had never been completed. The child was left certain property by the will of the foster parent, and the inheritance tax authorities assessed the child on the basis that he was a stranger to the blood of the decedent. The child claimed that he was entitled to the

more beneficial tax treatment accorded to a "child adopted as such in conformity with law" (Mont.Rev.Codes 1935, § 10400.2 [now Mont.Rev.Codes, § 91–4409]), by virtue of the contract of adoption, fully performed on his part. The court reviewed the general rules with respect to contracts of adoption (as cited *ante),* and concluded that the trial court had correctly held that, whether or not the child could have enforced the contract against the estate of the decedent, he was not "a child adopted as such in conformity with law," and the determination of the taxing authorities was sustained.

In Lamb's Estate v. Morrow (1908) 140 Iowa 89, 117 N.W. 1118, 18 L.R.A.,N.S., 226, the recipient of property from the decedent claimed that he was entitled to the more favorable tax treatment accorded to an adopted child. He argued that although he had not been legally adopted, he had been equitably adopted, and that in fixing the tax the equitable aspects of the case should be considered. The court stated, beginning at page 1120 of 117 N.W.: "The answer to this is that the case is not in equity, and if it were, the matters relied on cannot make one an heir if in fact they do not in law establish that relation. * * * Holmes does not, in any event, take as an heir." The same answer is equally applicable to the contentions of the child here.

In Wooster v. Iowa State Tax Commission (1941) 230 Iowa 797, 298 N.W. 922, 141 A.L.R. 1298, the child had not been adopted under statutory procedure, but claimed to have been adopted by estoppel. It was conceded that the foster parents were estopped to deny the adoption. Property passed to the child under the will of a foster parent, and the question was whether the child was entitled to have the transfer assessed at the lower inheritance tax rates and higher exemption applicable to a "legally adopted child * * * entitled to inherit under the laws of this state." (Code of Iowa 1939, § 7313 [now Iowa Code, § 450.10, I.C.A.].) After reviewing the authorities, the court stated:

"The conclusion that Grace S. Wooster was not a legally adopted child of Delia B. Wooster appears inescapable. She did not have the status of an adopted child or any right of inheritance as such. A decree establishing her rights in the property of the deceased foster parents could not have changed her previous status to that of an adopted child. The principle involved in such equitable proceedings is property recompense measured in the amount fixed in the statutes of descent and distribution * * *

"Appellee argues that the state is in such privity with Delia B. Wooster as to be bound by the estoppel against her. In support of this contention it is said that the state allows the party to fix the status of the child and should be bound by the status so fixed by its authority. With this statement we do not agree. The state, through its legislative enactments, allows the status of an adopted child to be fixed by one method only, to wit, by statutory adoption. When such status has been thus fixed the legally adopted child becomes entitled to the exemption and classification provided by statute for property passing to a legally adopted child. Obviously, when a party fails to take the steps required by the state to effectuate a legal adoption the estoppel against such party resulting from such noncompliance with the statute does not bar the state from standing upon the facts as they actually exist in making classifications for inheritance tax purposes.

"Nor do we agree that a decree establishing appellee's rights would constitute a judgment in rem determining her status which would be binding upon the taxing authorities. One reason for this is that appellee never had the status of an adopted child and the courts 'do not undertake to change the status.' Such decree would merely establish her property rights." (Wooster v. Iowa State Tax Commission (1941, Iowa), supra, 298 N.W. 922, 925 [1–4].) The reasoning in the Wooster case is equally pertinent here. (See also

In re Adoption of Parker (1948), supra, 31 Cal.2d 608, 617 [9], 191 P.2d 420.)

The so-called "heirship" proceedings in California are not limited to those persons who claim to be technical heirs of the decedent. Rather, the statute providing for such proceedings states that "any person claiming to be an heir of the decedent *or entitled to distribution of the estate* or any part thereof" may institute such proceedings. (Prob.Code, § 1080, italics added.) The mere determination of the rights to distribution in such a proceeding is not necessarily a determination of technical heirship. George petitioned the court for a "Decree Determining Interests" in the decedent's estate. The court determined George's interest, and decreed distribution of the estate to him, not because he was an adopted son of decedent, but because he *should have been* decedent's adopted son, and because, under the facts of this case, he had higher equities than any other claimant. Such a decree did not, nor could it, adjudicate George's status to be other than it factually was—i.e., a stranger to the blood of the decedent—and it did not purport to affect his status for inheritance tax purposes.

The order in the instant proceeding (fixing the inheritance tax) is distinct from that in the heirship proceeding. Each order is appealable (Prob.Code, § 1240; see also Attorney General v. Superior Court (1955), 41 Cal.2d 249, 251 [4], 259 P.2d 1.) Such orders have "the force and effect of a judgment in a civil action" (Rev. & Tax. Code, § 14672), and "the provisions of the Code of Civil Procedure relative to judgments, new trials, appeals, attachments, and execution of judgments, so far as applicable, govern all [such] proceedings * * *" (Rev. & Tax.Code, § 14671). "[I]n fixing the inheritance tax the probate court may consider matters not before it in the distribution of an estate. * * * The order fixing inheritance taxes, which may incidentally determine questions in regard to succession and beneficial ownership, is not binding except for tax purposes as between those who claim the estate, whether as heirs, legatees, or beneficiaries of a trust extrinsic to the will. (In re Lloyd's Estate, 106 Cal.App. 507 [289 P. 892].)" (In re Estate of Rath (1937), 10 Cal.2d 399, 406, 75 P.2d 509, 115 A.L.R. 836.) The Lloyd case referred to in the Rath opinion recognizes that an inheritance tax proceeding is completely separate from a proceeding to determine distribution of the estate, and that an adjudication of tax status in the one proceeding will not prevent a different adjudication of status with regard to the right to take in the distribution proceeding. The converse is equally true where, as here, the distribution proceeding only purports to determine the right to take and not the tax status of the one taking.

The case of Johnson v. Superior Court (1929), 102 Cal.App. 178, 283 P. 331, is not opposed to the principles enunciated herein. The Johnson case merely holds that the probate court has power to determine the rights of one claiming an interest in the decedent's estate by virtue of an executory contract to adopt. That the probate court has such power, and that it exercised such power in the present case, is undisputed. But the determination that George was equitably in privity with the estate and therefore entitled to distribution of the property does not determine in what manner George (or the transfer) is to be treated for tax purposes. The right to distribution of the estate having been determined, the transfer and the transferee became subject to the inheritance tax laws. The duly appointed inheritance tax appraiser classified George as a Class D transferee and reported the inheritance tax on such classification. The co-administrators and George filed objections to the appraiser's report pursuant to the authorization of section 14510 of the Revenue and Taxation Code. At the hearing it was the duty of the court to presume that the report of the tax appraiser was correct and the burden was upon the objector to proceed in support of his objection. (Rev. & Tax.Code, § 14512.) The inheritance tax authorities in setting the tax were entitled to fix George's tax status under the tax

laws in accordance with the facts as they actually stood. One of those facts was the probate decree of distribution, and this the tax authorities relied on for exactly what it held—that George, under equitable principles, was entitled to take a certain amount of property. The probate decree determined how much property George was to take and why he was entitled to it, but did not determine in what taxable capacity he was to take it. The latter determination was made by the court in this entirely separate and distinct proceeding. Such determination is erroneous as a matter of law and should, if the law were followed, lead to a reversal.

McCOMB, J., concurs.

Rehearing denied; SCHAUER and McCOMB, JJ., dissenting.



149 Cal.App.2d 299

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Raymond BEAN, Defendant and Appellant.

Cr. 1093.

District Court of Appeal, Fourth District, California.

March 19, 1957.

Hearing Denied May 15, 1957.

Defendant was convicted of unlawfully possessing marijuana. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment on the verdict and an order denying a new trial, and the defendant appealed. The District Court of Appeal, Barnard, P. J., held that admission of evidence that 17 days after the alleged offense marijuana seeds were found in automobile of defendant, was not reversible error, where jury was instructed that defendant was not being tried for possession of the seeds found in his automobile, and that the only purpose of permitting evidence concerning the seeds to be introduced was to show that whoever put the seeds in the automobile was familiar with the use and possession of narcotics.

Judgment and order affirmed.

1. Criminal Law ⇐369(2)

Evidence, which is otherwise admissible is not rendered inadmissible because it may show commission of another and distinct offense from that for which defendant is on trial.

2. Criminal Law ⇐369(2)

The general test of relevancy of evidence concerning the commission of another and distinct offense from that for which defendant is on trial, is whether the evidence tends logically, naturally, and by reasonable inference to establish any material fact or to overcome any material matter sought to be proved by the defense.

3. Criminal Law ⇐370, 371(12), 372(1)

Evidence of other acts of a similar nature may be admitted in a criminal prosecution, when not too remote to prove a material fact or where it tends to show motive, plan, scheme or system, or to show guilty knowledge.

4. Poisons ⇐9

Prosecution must show that defendant charged with possession of narcotics knew that the objects in his possession were narcotics. West's Ann.Health & Safety Code, § 11500.

5. Poisons ⇐9

In prosecution for unlawful possession of marijuana, it was proper to introduce evidence tending to show that defendant was familiar with marijuana. West's Ann.Health & Safety Code, § 11500.

6. Criminal Law ⇐673(5)

In prosecution for unlawful possession of marijuana, admission of evidence that 17 days after the alleged offense, marijuana seeds were found in automobile of defendant, was not reversible error, where jury was instructed that defendant was not being tried for possession of the seeds found in his automobile, and that the only pur-

pose of permitting evidence concerning the seeds to be introduced was to show that whoever put the seeds in the automobile was familiar with the use and possession of narcotics. West's Ann.Health & Safety Code, § 11500.

7. Criminal Law ⇐655(5)

In prosecution for unlawful possession of marijuana, it was improper for trial court to state to the jury that the trial court had never sent anyone to the penitentiary for possession of marijuana when it was his first offense, even though such statement was suggested, if not invited, by argument of defendant's counsel. West's Ann.Health & Safety Code, § 11500.

8. Criminal Law ⇐1166½(12)

In prosecution for unlawful possession of marijuana, wherein defendant's attorney, in argument to jury, stated that nothing more than a suspicion had been shown, and that suspicion was not a sufficient ground to send a person to prison and make him an ex-convict, trial court's improper statement to jury that the trial court had never sent anyone to the penitentiary for possession of marijuana when it was his first offense was not reversible error. West's Ann.Health & Safety Code, § 11500.

Holliday & Folsom, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., G. A. Strader, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The appellant and two other youths were jointly charged with a violation of section 11500 of the Health and Safety Code, it being alleged that on or about March 12, 1956 they unlawfully possessed a certain narcotic, marijuana. A jury returned verdicts of guilty as to each defendant. The court denied probation, and judgment was entered committing all three defendants to the California Youth Authority. The appellant has appealed from the judgment and from an order denying his motion for a new trial. He admits that the evidence, although conflicting, was sufficient to support the verdict but contends that prejudicial error appears in connection with the admission of one item of evidence, and in one statement made by the court to the jury.

On March 12, 1956, at about 7:45 p. m. a Mrs. Graves parked her car in a drive-in restaurant in Chula Vista. A Mrs. Mason and Peggy Ryan, a 14-year old girl, were in the car with her. They had gone there looking for Mrs. Graves' daughter Betty. Parking spaces were marked on the pavement with white lines, and Mrs. Graves parked in Stall No. 5. A car owned by the appellant Bean and occupied by the three defendants was parked in Stall No. 3, with an intervening space between it and Mrs. Graves' car.

A few moments after arriving at the drive-in Peggy Ryan went over to the car occupied by the three boys and inquired as to whether or not they knew Betty or had seen her. She received a negative reply and returned to the Graves car. A few minutes later she again went over to the other car and talked to the boys. She noticed a strange odor in that car which she described as sweet and musty; and she observed the three boys smoking a brown or tan-colored cigarette, which they were passing from one person to another. The radio in the boys' car was turned up very loud and the boys were acting in a peculiar manner, waiving their arms, and talking and cursing in extremely loud voices. Peggy thought they were drunk. The language and actions of the boys were observed also by Mrs. Graves and Mrs. Mason. The license number of this other car was written down by one of the occupants of the Graves car. The occupants of the Graves car then saw two cigarette butts flipped or dropped from the other car, and that car drove away. Mrs. Mason and Peggy went over to where the other car had been parked and picked up several cigarette butts. Mrs. Mason picked up a tan-colored cigarette butt. She observed that it was different from the other cigarette butts, she smelled it and had Peggy smell

it. Peggy testified that it smelled like what she had smelled from the car earlier, but that "the cigarette wasn't as strong as the odor in the car." They then drove to the police station, and Mrs. Mason turned the tan-colored cigarette butt over to the police officers. The cigarette butt was identified as containing marijuana, and was introduced in evidence. There was also evidence that this cigarette butt had the appearance of being home-made. A police officer with experience in the detection of narcotics testified that the odor of marijuana which has been partly burned is sweet and musty, and that to him it smelled something like burning alfalfa. The appellant was arrested on March 27, 1956, at which time his automobile was taken by the officers and locked in a police garage. Two days later the car was searched and marijuana seeds were discovered scattered under the driver's seat, under the floor mat near the door, and along the ridge of the rear door on the left side of the car. These seeds were collected, identified and introduced in evidence.

The appellant first contends that the court committed prejudicial error in admitting the evidence with respect to the finding of these marijuana seeds in his automobile seventeen days after the date of the commission of the offense for which he was on trial. It is argued that this was evidence of an independent crime, and that it was not admissible because it did not tend to prove any fact material to the charge on which he was being tried, and was not a part of the *res gestae*, and did not tend to show guilty knowledge or a common plan or scheme. He relies particularly on the cases of People v. Albertson, 23 Cal.2d 550, 145 P.2d 7; People v. Lapin, 138 Cal. App.2d 251, 291 P.2d 575, and People v. Musumeci, 133 Cal.App.2d 354, 284 P.2d 168.

An objection to this evidence was made, in the absence of the jury, on the ground that it was an attempt to show an entirely different crime, and one for which the other defendants were not charged. The court ruled that the evidence was admissible, stating that it might show familiarity and association with narcotics of the same kind the appellant was accused of having in that cigarette; that it was up to the jury to determine whether he had knowledge of it; that counsel could bring out when the appellant bought the car and whether he knew anything about it; and that it was up to the jury to determine whether or not it was in the car when he bought it, or whether he put it there. After the jury returned the court, at the suggestion of counel for the other defendants, instructed the jury that the testimony about to be offered was binding only on the appellant and not on the other defendants. The officer then testified about finding the seeds, without further objection. In his instructions the court told the jury that none of the defendants were being tried "for those seeds that were found in the car"; that the only purpose for permitting that evidence to be introduced was to show the presence of these seeds and that "whoever put them in the car was familiar with the use and possession of narcotics"; that the appellant had testified that he did not put the seeds there; and that it was for the jury to determine whether the seeds were put there by him or by someone else, or whether the seeds were there at the time he purchased the car. The appellant had owned the car for about four months.

[1–6] It is well established that evidence which is otherwise admissible is not rendered inadmissible by reason of the fact that it may show the commission of another and distinct offense from that for which the defendant is on trial. People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Torres, 98 Cal.App.2d 189, 219 P.2d 480. As stated in many cases, the general test of relevancy is whether the evidence tends logically, naturally and by reasonable inference to establish any material fact or to overcome any material matter sought to be proved by the defense, and that evidence of other acts of a similar nature may be admitted, when not too remote, to prove a material fact or where it tends to show motive, plan, scheme or system or to show

guilty knowledge. It is now necessary for the prosecution to show that a defendant charged with possession of narcotics knew that the objects in his possession were narcotics. People v. Winston, 46 Cal.2d 151, 293 P.2d 40. The cases cited by the appellant are distinguishable on their facts and the case of People v. Masumeci, 133 Cal. App.2d 354, 284 P.2d 168 was distinguished in the case of People v. Tabb, 137 Cal. App.2d 167, 289 P.2d 858. Since one element of the offense here charged was appellant's knowledge that the substance he possessed was a narcotic, it was proper to introduce evidence tending to show that he was familiar with marijuana. The evidence here complained of tended in some degree to show such knowledge. Also, the presence in the car of marijuana seeds would be material in view of the evidence indicating that this cigarette was "homemade". It indicated that there had been a larger quantity of marijuana in the car at some time, and the inferences reasonably to be drawn were for the jury. The fact that the seeds were found after, instead of before, the date of the offense with which he was charged would make little difference under the circumstances here, and the question of remoteness was one for the jury in weighing all of the evidence in this connection, including the appellant's denial that he had placed the seeds in the car or knew anything about them. The jury was instructed that the appellant was not being tried for having those seeds in his car, and instructed as to the purpose of receiving that testimony. In our opinion, no reversible error appears in this connection.

[7, 8] It is next contended that the court erred in "instructing the jury that he would not send a person to the state penitentiary for a first offense." In this connection it appears that appellant's attorney, in his argument to the jury, stated that nothing more than a suspicion had been here shown; that it is not in the American custom to convict a man and send him to prison on suspicion; and that "Suspicion isn't a sufficient ground to send a man to prison, to make him an ex-convict." In beginning his instructions the court stated that something had been said in the argument about sending these boys to the state prison and ruining their lives. He then said that this "has no place in the argument", and that he would later give an instruction to the effect that the penalty to be imposed was no concern of the jury. He then went on to say that as far as he could recall he had never sent a person to the state penitentiary for possession of marijuana when it was his first offense; that he wanted to correct the erroneous impression made by the argument; and that the matter of punishment was not a concern of the jury. He later instructed the jury that "In arriving at a verdict in this case the subject of the penalty or punishment is not to be discussed or considered by you, as that matter is one that lies solely with the court and must not in any way affect your decision as to the innocence or guilt of the defendant." The court's formal instruction on this matter, and a part of the general statement made, correctly stated the law. The portion of the statement to the effect that the judge had never sent anyone to the penitentiary in a case of this nature should not have been made even though it was suggested, if not invited, by the argument of appellant's counsel. We have read the entire transcript and, in view of the record as a whole, we are unable to agree with appellant that the improper statement thus made by the judge was sufficiently prejudicial to justify a reversal.

Some contention was made in the opening brief that the district attorney was guilty of misconduct in saying to the jury, during his argument, that appellant's witnesses were "all members of a gang". In his closing brief the appellant concedes that this contention is not sustained by the record.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.

William J. MOORE, Jr., Plaintiff and Appellant,

v.

TRINITY OIL AND GAS COMPANY and Walter de Courcy, Defendants,

Walter de Courcy, Respondent.

Civ. 5379.

District Court of Appeal, Fourth District, California.

March 18, 1957.

Rehearing Denied April 11, 1957.

Hearing Denied May 15, 1957.

Holder of notes brought action against maker and endorser on notes. The Superior Court, Kern County, Gordon L. Howden, J., entered judgment in favor of the endorser, and the maker appealed. The District Court of Appeal, Barnard, P. J., held that complaint alleging that after endorser received notice of dishonor, he promised to pay the notes, sufficiently alleged issue of waiver by endorser of notice of dishonor, and that evidence was sufficient to support a finding of waiver by endorser.

Judgment reversed.

1. Bills and Notes ⇐422(1)

A failure on part of holder of note to make a timely presentation of note for payment or to give a timely notice of dishonor to endorser may be waived by endorser. West's Ann.Civ.Code, §§ 3151 et seq., 3190.

2. Bills and Notes ⇐469

In action on notes by holder against maker and endorser, complaint alleging that after endorser of notes had received notice of dishonor, endorser promised to pay the notes, was sufficient to present issue of waiver by endorser of timely notice of dishonor. West's Ann.Civ.Code, §§ 3151 et seq., 3190.

3. Bills and Notes ⇐526

In action on notes by holder against maker and endorser, evidence was sufficient to support a finding of waiver by endorser of timely notice of dishonor. West's Ann.Civ.Code, §§ 3151 et seq., 3190.

Kendall & Howell, Bakersfield, for appellant.

DiGiorgio & Davis, Thomas R. Davis, Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action on two promissory notes. Each note was executed by the Trinity Oil & Gas Company, was dated June 5, 1954, and was payable 90 days after date. Each note was for $5,000 and was payable to Walter de Courcy. Each note was endorsed "Pay to William J. Moore Jr or his order: Walter de Courcy." Among other things, the complaint alleged, as to each note, that at the time said note matured and subsequent thereto it was presented to Trinity Oil & Gas Company; that Trinity failed to pay said note; that notice of dishonor was given to Water de Courcy; and that "following receipt of notice of dishonor defendant Walter de Courcy promised plaintiff that he would pay said note." The answer of de Courcy alleged, among other things, that he had transferred these notes to the plaintiff in connection with a deal in which $4,000 was to be paid to the plaintiff out of a certain escrow; that he was to pay the notes only if this amount was not paid from the escrow; that payment from the escrow within a short time appeared probable; and that the plaintiff should be estopped from prosecuting this action until it is determined whether or not the plaintiff will receive said $4,000 from the escrow. The prayer was that the plaintiff take nothing and that he be required to deposit the notes in court awaiting the results from the escrow.

Neither of the defendants appeared at the trial although they were represented by counsel. The defense presented was based upon the failure of the plaintiff to present the notes for payment to Trinity on the due date, and the failure to give

timely notice of dishonor to de Courcy. The note was due on September 3, 1954. The plaintiff testified that he presented the notes for payment at the office of Trinity on September 7; that no one was there; that thereafter he made many calls at the Trinity office but found no one there; that about the middle of October he saw the vice president of Trinity who told him that Trinity did not have the money to pay the notes; that during this period he had made efforts to contact de Courcy without success; that on November 15, 1954, he sent a telegram and letter to de Courcy; and that after receiving this letter and telegram de Courcy called him by phone and promised to pay the notes, saying "I'll have the money for you in a few days". The letter thus referred to was received in evidence. In this letter the plaintiff stated that at the time he gave the money to de Courcy he had told him that he would have to reassign the notes to someone as he needed the money; that he had had to pick up the notes and pay off the obligation to one Wakely; and that he must have the money or bring suit. The plaintiff testified that he had assigned the notes to Wakely but before doing so he had told de Courcy about the terms of the assignment; that de Courcy had agreed to this; and that he had paid the obligation to Wakely and taken back the notes.

In addition to the general findings as to the execution and endorsement of the notes the court found, with respect to each of the notes, that it was payable on September 3, 1954; that "no presentation for payment was made on said day"; and that said failure of presentment was not excused. It also found with respect to each note that it was presented for payment subsequent to its maturity, that "due notice of dishonor" was not given, and that said failure to give notice was not excused. As conclusions of law "from the foregoing facts" it was found that the plaintiff should have judgment against the Trinity Oil & Gas Company, and that he should take nothing against de Courcy. Judgment was entered accordingly, and the plaintiff has appealed from that part of the judgment which denies him relief as against de Courcy.

[1] Under the statutes an endorser is not liable unless presentment is made and notice of dishonor given to him, as required by the statutes. Civ.Code, Sec. 3151 et seq. The statutes further provide that a delay in making presentment for payment is excused when it is caused by circumstances beyond the control of the holder, and that notice of dishonor may be expressed in any terms indicating a dishonor by nonpayment. Moreover, a failure to make a timely presentation or give a timely notice of dishonor may be waived by the endorser. Civ.Code, Sec. 3190; Fashion Hat Frame Co. v. Ringel, 81 Cal. App. 556, 254 P. 275; Curtis v. Sprague, 51 Cal. 239. In the first of these cases it was held that a promise by the endorser to pay after knowledge of the failure of presentation is a waiver of demand and notice. In the second of these cases, it was held that a statement made to the payee after the maturity of the note that "I am responsible for that note" amounted to a promise to pay the note, and that the evidence sufficiently showed that the endorser had knowledge of the laches of the holder. The appellant here contends that the evidence was not sufficient to support a finding that a timely presentation of these notes and timely notice of dishonor were not made and given, since he was unable to find anyone at the office of the Trinity company and was unable to find de Courcy at his residence or elsewhere; and that the evidence was sufficient to establish a waiver of the requirements for presentation and notice of dishonor because of the promise to pay made after maturity.

[2,3] While a waiver was not alleged in the complaint by the use of that word, a waiver was sufficiently alleged in that it was alleged that after he had received notice of dishonor de Courcy promised to pay the notes, and a large part of appel-

lant's testimony was directed to that issue. This issue was sufficiently presented by the pleadings; the evidence, with the inferences which could reasonably be drawn therefrom, was sufficient to have supported a finding of such waiver; and the court erred in failing to make a finding on that issue. Vigen v. Castle Building Co., 19 Cal.App.2d 704, 65 P.2d 1340. The undisputed evidence which was received without objection shows that the endorser promised to pay these notes with full knowledge that they were long overdue and had not been paid, and when he knew he had received no notice of dishonor within the time required by the statutes. He is presumed to know the law, and the fact that he received a notice of dishonor seventy-four days after the due date of the notes would justify the inference that he knew that the law had not been complied with and that the notes had not been presented for payment on the date they were due. In any event, a question of fact was presented on this issue and the court should have weighed the evidence as it affected that issue and made a finding thereon. The court erred in basing its conclusion and judgment solely on the endorser's failure to comply with the statutory requirements, or to bring himself within the statutes excusing such compliance, without finding on the further issue of waiver by reason of the endorser's subsequent promise to pay. While it clearly appears that the requirements of the statutes, with respect to when presentation should be made and notice of dishonor given, where not complied with it does not clearly appear that this endorser was, under established law, entitled to a discharge from this obligation. The respondent relied on a strict application of the statutes even to the extent that he did not appear at the trial. The cause should be retried with proper consideration given to the matter of waiver by subsequent promise of payment, and a finding made on that issue.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

149 Cal.App.2d 362

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William Elmer FARRAR, Defendant and Appellant.

Cr. 1209.

District Court of Appeal, Fourth District, California.

March 21, 1957.

Hearing Denied May 15, 1957.

Prosecution for robbery. The Superior Court of Kern County, Norman F. Main, J., entered judgment of conviction and defendant appealed therefrom and from order denying new trial. The District Court of Appeal, Griffin, J., held that the evidence was not closely balanced but sufficiently established defendant's guilt, and consequently prosecutor's closing argument that defendant was "an experienced and professional armed robber" or a "virtually professional" one was not prejudicial error.

Judgment and order affirmed.

1. Criminal Law ⇐1171(6)

In robbery prosecution, the evidence was not closely balanced but sufficiently established defendant's guilt, and consequently prosecutor's closing argument that defendant was "an experienced and professional armed robber" or a "virtually professional" one was not prejudicial error.

2. Criminal Law ⇐1037(1, 2)

In robbery prosecution, even if description of defendant as "an experienced and professional armed robber" or a "virtually professional one" should not have been used in prosecutor's closing argument, where no objection was made to its use and defendant did not request that jury be admonished to disregard description, defendant could not assert that description was prejudicial error.

3. Criminal Law ⇐1037(2)

If the harmful effect of improper statements by prosecuting counsel in his closing argument could probably have been re-

moved by admonition to jury, failure to request such admonition is regarded, with certain exceptions, as a waiver of the right to rely on the statements as misconduct.

4. Criminal Law ⇐1171(3)

In prosecution for robbery, where prosecutor had commented upon failure of one of defendant's witnesses to testify, which witness might have corroborated defendant's alibi, but upon being informed of fact that witness was not in state at time of trial, prosecutor in closing argument, stated he did not know that fact and did not deliberately misrepresent the fact to jury, occurrence was not prejudicial error.

Thomas P. Daly, Jr., Bakersfield, for appellant.

Edmund G. Brown, Atty. Gen., George Goffin, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged in one count with robbing one W. W. Wright (Bi-Wright Market) on December 20, 1955; in count two with robbery of Wong's (Alta Vista Market) about 5 p. m. on December 20, 1955; in a third count with robbing Frank Greer (White Spot Market) about 6 p. m. on December 27, 1955; in a fourth count with robbing W. J. Reimer (Spick-and-Span Market) on January 19, 1956; and in a fifth count with robbing one W. M. Scott (Sears Market No. 7) on February 1, 1956. All were grocery markets in Bakersfield, and about the same method of robbery was indicated in each charge. It was charged that at the time indicated, defendant was armed with a deadly weapon (an automatic pistol). A trial by jury resulted in a verdict of guilty on counts one and four and not guilty on counts two, three and five. A motion for new trial was denied.

[1] Defendant on this appeal concedes there is a conflict in the evidence as to his presence at the scenes on the evenings charged, but argues that the facts presented bring the case within the "close case rule", and since the district attorney committed prejudicial error in his closing argument, particularly by referring to defendant as "an experienced and professional armed robber" and as "an experienced, virtually professional armed robber", such error requires a reversal of the judgment of conviction, citing such authority as People v. Ford, 89 Cal.App.2d 467, 200 P.2d 867; People v. Vienne, 142 Cal.App.2d 172, 297 P.2d 1027; and People v. Talle, 111 Cal.App.2d 650, 677, 245 P.2d 633.

As to count one, the evidence shows defendant entered the market at about 5:30 p. m. and started to walk around the end of the counter; that at that time he said to Wright: "Stick it in the bag, the money"; that Wright put the currency, checks and silver ($510) from the cash register in the bag and defendant then said: "Put in your billfold", and Wright hesitated; that before this time defendant had drawn a small black automatic gun and told Wright he would give back the billfold (tooled leather wallet with the initials "W.W.W." containing $211 and other personal papers and checks) but he put it in the bag and walked backwards, facing him for some distance and then departed. Wright described defendant as talking in a low voice and said he was very nervous and wore cheap-looking clothes. He described defendant to the officers as being about five foot 11 inches tall, 33 years old, and weighing 175 pounds, and said he appeared to be "an outdoor man" and that there was something peculiar about one of his eyes. He also testified that he was looking defendant in the face all of this time, and in court he positively identified him as the man.

Defendant testified he lived in Shafter, about 18 miles from Bakersfield. Wright's wallet, containing a check made payable to him, together with other papers, was found near the road about 1½ miles from Shafter on March 16, near the place where defendant lived at the time.

A witness who was at the store on the date indicated, after a minute examination

of defendant in the courtroom, identified him as follows: He said he met him "face to face", at the door of the market and defendant came "in on the side of him"; that he startled defendant as defendant was leaving the store and that Wright then told the witness to "call the cops"; that he "believed" defendant was the gentleman; and that defendant was the man or "either he is or has a twin brother, one or the other".

As to count two, the evidence shows defendant went into the store, obtained a paper bag, placed three onions in it and went to the check stand; that he held a gun on Wong and told him to put the money in the sack. The defendant said he would shoot him if he did not do so. Customers were coming into the market. Wong, pretending to obtain another sack for that purpose, called his brother on the telephone extension and defendant backed out to the front end of the store, turned, and left. Wong was not able to tell the type of gun but said defendant spoke in a low voice and appeared to be quite nervous; that he was dirty in appearance and was wearing what looked like an olive green field jacket; that he appeared to be about 40 years of age and that defendant resembled the man but he was not positive of his identification.

As to count three Greer testified defendant walked into the store, came to the check counter and placed a dark-colored automatic gun close to his body and said: "Get over there and give me the money"; and defendant grabbed the currency ($992) which he demanded, and ran out the door; that he spoke in a low voice, had on a dark-colored jacket, a baseball type cap and khaki pants. He described defendant to the officers as being 5 ft. 10 inches tall, aged 30 to 35 years, and weighing 165 pounds; and said he was dark complected. His testimony was corroborated by a clerk who saw this occurrence and gave a similar description of defendant and the gun.

As to count four. Reimer testified that about 6:10 p. m. defendant put a bag of lemons on the counter and he noticed he had a small automatic pistol pointed at him and his assistant, and he was ordered to open the cash register and to put the money in a bag; that they did so and were told by defendant to "get to the back" of the store, and as they were doing so defendant ran out the door. They described him as being about 30 years of age, weighing about 170 pounds, and that he wore a black welder's cap with a small beak, and a dark tan checkered sport shirt. A housewife present in the store at the time, described defendant as being "very dominating" with piercing, limpid eyes and wearing a welder's cap.

As to count five, Mr. Scott was standing at two cash registers. Defendant walked up and said: "Give me the day's receipts" and stuck a "short, small" gun up close to him and demanded the money ($624) from the two registers, which he gave to defendant. He described the defendant as wearing jeans, a dark shirt, no hat or coat, weighing about 175 pounds; that he was about 5 ft. 10 inches tall; and that he spoke in a low voice. He testified in court that defendant was the man he saw that evening.

In defense, defendant's sister testified that defendant arrived at her home in Shafter about 8 p. m. on December 21st; that he came out here from Texas and took her back there to bring her children to Shafter; that they left that evening and had an automobile accident at Tehachapi; that they returned to Shafter and on December 26th again left for Texas at about 9:30 p. m.; that they arrived there on December 28th, returned to Shafter on January 14, 1957, and thereafter he lived in Shafter in a separate apartment. She claimed that on January 19 she was at his apartment at the time of the robbery and cooked dinner for defendant; that on January 21 they all went to Indiana and returned on January 30th. Defendant corroborated her testimony and testified he came to Shafter via Los Angeles from Texas and arrived in Kern County and Shafter on December 21, about 8 p. m.; that on December 20 he was

in Arizona. He claimed he was not present at any of these markets when the claimed robberies took place and never owned a gun. He admitted a previous conviction of a felony (escape from a county jail). He produced certain witnesses who attempted to corroborate his alibi. On rebuttal the prosecution produced a witness who testified that defendant told him on two occasions that he was in El Paso, Texas, on December 20. Although he claimed he had been out of employment and was without funds, except what he borrowed from his sister, he traded cars and paid a $75 differential, bought a television set and took the trips indicated. When making an $8 payment due on the television set he paid $20 and told the office manager, on January 14, that he had been working for a pipeline company in Texas and was going around Shafter paying people to whom he owed money.

[2] There is sufficient evidence of defendant's guilt under the counts on which he was convicted and also considerable evidence indicating his participation in the robberies charged in the remaining counts. It does not affirmatively appear that this is a so-called close case. In most instances the identifications were quite positive and the places robbed and method used indicated a particular system in committing the crimes charged. While the Vienne case, supra, relied upon by defendant, did condemn the persistent use of the term "professional gunman" in describing the defendant, it was said in that case that there was no evidence so indicating. Likewise, objection was there made to the use of such description and the trial court admonished the prosecution to refrain from using such description. In the instant case, if the prosecution had established defendant's guilt on all the charges as indicated by the evidence, his conclusion or deduction that defendant was "an experienced and professional armed robber" or a "virtually professional" one, would not be entirely unfounded. People v. McKenzie, 12 Cal.App.2d 614, 55 P.2d 1200. Assuming that the description of defendant, as made by the prosecutor, should not have been used in the closing argument to the jury, nowhere did defendant's counsel object to its use or ask the trial court to strike it, to admonish the jury to disregard it, or to admonish the prosecution against the use of such description.

[3] The general rule is that if the harmful effect of improper statements could probably have been removed by admonition to the jury, failure to request such admonition is regarded as a waiver of the right to rely on the statements as misconduct. Certain exceptions to this rule are noted in People v. Ford, supra, 89 Cal. App.2d at page 470, 200 P.2d 867. Since this is not a conviction on circumstantial evidence or a case that could be considered closely balanced as to defendant's guilt or innocence, it cannot be affirmatively said that any such remarks inflamed the jurors or turned the scales against the accused. Under the circumstances no prejudicial error appears. People v. O'Moore, 83 Cal. App.2d 586, 601, 189 P.2d 554; People v. Hoyt, 20 Cal.2d 306, 318, 125 P.2d 29; People v. Panagoit, 25 Cal.App. 158, 143 P. 70; 8 Cal.Jur. p. 508, sec. 521, and cases cited.

[4] The prosecution commented upon the failure of one of defendant's witnesses to testify, which witness may have corroborated defendant's purported alibi. It was pointed out by counsel for defendant that she was not in the State of California at the time of trial. The prosecution then stated, in his closing argument, that he did not know that fact and did not deliberately misrepresent it to the jury, and in effect said that if she was not in the state she could not be compelled to be a witness. No prejudicial error can be based on this occurrence. People v. Piero, 79 Cal.App. 357, 360, 249 P. 541; People v. Pierson, 69 Cal.App.2d 285, 296, 159 P.2d 39.

An examination of the entire record convinces us that no prejudicial error or misconduct was affirmatively shown.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

149 Cal.App.2d 287

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John Willie ROSS, Defendant and Appellant.

Cr. 5816.

District Court of Appeal, Second District, Division 2, California.

March 19, 1957.

Prosecution for possession of heroin. The Superior Court of Los Angeles County, LeRoy Dawson, J., entered judgment of conviction and order denying motion for new trial and defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Poisons ⇐4

To establish the offense of possession of heroin, it is necessary to show that the accused had possession and a knowledge of the character of the heroin possessed. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⇐1144(13)

In reviewing criminal conviction, where defendant claimed that one of the essential elements of the crime had not been proved, reviewing court would accept as established all evidence and all inferences favorable to the state.

3. Poisons ⇐9

In prosecution for heroin which defendant claimed belonged to a roommate who was never proved to have existed, evidence was sufficient to support implied finding that defendant had possession and knowledge of the character of the heroin which was found in his room. West's Ann. Health & Safety Code, § 11500.

4. Poisons ⇐9

In prosecution for possession of heroin, proof that defendant was sole occupant of room harboring a narcotic raised an inference that he was in possession of the drug and that he had knowledge of its character. West's Ann.Health & Safety Code, § 11500.

John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Morris Schachter, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

[1] After a nonjury trial defendant was convicted of possession of heroin, § 11500, Health & Safety Code. He appeals from the judgment and an order denying his motion for new trial. The only point urged by counsel is insufficiency of the evidence to support an implied finding that defendand had possession and knowledge of the character of heroin which was found in his room. That knowledge, as well as possession, is an essential element of the crime is now clear. People v. Winston, 46 Cal.2d 151, 158, 293 P.2d 40; People v. Denne, 141 Cal.App.2d 499, 510, 297 P.2d 451; People v. Antista, 129 Cal.App.2d 47, 50, 276 P.2d 177.

[2, 3] In examining the integrity of this claim we must accept as established all evidence and all inferences favorable to respondent. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. On May 31, 1956, Los Angeles city police officers Swain and Forbes went to a hotel at 711½ East Fifth Street in said city, in response to information that there was a dead body in a toilet on the second floor. They there saw such a body propped up against the toilet door. There were several persons gathered around and defendant was one of them. When the police started to question him they observed that he was under the influence of a narcotic and thereupon arrested him. He stated that he was a user of narcotics, a fact which was later further verified by needle marks upon his arms, and he volunteered the statement, "You can search my room if you want to because there is nothing in it." His room was No. 7 on that same floor. He showed it to the police and they entered it with him. Defendant sat on the bed while the officers searched the room. On a closet shelf under some dirty rags they discovered a

rubber tissue which was tied in a knot and contained heroin. When it was shown to defendant he said he never saw it before and it probably belonged to his roommate. The word "roommate" is the key to his unsuccessful defense.

[4] The claim is that one David Hamilton occupied the room jointly with defendant from April 28, 1956, the day it was rented to defendant, until May 31st, the day of arrest, and that the proof does not exclude a secret possession of the narcotic by Hamilton and by him alone. Henry Koyama, who owned and operated the hotel, testified that defendant rented the room and signed the register on April 28th; he signed the name David Hamilton as well as his own; the witness had no recollection of seeing Hamilton then or at any later time; he knew no such man; all rents were collected from defendant; the room was occupied by defendant alone during the entire period from April 28th to May 31st, and no one visited it on the last named date. No person named Hamilton was produced at the trial and there is no evidence to raise an inference that Hamilton (assuming his existence) was a user or peddler of narcotics. Defendant's testimony that he and Hamilton were joint occupants of the room was in the opinion of the trial judge outweighed by the testimony above summarized. Thus disappeared the substance of the defense, for proof that defendant was sole occupant of the room harboring the narcotic raises an inference that he was in possession of the drug and that he had knowledge of its character. People v. Bassett, 68 Cal.App.2d 241, 247, 156 P.2d 457; People v. Brown, 92 Cal. App.2d 360, 366, 206 P.2d 1095; People v. Oliver, 66 Cal.App.2d 431, 434, 152 P.2d 329; People v. Shafer, 101 Cal.App.2d 54, 58, 224 P.2d 778; People v. Ng King, 60 Cal.App. 2d 239, 240, 140 P.2d 426; People v. Coleman, 134 Cal.App.2d 594, 598, 286 P.2d 582; People v. Cuellar, 110 Cal.App.2d 273, 278, 242 P.2d 694.

Joint occupancy of the room with Hamilton would not necessarily exonerate defendant. People v. Batwin, 120 Cal.App.2d 825, 827, 262 P.2d 88; People v. Hoff, 84 Cal.App.2d 398, 400, 190 P.2d 616; People v. Van Valkenburg, 111 Cal.App.2d 337, 340, 244 P.2d 750; People v. Bagley, 133 Cal.App.2d 481, 484, 284 P.2d 36. Defendant conceded that he was a user of the drug, which means an addict; he was under the influence of a narcotic at the time of his apprehension, and in the absence of evidence that the mythical Hamilton was an addict or peddler the fair inference would be that the "fix" in question had been secreted by defendant in the closet for his own use at a not distant date.

The judgment and order denying new trial are affirmed.

MOORE, P. J., and FOX, J., concur.



149 Cal.App.2d 201

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Eugene BRITTAIN, Defendant and Appellant.

Cr. 5764.

District Court of Appeal, Second District, Division 1, California.

March 18, 1957.

Prosecution for possession of marijuana. From judgment of conviction entered in Superior Court, Los Angeles County, LeRoy Dawson, J., and from order denying motion for new trial, defendant appealed. The District Court of Appeal, White, P. J., held that where defendant was with suspect who was wanted for burglary and for whom officers were waiting in suspect's apartment, and defendant fitted description of another burglary suspect, arresting officers had reasonable grounds for belief of defendant's guilt and marijuana found on defendant was not inadmis-

sible as evidence obtained by unlawful search and seizure.

Judgment and order affirmed.

1. Criminal Law ⇐1036(1)

Unless an accused raises the issue of a claimed unlawful search and seizure at the trial by appropriate objection and motion to strike, the point will not be considered on appeal.

2. Criminal Law ⇐395

Searches and Seizures ⇐7(20)

Where defendant, charged with possession of marijuana, was with suspect who was wanted for burglary and for whom officers were waiting in suspect's apartment, and defendant fitted the description of another burglary suspect, arresting officers had reasonable grounds for belief of defendant's guilt and marijuana found on defendant was not inadmissible as evidence obtained by unlawful search and seizure. West's Ann.Health and Safety Code, § 11500.

Matthews & Hill, John J. Hamilton, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with a violation of Section 11500 of the Health and Safety Code, in that he unlawfully had in his possession marijuana. The information further alleged that defendant had previously been convicted of a violation of the foregoing code section. A plea of not guilty was entered and the alleged prior conviction was denied. Trial was had before the court sitting without a jury. By stipulation the case of the prosecution was submitted on the transcript of the testimony adduced at the preliminary examination and additional testimony was offered. Defendant did not testify in his own behalf. The court adjudged him guilty as charged and found the allegation of a prior conviction to be true. His motion for a new trial was denied and he was sentenced to State Prison. From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

The record reveals the following factual background surrounding this prosecution. Richard W. Green, a police officer of the City of Los Angeles, was investigating a reported burglary which occurred at 1820 W. Pico Boulevard. One of the officers who had been in the vicinity that particular night and had been fired upon, gave a description in the police report of a man seen in that vicinity which neither fitted the description of the defendant nor that of one Verdi Woodward, at whose apartment Officer Green later apprehended defendant. But, Green also had a description of a suspect that was given by officers who were at the scene of the burglary which matched the description of the defendant. Further, Green had a description of a wanted person which matched that of the defendant, which had been received from an unnamed informant at about 3:00 o'clock the afternoon of April 12, 1956.

At approximately 3:30 or 4:00 p. m. on April 12, 1956 Officer Green received from an untested informant "information that one person answering by the name of Verdi Woodward was wanted for burglary and the description of a second suspect also wanted for an attempted safe burglary on Pico Boulevard." Green also received information from one of the officers in the Valley Division that Woodward might live at the particular location where the arrest was later made. Officer Green also took a "mug shot" of Woodward when he and other officers went to the scene of the arrest.

Green and the other officers waited outside at this location for about 6 hours, during which time no one left the apartment. The officers thereupon went to the apartment door and knocked, but nobody answered. Since there was a light on in the apartment, although only a blue light left by the occupants, the officers sought out the manager and showed him the "mug shot"

of Verdi Woodward. The manager thereby identified the room for the officers and let them in. Nobody was inside, so the officers sat down to wait. The officers had no search warrant and in answer to a question as to whether any effort was made to obtain one, Officer Green testified, "No, sir, we did not. The courts were closed after 4:30."

About 11 p. m. Mr. Woodward, his wife, and the defendant entered the apartment. One of the officers immediately stated to all that entered the room: "You are under arrest for burglary." Officer Green testified that based on conversation with the officers who were at the scene of the burglary, and with the informant, defendant's description fitted the description of a suspect at the time of the arrest, and Officer Green, at that time, considered him a suspect.

The officers searched the two men for weapons and, pursuant thereto, a tinfoil packet was taken from the person of the defendant. The contents of this packet, upon scientific analysis, was found to be cannabis sativa, commonly known as marijuana.

The officers took the trio to the University Station where, at 12:30 or 1:00 a. m., the defendant freely and voluntarily made the statement that he had received the marijuana that night from a man on the street and that this person had told him that there might have been enough marijuana to make a "joint" from it.

[1] The sole ground urged for reversal is that the court erred in refusing to suppress all the evidence obtained by the search and seizure that occurred at the time of appellant's arrest. However, the record herein reflects that at no time during the trial did appellant make any objection to the receipt of the evidence or a motion to strike. It is true that on his motion for a new trial, appellant argued the principles enunciated in the case of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. But, we are satisfied that unless an accused raises the issue of a claimed unlawful search and seizure at the trial by appropriate objection or motion to strike, the point will not be considered on appeal. People v. Kelsey, 140 Cal.App. 2d 722, 723, 295 P.2d 462.

[2] However, since the issue was argued on the motion for a new trial, we have examined the record in this case and are persuaded that under the facts and circumstances presented herein, the search of appellant was reasonable. At the time of the latter's arrest he was with one Verdi Woodward, who was wanted for burglary and whom the officers were waiting to arrest. Appellant himself was considered by the officers who arrested him to be a person who fitted the description of a burglary suspect. At the trial Officer Green testified as follows:

> "Q. Officer Green, you are one of the arresting officers of the Defendant Brittain; is that right? A. Yes, sir.
>
> "Q. Now, in your own mind at the time that you arrested him did you consider him a suspect of any kind? A. Yes, we did.
>
> "Q. And what was the basis of your considering him a suspect? A. Conversation with the officers that were at the scene of a burglary at 1820 West Pico on the 12th of I believe it was May, the conversation that we had with some Valley officers with regard to a defendant, Verdi Woodward, and another person which we had talked to that same day."

The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. People v. Kilvington, 104 Cal. 86, 92, 37 P. 799. Moreover, under the facts presented by the evidentiary features of this case, the officers were justified in taking precautionary measures to assure their own safety when they encountered the suspects. It was therefore reasonable for the officers to search them for weapons, and when they found the contraband they were justified in taking it. People v. Martin, 46 Cal.2d 106, 108, 293 P.2d 52.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and FOURT, JJ., concur.

149 Cal.App.2d 339

SOUTHERN CALIFORNIA GAS COMPANY, a Corporation, Plaintiff and Respondent,

v.

Edmond L. GOSS and Agnes Goss, Defendants and Appellants.

Civ. No. 5378.

District Court of Appeal, Fourth District, California.

March 20, 1957.

Action to condemn angular right of way for 8-inch gas line across parcel of land containing 4¾ acres outside limits of city. The Superior Court of Kern County, Warren Stockton, J., rendered judgment awarding damages, and defendants appealed. The District Court of Appeal, Griffin, J., held that the evidence supported finding as to amount of damages.

Judgment affirmed.

1. Appeal and Error ⇐994(3), 1011(1)

Where trial court rests its decision of a question of fact upon conflicting evidence, neither the weight of such evidence nor the credibility of witnesses may be considered by reviewing court.

2. Appeal and Error ⇐996

Where a question of fact as to which reasonable minds might draw different conclusions is presented for review, reviewing court is bound by decision of the trier of facts.

3. Eminent Domain ⇐150

In action to condemn angular right of way for 8-inch gas line across parcel of land, containing 4¾ acres outside limits of city, evidence supported award of only $180 damages, and no abuse of discretion affirmatively appeared, notwithstanding evidence that gas line would diminish the number of lots that could be sold in any future subdivision of the land involved.

T. R. Claflin, Bakersfield, for appellants.

Mack, Bianco, King & Eyherabide, Bakersfield, for respondent.

GRIFFIN, Justice.

Defendants and appellants were and are the owners of a small tract of land (4¾ acres) west of the city limits of the city of Shafter, in Kern County. Plaintiff and respondent desires an angular right of way across such property for an 8-inch gas line. The easement for this purpose consists of .3126 of an acre. There was a conflict in the testimony as to the damages. The trial court, without the aid of a jury, held that the damages were $180. The only question presented on this appeal is whether the court abused its discretion in awarding this amount.

Defendants' expert witness claimed that the damages were $7,000, due to the fact that although defendants' land is now surrounded by small farms and suburban homes, it is potential subdivision property and as such the damages would be that amount.

There is evidence that the population of the Shafter area is increasing constantly and the necessity for the extension of the gas line across defendants' property in an angular direction would cut down, to some extent, the number of lots that could be sold in any future subdivision that might be developed, citing 17 Cal.Jur.2d p. 647, sec. 75; and California Trial & Appellate Practice, by McBaine, page 406.

The qualifications of plaintiff's expert witness to testify as to value are unquestioned. He testified the property was not potential subdivision property; that it was too far removed from the town itself; that it was strictly farming land and that was its "highest and best use"; that no great damage would be done to it by the easement which crosses it with an 8-inch gas line buried 32 inches deep in the soil. Defendants' claim is that his testimony should be disbelieved and was unacceptable in the face of the testimony of defendants' expert witness and the circumstances disclosed.

[1, 2] Defendants, as well as this court, are bound by the familiar rule, too well settled to admit of discussion, that where

the lower court rests its decision of a question of fact upon conflicting evidence, neither its weight nor the credibility of witnesses can be considered by an appellate court, and when there is presented for review simply a question of fact from which reasonable minds might draw different conclusions, this court is bound by the decision of the trier of facts. Carter v. Grosshans, 17 Cal.App. 703, 121 P. 700; County of Los Angeles v. Carpenter, 118 Cal.App.2d 871, 258 P.2d 1056; In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689.

[3] The evidence supports the finding of the trial court and no abuse of discretion affirmatively appears.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



149 Cal.App.2d 94

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Franklin Eugene PETERS and James Henry Smith, Defendants,

Franklin Eugene Peters, Appellant.

Cr. 5775.

District Court of Appeal, Second District, Division 1, California.

March 12, 1957.

Hearing Denied May 8, 1957.

Defendant was convicted of rape. From judgment rendered by the Superior Court of Los Angeles County, Louis H. Burke, J., defendant appealed. The District Court of Appeal, Fourt, J., held, inter alia, that evidence sustained conviction.

Judgment affirmed.

1. Rape ⇐51(2)

Corpus delicti of rape could be shown by circumstantial evidence. West's Ann.Pen.Code, § 261, subd. 3; West's Ann.Code Civ.Proc., § 1871.

2. Rape ⇐51(1)

Evidence sustained rape conviction.

3. Criminal Law ⇐566

In establishing elements of crime, identity of perpetrator need not be established.

4. Criminal Law ⇐1159(2)

Test on appeal is whether there is substantial evidence to support conclusion of trier and not whether guilt is established beyond a reasonable doubt.

5. Criminal Law ⇐563

Slight or prima facie evidence is sufficient to establish corpus delicti.

6. Criminal Law ⇐317

In rape prosecution, failure of accused to testify could properly be considered in weighing evidence. West's Ann.Pen.Code, § 261, subd. 3; West's Ann.Const. art. 1, § 13.

7. Rape ⇐35(2)

It is better procedure, in rape prosecution, to straightforwardly establish that there was no marriage between prosecutrix and accused. West's Ann.Pen.Code, § 261, subd. 3.

8. Rape ⇐51(1)

In rape prosecution, although it was not straightforwardly established that prosecutrix and accused were not married, disparity in ages between 80 year old prosecutrix and accused was sufficient to establish prima facie case that they were not married. West's Ann.Pen.Code, § 261, subd. 3.

Gladys Towles Root, Eugene V. McPherson, Joseph A. Armstrong, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction on a charge of forcible rape under

the provisions of section 261, subd. 3, of the Penal Code.

In an information filed by the district attorney of Los Angeles county, appellant was charged, with his codefendant, James Henry Smith, of forcibly raping Catherine J. Stevens on or about December 7, 1955. Appellant pleaded not guilty, and after several continuances, by stipulation, the People's case was submitted on the transcript of the preliminary hearing. The court appointed a doctor, pursuant to the provisions of section 1871 of the Code of Civil Procedure, to examine Catherine J. Stevens and to ascertain if her health would be impaired by coming to court and whether she was mentally competent to testify. A motion by the appellant was made to strike all of the testimony of the complaining witness and such motion was granted, it having been stipulated that a medical report relating to her condition could be considered.

The facts of the case are substantially as follows: On December 7, 1955, about 3:30 o'clock a. m., a police officer of Montebello observed a car coming from the hills of that vicinity. There was only one headlight burning on the automobile and the officer followed the car a short distance and then stopped it. He observed that the appellant Peters was driving the two-door sedan automobile, and the co-defendant Smith was riding in the front seat, and Catherine J. Stevens occupied the rear seat. When the officer first saw the lady she was trying to push the front seat forward and climb out of the vehicle. She appeared to be quite elderly, grey haired, about five feet two inches tall, and to weigh about 110 pounds. Her face, nose and arms were bruised. The appellant and his co-defendant were both youthful. The officer questioned Peters as to the identity of the lady in the back seat, and Peters stated that she was Smith's grandmother by marriage. When asked what her name was, neither Peters nor Smith could or did tell him her name. The men were then directed to get out of the automobile and they were separated. When appellant and Smith were within two feet of Catherine J. Stevens, while they were being brought back to the automobile, she said of the appellant, "That is him * * * That is him with the brown hair."

A second officer arrived at the scene of the stopping of the car and the arrest, pursuant to a call for assistance. In the back seat of this officer's automobile unit, which was parked across the street, the appellant talked with the officer freely and voluntarily and told about how he, the appellant, and Smith had been on Main Street in Los Angeles "trying to find something * * * looking for a woman, and when they were coming back they saw Mrs. Stevens standing on the corner of 4th and Alameda. They asked where she was going and she said home, and they said they would take her, and he told me at first that she was Smith's grandmother." The officer testified further that: "Then finally he broke down and he said that they had taken her to the hills, and that he had had sexual intercourse with her."

The lady was then taken to the hospital where a medical doctor of many years experience examined and observed her. The doctor testified that she was an elderly lady, not very large, about eighty years of age; that he saw bruises on the face and the nose and the arms, and there was a moderate amount of vaginal bleeding—that is, such an amount as would stain the clothing and the skin. Because of the fact that she was to be taken to the General Hospital for appropriate treatment, the doctor did not make an internal vaginal examination.

About half an hour after the officer first stopped the automobile the appellant and Smith were in the booking office of the police station and, freely and voluntarily, the appellant stated to the first officer that he had picked up the lady at Fourth and Alameda, had driven her to the hills of Montebello and had had an act of sexual intercourse with her, in the rear seat of the car, and that Smith had remained in the front seat. Later on, in the morning, about 10:30 o'clock a. m., a lieutenant of the police department talked with the defendants at the police station. The statements made were

freely and voluntarily given and the appellant stated that he and Smith had been "down in the Main Street area of Los Angeles drinking and attempting to pick up some girls"; that on their way back to East Los Angeles, along Seventh Street, they stopped at about 2:30 o'clock a. m. and picked up a woman, later identified as Catherine J. Stevens; that when they stopped he asked where she was going and she stated she was going home, and she was then told in substance that if she would get into the car, they would take her home; that she got into the rear seat of the automobile and they drove her to Montebello; that they parked the car and "he got in the rear seat with her and that he started * * * messing around." The officer asked what he meant by that phrase, and he stated that he was "trying to have an act of sexual intercourse with her, and that when he started this act and she was screaming and hollering that he put his hand over her mouth to stop her from hollering and he had completed an act of sexual intercourse."

Appellant contends primarily that there was a failure to establish the corpus delicti by any evidence independent of the extrajudicial admissions of the appellant, and that the court erred in receiving extrajudicial statements of the appellant into evidence in the absence of a showing of the corpus delicti of the crime of rape. We are of the opinion that, under the facts of the instant case, there is no merit in the appellant's contentions.

[1] The corpus delicti, or "the substantial and fundamental fact or facts necessary to the commission of a crime" may be shown by circumstantial evidence. People v. Guldbrandsen, 35 Cal.2d 514, 218 P.2d 977. The court said in People v. Singh, 93 Cal.App. 32, at page 35, 268 P. 958, at page 959: "* * * Obviously, the fact of penetration in a case of this character, as in that of rape, may be shown, as may any other ultimate fact, by circumstantial as well as by direct evidence. Indeed, it is undoubtedly true that in many of such cases as this, as well as of cases of rape, it is essential to prove the fact of penetration by means of circumstantial evidence."

[2] Mrs. Stevens was a small woman, approximately eighty years of age, and was seen by the officers in the presence of two young men about 3:30 o'clock in the morning coming out of the Montebello hills. She was apparently not a willing passenger, in that shortly after the automobile was stopped she tried to push the front seat forward and endeavored to get out of the car. The young men were patently not telling the truth when the appellant stated that she was the grandmother of Smith, and neither of them could tell her true name. She was bruised about the face and arms, and had vaginal bleeding from which the skin and clothing were stained. This demonstrated that something had occurred. The bruises indicated force and the vaginal bleeding could have come from an act of sexual intercourse. The bleeding certainly indicated penetration in this particular case. In our opinion, the evidence here, coupled with other facts and the inferences to be drawn therefrom, apart from the admissions of the appellant, point circumstantially to the fact that Mrs. Stevens had been raped.

[3] It is, of course, not necessary, in establishing the elements of the crime, that the identity of the perpetrator be established. People v. Leary, 28 Cal.2d 727, 172 P.2d 34; People v. Sparks, 82 Cal.App.2d 145, 185 P.2d 652; People v. Mehaffey, 32 Cal.2d 535, 197 P.2d 12; People v. Cullen, 37 Cal.2d 614, 234 P.2d 1; People v. Amaya, 40 Cal.2d 70, 251 P.2d 324.

Two of the members of this court as now constituted participated in a decision, Smith v. Superior Court, 140 Cal.App.2d 862, 295 P.2d 982 (a proceeding of appellant's codefendant, wherein he sought a writ of prohibition, following a denial of his motion under section 995 of the Penal Code), wherein we considered some of the very matters now before us. In that case we said, 140 Cal.App.2d at page 864, 295 P.2d at page 983:

"From the disparity in the ages of the petitioner and the victim the trial court

could draw the inference that the victim was not the wife of the defendant. The bruises upon her face, nose and arms, and the presence of blood upon the inner aspect of her thighs and upon her clothing was sufficient proof of the element of force and resistance.

"The evidence as to there having been an act of sexual intercourse with penetration is weak but, we believe, sufficient."

[4] True it is that we had before us at the time of that decision the testimony of the victim, which was later, at the occasion of the trial, stricken. However, we are still of the opinion that the evidence, exclusive of what Mrs. Stevens said, supports the conclusion that there was an act of sexual intercourse. The rule which must guide us, in this appeal, is stated in People v. Daugherty, 40 Cal.2d 876, at page 885, 256 P.2d 911, at page 916, where it was said: "The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. It is not whether guilt is established beyond a reasonable doubt."

[5] Although the appellant vehemently contended, at the time of the trial, that the elements of the corpus delicti of the crime in their entirety had to be established beyond a reasonable doubt, such is not the law in this state. Slight or prima facie evidence is sufficient. People v. Corrales, 34 Cal.2d 426, 429, 210 P.2d 843; People v. Gouldy, 69 Cal.App.2d 6, 10, 158 P.2d 59.

[6] It might be noted too, that the appellant did not, in any proceeding, testify in his own behalf. In People v. Adamson, 27 Cal.2d 478, 489, 165 P.2d 3, 9, the court said:

"The failure of the accused to testify becomes significant because of the presence of evidence that he might 'explain or * * * deny by his testimony' (Art. I, § 13, Cal. Const.), for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it. State v. Grebe, supra [17 Kan. 458]; Mooney v. Davis, supra, 75 Mich. 188, at page 193, 42 N.W. 802; see Code Civ.Proc., §§ 1963(5), (6), 2061(6), (7). No such inference may be drawn, however, if it appears from the evidence that defendant has no knowledge of the facts with respect to which evidence has been admitted against him, for it is not within his 'power' (Code Civ.Proc., § 2061 (6) to explain or deny such evidence."

And in People v. Ashley, 42 Cal.2d 246, at page 268, 267 P.2d 271, at page 285, the court said: "A defendant's failure to take the stand 'to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.' People v. Adamson, 27 Cal.2d 478, 489, 165 P.2d 3, 9, * * *. But the failure to testify will not supply a lacuna in the prosecution's proof. People v. Zoffel, 35 Cal.App.2d 215, 221, 95 P.2d 160; People v. Adamson, 27 Cal.2d 478, 489–490, 165 P.2d 3; People v. Sawaya, 46 Cal.App.2d 466, 471, 115 P.2d 1001; People v. Cox, 102 Cal.App.2d 285, 287, 227 P.2d 290. * * *"

[7, 8] Appellant also insists that there was no showing by any direct evidence of the non-marriage of Mrs. Stevens to him. It would have been better if the district attorney had straightforwardly established that there was no marriage between them, which unquestionably could have been done, and the problem would not now be before us. We believe, however that the disparity in ages and the complete differences of their names was sufficient to establish, prima facie, that they were not married. Smith v. Superior Court, supra; People v. Allison, 44 Cal.App. 118, 185 P. 992.

The statements made by the appellant to the police establish that he was fully aware of what he was saying, and understood all of the terms used by him. The appellant points out that evidence should never be replaced by mere suspicion and conjecture, and with that statement we agree, and in connection therewith there is not the slightest doubt in our minds that the appellant forcibly raped Catherine J. Stevens. At the

time of the hearing of the appellant's application for probation and pronouncement of judgment, apparently counsel for the appellant himself abandoned any thought that he was not guilty, for, among other things he said:

"* * * although the doctor's report was that there were some bruises about her face and her arms and I think that is explained by the defendant's statement in here that he held her mouth. I don't think there was any actual vicious bleeding in this case.

"I would point out to the Court that the defendant was drunk.

* * * * * *

"* * * And I feel that this type of a case here is a very unfortunate one, and it has aggravated circumstances, but I don't feel the defendant would benefit by going up to the penitentiary with other people, hardened criminals. I think this is the type of case where we should consider the drinking, *the fact that he probably wouldn't have done it if he hadn't been drinking,* and I think that if he was given a chance to go on probation that he would rehabilitate himself.

"I would like to state further that from the very first with this boy, the very first note that he sent down to our office, and from the statements we have taken, *he has shown a tremendous amount of remorsefulness.* He has been remorseful about this thing all the way through. As he stated to me several times, and Mrs. Root, he could hardly look anyone in the eye. He said he just felt so bad and so ashamed about it. I think that with that attitude the Court might well consider probation." (Emphasis added.)

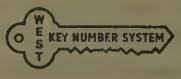
The trial judge quite correctly summed up the whole matter when he said:

"Well, that's a good attitude to have because the crime was an exceedingly vicious crime. It is difficult to imagine how it could possibly have occurred, how a person could be so animal-like and so vicious as to pick up a lady well over 80 years of age, obviously a very elderly, feeble person, under the guise of taking her home, and taking her up into the hills and getting in the back seat, and by his own admission when she is struggling with him put his hand over her mouth and stifle her cries and then proceed to rape her. To say that it has some vicious aspects, it is all vicious from the very start, so it is about time that this young man had some remorse. This doesn't condemn him or say that it is a hopeless situation; remorse is a good sign, but it is a crime that society looks on as being exceedingly vicious and one for which comparable punishment must be administered.

"This boy has had a pretty rugged life. This isn't his first offense of a sexual nature."

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



149 Cal.App.2d 376

Donald K. MacDONALD, Plaintiff and Respondent,

v.

O. D. KINGSLEY, Mrs. O. D. Kingsley, George W. Snipes, and Mrs. George W. Snipes, Defendants and Appellants.

Civ. 9068.

District Court of Appeal, Third District, California.

March 22, 1957.

Action was brought for damages for conversion of personalty and to recover amount paid on an oral contract for the purchase of realty by plaintiff from defendants. The defendants filed a cross-complaint for damages, a declaration that plaintiff had no interest in the realty, and for a restitution of the realty. The Superior Court, Sacramento County, J. O. Moncur, J., entered judgment for plaintiff for the amount of the personalty allegedly converted by defendants, less the sum, which was determined to be the reasonable value of the use of the realty, and an order denying

motion for new trial and defendants appealed. The District Court of Appeal, Warne, J. pro tem., held that alleged fact that contract for purchase of realty was unenforcible, because of the statute of frauds, would not preclude recovery by plaintiff for conversion of his personalty on the realty.

Purported appeal from order denying motion for new trial dismissed, and judgment affirmed.

1. Appeal and Error ⇐907(3)

When appeal is on the judgment roll alone, the evidence is presumed to support the judgment.

2. Appeal and Error ⇐544(3)

The only question presented on appeal on the judgment roll alone was whether findings supported the judgment.

3. Trover and Conversion ⇐32(2, 3, 4)

Allegations in second cause of action of ownership and possession of personalty converted, forcible and unlawful taking thereof by defendants, and the value of such property, stated a good cause of action for conversion.

4. Trover and Conversion ⇐61

Findings of trial court that plaintiff was the owner and in possession of converted personalty, that defendants wrongfully entered on realty where personalty was located and converted personalty to their own use, and that, by reason of such conversion, plaintiff was damaged in the sum of $2,962.50, supported judgment for plaintiff for $2,962.50 for conversion.

5. Trover and Conversion ⇐22

Alleged fact that alleged oral contract for the purchase by plaintiff of realty of defendants was unenforcible, because of the statute of frauds, would not preclude recovery by plaintiff for conversion by defendants of plaintiff's personalty on the realty.

6. Appeal and Error ⇐110

Order denying motion for new trial was not an "appealable order" and purported appeal therefrom would be dismissed.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

Richard A. Case, Sacramento, for appellants.

Floyd H. Pettit, Sacramento, for respondent.

WARNE, Justice pro tem.

Plaintiff and respondent, Donald K. MacDonald, brought an action against appellants Mr. and Mrs. O. D. Kingsley and Dr. and Mrs. George W. Snipes to recover damages for conversion of personal property and to recover $175 paid on an oral contract of sale of real property. The complaint alleged that plaintiff entered into an oral contract of sale of real property with Mr. Kingsley who was the agent of the Snipes; that plaintiff took possession of the property and made valuable improvements thereon; that the agreement was modified by another oral agreement which permitted plaintiff at his election to make his payments at six month intervals rather than monthly; that after a total of $175 had been paid, defendants, without notice to plaintiff, forcibly evicted plaintiff's tenant and converted certain of plaintiff's personal property to their own use.

Defendants filed a cross-complaint in which they alleged that the plaintiff was the assignee of one Adams; that the agreement contained certain building restrictions; that the agreement was breached. They asked for damages, a declaration that plaintiff had no interest in the property, for restitution of the property, and for damages for use and occupancy of the premises. They also raised the defense of the statute of frauds.

After a trial without a jury, judgment was entered in favor of the plaintiff in the amount of $2,962.50, the value of the personal property converted by the defendants, less the sum of $175, which the court determined to be the reasonable value for the use of the premises. It was also

decreed that plaintiff had no right, title or interest in the property.

The defendants have appealed from the judgment on the ground that said judgment is not supported by the evidence and that the findings of fact do not sustain the judgment. The appeal is on the judgment roll only.

[1, 2] When the appeal is on the judgment roll alone, the evidence is presumed to support the judgment. Kompf v. Morrison, 73 Cal.App.2d 284, 286, 166 P.2d 350. Therefore, the only question presented on this appeal is whether the findings support the judgment. Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5; Sacre v. Imperial Water Co. No. 3, 206 Cal. 13, 272 P. 1044; Semple v. Andrews, 27 Cal. App.2d 228, 235, 81 P.2d 203; Hunt v. Plavsa, 103 Cal.App.2d 222, 224, 229 P.2d 482.

[3, 4] In the instant case plaintiff in his second cause of action alleged ownership and possession of the personal property converted, the forcible and unlawful taking thereof by the defendants and the value of said property. These allegations state a good cause of action for conversion. (24 Cal.Jur. 1022.) The trial court found that plaintiff was the owner and in possession of the converted personal property; that the defendants wrongfully entered upon the premises where said property was located and did convert same to their own use; and that by reason thereof, plaintiff was damaged in the sum of $2,962.50. These findings support the judgment so far as based on conversion.

And, for the defendants, the court found that the plaintiff had no interest in the real property involved and granted them restitution of the premises. It also awarded them damages in the sum of $175 for the use of the real property as an offset against the amount awarded plaintiff. We find no insufficiency in the findings to support the relief granted appellants.

[5] The defendants claim that the contract violated the statute of frauds, because it was not in writing, and there was no evidence that the authority of the alleged agent Kingsley was in writing. Assuming that the contract for the purchase and sale of the real property was unenforcible, because of the statute of frauds, plaintiff would still be entitled to recover since his cause of action was not to enforce the contract but for the conversion of his personal property.

The question as to the application of the statute of frauds is, therefore, immaterial.

[6] The purported appeal from the order denying the motion for a new trial is dismissed since it is not an appealable order. The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



149 Cal.App.2d 290

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Phynus REYNOLDS and Joseph Nichols, Defendants.

Joseph Nichols, Appellant.

Cr. 5672.

District Court of Appeal, Second District, Division 3, California.

March 19, 1957.

Hearing Denied May 15, 1957.

Prosecution for unlawfully receiving stolen property. From order of Superior Court, Los Angeles County, Beach Vasey J., suspending proceedings and granting defendant probation, defendant appealed. The District Court of Appeal, Parker Wood, J., held that where defendant had possession of stolen property soon after it was stolen, gave false and evasive statements to investigating officer relating to ownership thereof, and bought property at price disproportionately below its true value, evidence sustained verdict.

Affirmed.

1. Receiving Stolen Goods ⇐8(4)

Rule that possession of stolen property accompanied by no explanation, or unsatisfactory explanation, or by suspicious circumstances will justify inference of knowledge that goods were stolen, is usually applied when accused has possession of property soon after it was stolen. West's Ann.Pen.Code, § 496.

2. Receiving Stolen Goods ⇐8(4)

False or evasive answers to material questions relating to ownership of stolen property tend to prove knowledge that property was stolen. West's Ann.Pen.Code, § 496.

3. Receiving Stolen Goods ⇐8(4)

Sale of property at a price disproportionately low compared to its value may be a suspicious circumstance justifying inference of knowledge that property was stolen.

4. Receiving Stolen Goods ⇐8(3)

Evidence sustained conviction for unlawfully receiving stolen property consisting of adding machine found in defendant's possession 6 days after it was stolen. West's Ann.Pen.Code, § 496.

5. Witnesses ⇐277(4)

In prosecution for unlawfully receiving stolen property, where direct examination of defendant had referred to intermediary, deputy district attorney was justified in asking question on cross-examination whether defendant had heard that intermediary "was shot last night" for purpose of showing that intermediary was not available as witness.

Edwin J. Wilson, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and James L. Mamakos, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant Nichols and one Reynolds were charged in Count I of an information with burglary, and in Count II with unlawfully receiving stolen property. Trial was by jury. Nichols was found not guilty on Count I, and guilty on Count II. Reynolds was found guilty on Count I. Count II was dismissed as to Reynolds. Proceedings were suspended and probation was granted to both defendants. Nichols appeals from the order granting probation.

Appellant contends that the evidence was insufficient to support the verdict.

During the night of December 16, 1955, burglary was committed at the office of Mr. Cotter (a used car dealer in Long Beach) and an adding machine, serial No. 557796, was stolen from the office. Defendant Reynolds was convicted of committing that burglary.

Officer Parris testified that on December 22, 1955, he saw an adding machine in Nichols' cafe, and upon checking the serial number of it with the serial number of the stolen adding machine he found that the numbers were the same; defendant was not present at that time but his sister was there; the officer took the machine, a drill, and checkwriter from the cafe; the next morning the officer saw defendant on a lot next to the cafe; the officer asked him about the adding machine which the officer had taken from the cafe; defendant said that he bought it for $15 from a key man at 2121 Orange Avenue a week or two or a month previously; the officer asked him to go with the officer to the key man; defendant said that he could not go because he had to work; the officer arrested him and while they were in the police car on the way to the key shop defendant said it might be that he bought the machine a month and a half or two months previously, and he was not sure that he bought it from the key man; when they were at the key shop the officer asked the man if he had sold an adding machine to defendant; the man replied that he had not sold an adding machine but had sold a checkwriter to him three or four days previously; on the way from the key shop to the police station defendant said he did not know where he obtained the adding machine—that he bought lots of things from different per-

sons and he knew some of the persons and he did not know the others; he also said that he was in the contracting business but he buys and sells articles if he thinks he can make money on the resale; he also said he did not remember paying $15 for the adding machine; on December 27, in a conversation at the police station, defendant said that he made the deal to buy the machine for $30 in the Royal Palm Cafe but he was not sure as to the name of the fellow; he paid the man $10 in cash and gave $20 to another person who took it to the man later that day; during the conversation at the station defendant Reynolds, who was in jail, was brought into the presence of the officer and defendant Nichols, and the officer asked Nichols if Reynolds was the man from whom he bought the adding machine; Nichols replied that he looked like the man but he (Nichols) was not positive; the officer asked Reynolds if Nichols was the man to whom he sold the machine, and Reynolds replied that he was the man.

Mr. Cotter, the owner of the adding machine, testified that he paid $300 for the machine about three years ago when it was practically new; he bought it from the Nevada Car Company; in his opinion the value of the machine (when stolen) was $200; his estimate as to value was based upon the prices of similar machines, which prices were from $300 to $350.

Mrs. Diamond, called as a witness by defendants, testified that she was office manager of the Long Beach Branch of Remington-Rand; the records of her office show that an adding machine, bearing the serial number of Exhibit 1 (machine here involved), was first sold in 1948 to the Nevada Car Company.

Mr. Honeyman, called as a witness by defendants, testified that he was a real estate broker and was also in the vending business (apparently placing vending machines in restaurants); about December 18, 1955, while he was sitting in a booth in the Royal Palm Cafe he saw an adding machine which was similar to Exhibit 1; the machine was offered for sale for $60; at that time 10 or 12 persons were present; thereafter defendant Nichols entered the cafe and sat in the booth with the witness (Honeyman), and they discussed business; defendant Reynolds approached the booth and asked defendant Nichols if he was interested in buying the adding machine for $60; Nichols asked the witness what he thought the value was; the witness replied that it was worth $40; Nichols offered $30 for it; the witness and Nichols continued to talk about their business affairs; then Nichols left the cafe.

The testimony of defendant Nichols was in substance as follows: He owns three cafes, and he has a contractor's license for cement work. On December 18, 1955, as he was going into the Royal Palm Cafe (not owned by him) he met a little short fellow at the door who said he had a machine for sale. While Nichols and Honeyman were at a table in the cafe a "tall bright [lighter colored] fellow" came to them and said that he had a machine for sale. Nichols knew that man "by sight," but he did not know his name at that time. The man so referred to was defendant Reynolds but the first time Nichols knew his name was later, when they were at the police station. Nichols asked Honeyman what the machine was worth. Honeyman replied that it was worth about $40. Nichols said he would give $30 for it. Reynolds said "O. K." Nichols said he had only $10 with him and he would have to get a check cashed. Reynolds asked Nichols to go to his room and see the machine. While they were in Reynolds' room, Nichols paid $10 and asked Reynolds to put the adding machine in Nichols' car. The "little short fellow" (whom Nichols had seen at the door of the cafe) was also in the room. Reynolds told Nichols that the short fellow would go home with Nichols and that Nichols, after cashing a check, should give $20 to the man. Nichols took the machine to one of his cafes and gave $20 to the man. The first time he (Nichols) heard that the machine was stol-

en was the morning that Officer Parris came to him on the vacant lot (about December 23) and asked him what he was doing "with all that stolen stuff" in his cafe. Nichols asked, "What stolen stuff?" When the officer said that he was going to take him to jail, Nichols said that he might show where he got "the stuff." Then Nichols and the officer went to the key shop. The officer asked the key man if he sold an adding machine to Nichols. The man replied, "No." Prior to that time the officer had not said anything to Nichols about an adding machine. The key man said that he had sold a checkwriter to Nichols. After leaving the key shop, and while they were in the police car, Nichols said he bought the drill from a carpenter and he bought the adding machine from a "tall bright fellow" at the Royal Palm Cafe. The officer asked him if that fellow was Reynolds. Nichols replied that he did not know. The first time Nichols saw the adding machine after the officer took it out of the cafe was when it was in court. Nichols did not go to the key man for the purpose of explaining his possession of the adding machine. He did not tell the officer that he did not remember or know where he bought the machine. He did not know the name of the "little short fellow" at the time the fellow was at the cafe door, but at the time of trial he knew that his name was Love. On cross-examination, the deputy district attorney asked: "You heard that Mr. Love was shot dead last night, didn't you?" Nichols answered "Yes, sir, I did."

Officer Boardman testified, on rebuttal, that on December 22 Nichols asked him where the adding machine and drill were; the officer (witness) asked: "Are they stolen?"; Nichols replied, "No, I bought them from a key man on Orange Avenue."

Nichols testified further that he did not tell Officer Boardman that he bought the adding machine from a key man.

[1–3] Appellant contends, as above stated, that the evidence was insufficient to support the verdict. Section 496 of the Penal Code provides: "Every person who buys or receives any property which has been stolen * * * knowing the same to be so stolen * * * is punishable by imprisonment in a state prison * * *." It is conceded that the evidence was sufficient to establish that the adding machine was stolen. The question, under the contention herein, is whether the evidence was sufficient to prove that defendant had knowledge that the machine was stolen. "[P]ossession of stolen property, accompanied by no explanation, or an unsatisfactory explanation of the possession, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen. The rule is generally applied where the accused is found in possession of the articles soon after they were stolen." People v. Lopez, 126 Cal.App.2d 274, 278, 271 P.2d 874, 876. False or evasive answers to material questions with reference to the ownership of stolen property tend to prove such knowledge. People v. Boyden, 116 Cal. App.2d 278, 288, 253 P.2d 773; People v. Malouf, 135 Cal.App.2d 697, 707–708, 287 P.2d 834. "A sale of property at a price which is disproportionately low in comparison with the value of the property may be a suspicious circumstance." People v. Malouf, supra, 135 Cal.App.2d 706, 287 P.2d 839.

[4] In the present case, the adding machine was found in defendant's possession about six days after it was stolen. Viewing the evidence in the light favorable to the prosecution, the defendant gave false and evasive answers to Officer Parris regarding the purchase of the machine. Some of his false and evasive statements were that he bought it from the key man; that he paid $15 for it; that he did not know where he obtained it; and that he might have bought it a month and a half or two months previously. Also, it could have been inferred from the evidence that the price of $30 which he paid was disproportionately low in comparison with the value of the machine. There was testimony by the owner that the value of the machine was $200; that he paid $300 for it about three years

previously when the machine was practically new. Defendant's statement to the officer as to the identity of the man, in the cafe, who sold the machine was evasive and was a suspicious circumstance. He described the man as a "tall bright fellow" when the fact was (according to defendant's testimony) he knew the man by sight, had seen him "a lot of times," and knew that the man had been the manager of the Brown Jug Cafe in 1944, and while the man was such manager defendant had bought chickens and other things from him at that cafe. In view of the false and evasive statements of defendant, and in view of the other suspicious circumstances including the low price paid, the jury could reasonably find that defendant knew that the adding machine was stolen. The evidence was sufficient to support the verdict.

[5] Appellant asserts further that a "review of the testimony suggests that the jury's verdict may have been influenced by prejudice. An instance where misconduct by the District Attorney appears to have occurred is when he questioned appellant about a Mr. Love, who was the intermediary between defendant Reynolds and appellant." The question so referred to was asked, on cross-examination, and was as follows: "You heard that Mr. Love was shot dead last night, didn't you?" The answer was: "Yes, sir, I did." Appellant argues that the question was improper and had no purpose other than to prejudice the jury against him; and that there was an implication in the question that appellant associated with persons of criminal character. All the circumstances under which the question was asked are to be considered. The question was the first question which was asked on cross-examination by the deputy district attorney. Just prior thereto, counsel for defendant Reynolds had asked defendant Nichols if he knew the name of the "short man," and if that man was the one who first mentioned the adding machine. Nichols had replied that the man's name was Love, and the man had said that he had "a machine." It is reasonable to assume that the reference which had just been made to Love, who was the intermediary, raised a question in the minds of the jurors as to the availability of Love as a witness, either for the prosecution or defense. The circumstances, created by Nichols on direct examination, justified the deputy district attorney in asking a question on cross-examination for the purpose of showing that Love was not available as a witness. Of course, the non-availability of Love as a witness could have been shown without using the words "shot dead," and by merely inquiring whether Love was dead. Under the circumstances, however, it does not appear that the deputy district attorney was guilty of misconduct in asking the question.

The order appealed from is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



149 Cal.App.2d 140

Theodore Roosevelt WILLIAMS, Petitioner and Appellant,

v.

INSURANCE COMMISSIONER of the State of California, etc., Respondent.

No. 17222.

District Court of Appeal, First District, Division 1, California.

March 14, 1957.

Hearing Denied May 8, 1957.

Proceeding on application for writ of mandate to annul Insurance Commissioner's decision revoking licenses to act as a bail agent, bail permittee and insurance agent. The Superior Court, County of Alameda, James R. Agee, J., denied application and petitioner appealed. The District Court of Appeal, Bray, J., held that evidence was sufficient to support findings of petitioner's incompetency, dis-

honesty and untrustworthiness in conduct of his bail business, and such findings also justified revocation of his insurance agent's license.

Affirmed.

1. Mandamus ⇐173

On writ of mandate to annul Insurance Commissioner's decision revoking license to act as a bail agent, bail permittee and insurance agent, trial court was authorized to exercise its independent judgment on the evidence in the proceeding which was in the nature of a trial de novo, and the record of evidence before the Commissioner was competent evidence before the court.

2. Mandamus ⇐187(9)

On appeal from trial court's judgment on application for writ of mandate to annul administrative decision, only issues are whether findings of trial court are supported by substantial evidence and if there is any reasonable doubt as to sufficiency of evidence to sustain a finding, doubt should be resolved in favor of the finding.

3. Evidence ⇐595

An inference, reasonably drawn, constitutes substantial evidence.

4. Bail ⇐60

Section of Administrative Code requiring bail agent to record any valuable consideration other than money received directly or indirectly as premium, guard fee or service charge or any part thereof, required entry of record of property put up as security for payment of premium even though security had not been foreclosed.

5. Bail ⇐60
Insurance ⇐12

In proceedings by Insurance Commissioner to revoke license of bail agent, bail permittee and insurance agent, evidence supported findings that agent had received stolen property knowing or suspecting the property to have been stolen, failed to keep proper records and solicited persons to deal in stolen property. West's Ann. Insurance Code, § 1806; West's Ann.Pen. Code, § 653f.

6. Bail ⇐60

Where party did not have a proper understanding of obligations and duties of bail and had demonstrated an incompetency, dishonesty and untrustworthiness in conduct of his bail business, revocation of his license as bail agent and bail permittee was proper. West's Ann.Insurance Code, § 1806.

7. Insurance ⇐12

Where party conducting a joint business of bail and insurance agent failed to keep proper records of bail transactions and accepted as security in bail transactions property known or suspected to have been stolen, such conduct was not only direct cause for revoking bail license but also justified revocation of insurance agent's license. West's Ann.Insurance Code, §§ 1649(b), 1731(d, e, g), 1805–1807, 1812, 1813, 1821.

8. Insurance ⇐12

Whether actions of party constituting direct cause for revocation of bail license also justified revocation of his insurance license should be viewed from standpoint that the holding of insurance license should not be permitted to continue when it appears that the acts of the holder are against the public interest. West's Ann. Insurance Code, §§ 1649(b), 1731(d, e, g), 1805–1807, 1812, 1813, 1821.

9. Bail ⇐60
Insurance ⇐12

A person who holds an insurance license and who also has a bail license and who violates any requirements of bail license chapter, may be disciplined under statute applicable to person who has failed to perform a duty expressly enjoined upon him by a provision of the Insurance Code or committed an act expressly forbidden by such provision. West's Ann. Insurance Code, §§ 1731(g), 1805(d).

Oliphant, Hopper & Stribling, Ralph E. Hopper, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., of the State of California, Harold B. Haas, Deputy Atty. Gen., for respondent.

BRAY, Justice.

The Insurance Commissioner after a hearing revoked petitioner's licenses to act as a bail agent, bail permittee and insurance agent. After a trial, and an independent weighing of the evidence originally before the commissioner, the superior court denied petitioner's application for a writ of mandate to annul the commissioner's decision. Petitioner appeals.

Questions Presented.

[1, 2] 1. Sufficiency of the evidence and findings.[1]

2. The power of the commissioner to revoke petitioner's insurance license in addition to revoking his bail license.

1. Evidence and Findings.

A recital of the evidence favorable to the court's findings shows that they are well substantiated, although in several instances, considering that evidence with petitioner's denials and evidence, the court, had it believed petitioner, could have found the other way.

1. (a) Motorola TV-Set Transaction.

The accusation before the commissioner charged and the commissioner and the court (finding III) found that petitioner accepted said set as security for payment of a bail surety undertaking premium, suspecting the set to have been stolen. It was stipulated that it was a stolen set. Petitioner admitted its receipt for the purpose mentioned. Petitioner contends that his actions, from which the commissioner and the court drew the inference that he must have known that the set was a stolen one, do not justify that inference.

Police officers came to his office one morning and told him that he had some equipment they wanted to look at, as they suspected it to have been stolen. With his permission they took back to the department a typewriter and an adding machine. Petitioner went with them. It was arranged that the officers were to go to petitioner's apartment that afternoon to see if he had other stolen property. One of the officers arrived at the apartment sooner than planned. Walking down the driveway, the officer saw petitioner come out of the apartment's back door, carrying the television set, and start up stairs leading to the second floor. The officer called to him and asked where he was taking it, and he said to one Davis. Petitioner's explanation of this was that after his visit to the police department, on returning he thought, "when I went to the office and they kept on after the investigation that morning, I started to thinking—what could I possibly have that I didn't know about, to be certain? And at that time I went through my mind—I rambled my brains right fast to think." He then thought of the fact that the person bonded had run away and "without thinking at all, I did move the T-V at that time—that was the end of it— * *" Petitioner admitted that Davis had not asked him for the set and further stated that he did not think Davis was home at the time, and that he had not figured how he was going to get into Davis' apartment, the door might or might not have been open. Petitioner conceded that he was getting the set out of the way before the officers arrived.

[3] Petitioner's actions in attempting to remove the set before the anticipated ar-

1. In cases of this type the trial court is authorized by law to exercise its independent judgment on the evidence. The court poceeding is in the nature of a trial de novo, and the record of the evidence before the administrative board is competent evidence before the court. On appeal from the trial court's judgment the only issue is whether the findings of the trial court were supported by substantial evidence. If there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, the doubt should be resolved in favor of the finding. Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308–309, 196 P.2d 20.

rival of the officers reasonably justifies the inference that petitioner knew or suspected that the set was a stolen one when he received it. An inference of this kind, reasonably drawn, constitutes substantial evidence. See People v. Lopez, 126 Cal. App.2d 274, 278, 271 P.2d 874; People v. Bycel, 133 Cal.App.2d 596, 599, 284 P.2d 927.

1. (b) The Clary Adding Machine.

The accusation charged and the commissioner and the court found (finding IV) that petitioner received and had in his possession a Clary adding machine, which he should have known was stolen property. As in the case of the television set, petitioner's attack is on the sufficiency of the evidence to show that he should have known it was stolen. Petitioner's claim was that this machine was a part of the equipment in the office when he took it over from his brother in January, 1952. He had witnesses to testify that they saw a Clary machine in the brother's office and then in petitioner's office from that time on, until taken by the officers. However, the machine was not stolen from its true owner until about March 20th. Petitioner also attacks the sufficiency of the evidence to show the identity of the stolen machine. However, this evidence is so strong as to not warrant detailing it here. Here, again, petitioner's actions, particularly in contending that both he and his brother had the machine in their possession at a time when it was still in the possession of its true owner, raises a reasonable inference that petitioner knew or should have known it to have been stolen, even though the Oakland police captain testified that they had not prosecuted petitioner because they did not think they had sufficient evidence.

1. (c) The Branch Transaction.

Both the commissioner and the court found that petitioner in violation of section 2102, Title 10, California Administrative Code, failed to keep proper records, as required by that section (findings XII, XIII and XIV). Of the violations found two refer to the Branch transaction. Petitioner failed to keep proper records of (1) cash received, and (2) considerations other than cash received for bail bond premiums. Section 2102 provides: "Every bail agent and bail permittee shall keep complete records of all business done under authority of his license. * * * These records shall be open to inspection or examination by the Commissioner at all times, at the principal place of business of the licensee. * * * Complete record of all business shall include the following: * * * (k) The date of each and every collection of premium or guard fee or service charge fees. * * * (r) If any valuable consideration other than money is received directly or indirectly as premium, guard fee or service charge or as any part thereof, a full statement of such consideration and the circumstances attendant thereto."

[4] Branch paid petitioner $175 on account of a $600 bail bond premium. The Department of Insurance investigator Jordan found no entry of any payment in petitioner's "Receipt and Statement of Charges." On questioning petitioner about the amount paid by Branch petitioner told him $60. Later on, again examining the above mentioned receipt, Jordan found that the figure of "$425" had been inserted as a balance. Petitioner then told Jordan he had received $135 on the account, but could not reconcile the conflict between the stated premium of $600, the balance due of $425, and the amount of $135 he claimed to have received. Jordan found a notebook of petitioner's which indicated that petitioner had received more money than he admitted receiving. Although not shown to the investigator or present at petitioner's place of business, petitioner claims that a little black book containing the proper figures which he produced later, and his explanation that he was merely careless in his manner of keeping accounts, showed no violation of section 2102. Both the commissioner and the trial court were justified in thinking otherwise. In addition to cash payments, Branch gave petitioner a bill of sale to, and physical possession of, a washing machine and a combination television set as security

for the payment of the balance of the premium. Petitioner still has these articles in storage, never having foreclosed his security by sale or otherwise. No reference of any kind appears in petitioner's records concerning this security. Petitioner contends that section 2102 does not require the entry of a security transaction until the security is foreclosed. This contention completely disregards the language of subdivision (r): "If any valuable *consideration other than money* is received directly *or indirectly* as premium, guard fee or service charge or as any part thereof, *a full statement of such consideration and the circumstances attendant thereto.*" (Emphasis added.) Obviously property put up as security for the payment of premium is received at least "indirectly" for the latter purpose.

1. (d) The Grundy Transaction.

Petitioner claims that Grundy paid him $125 as a bail bond premium. He had a miscellaneous collection of records, a file card, a set of "debt cards," a "Money Received Book Moore Rediform," (this was a book containing numbered receipts), a "Receipt and Statement," bail bond documents, and a copy of an order exonerating bail, which copy alone showed the amount of $125 as still owing. In none of the records is the payment shown. Petitioner produced a receipt stub in another receipt book which he used for miscellaneous purposes including some bail matters. This stub purported to show payment of the $125, although it is dated a year later than when petitioner claims to have received the money. Petitioner claimed that the year date on the receipt was merely a clerical error. Thus, there was substantial evidence to support the court's findings that petitioner did not keep the records required by section 2102.

1. (e) The Miller Transaction.

The court found (findings XIV and XV) that petitioner failed to keep a proper record of a bail bond transaction with one Miller, and that petitioner fraudulently represented to one Walter C. Lea when he transferred the Miller account to Lea for collection that the amount due was $200 when in fact it was only $100. Lea paid $150 for the account. Miller testified that the total premiums on his bail bonds came to $400. One payment was by a $200 check of Miller's mother-in-law on which she had written "Balance Bail C. C. Miller." Petitioner claimed that Miller owed him money on a personal transaction and that he credited this sum on that account. Had this check been credited on the premium account the amount due from Miller at the time petitioner sold the account to Lea would have been only $100.

It is petitioner's contention that Miller owed him on the premium account and the personal account together $200 or $250, and hence there was no fraud in representing to Lea that Miller owed him $200 on the premium account. As petitioner puts it, "Miller actually owed appellant a mimimum of $200 and *possibly* $250 as claimed by Appellant." (Emphasis added.) It is rather interesting that although petitioner is not quite sure whether at that time Miller's total indebtedness to him was $200 or $250, no record of this additional transaction appears in petitioner's records. The evidence supporting the findings of both the commissioner and the trial court on this subject is substantial.

1. (f) The Farkas and Hall Transactions.

[5] The accusation charged and both the commissioner and the court found (finding XI) that petitioner solicited Farkas to sell him stolen clothing and that petitioner held himself out to Farkas as ready, willing and able to buy and receive stolen clothing, and further that on eighteen different occasions Hall contacted petitioner regarding dealing in stolen property and each time petitioner expressed willingness to procure certain stolen property for delivery to Hall or to otherwise accept or deal in stolen property. No purpose would be served in detailing the evidence. It resolved itself primarily into questions of credibility between police officers, Farkas and Hall on the one side, and petitioner and his wife on the other. Both the com-

missioner and the trial court believed the officers. Such actions of petitioner were of the type which warranted the finding that the commissioner was entitled to revoke petitioner's license under the provisions of Insurance Code, § 1806: "The commissioner may suspend, revoke or refuse to issue any license under this chapter whenever it is made to appear to him that the holder of such permit is not a fit or proper person to be permitted to continue to hold or receive such license.

[6] Stoumen v. Reilly, 37 Cal.2d 713, 234 P.2d 969, cited by petitioner, is not in point. There it was held that a liquor license could not be taken from a restaurant merely because it was a "hangout" for homosexuals who in nowise committed any illegal or immoral acts there. Here petitioner's acts were criminal in nature—the solicitation of "another * * * to commit or join in the commission of * * * receiving stolen property * * *" Penal Code, § 653f. Such acts showed petitioner to be not fit to hold a bail bond license, particularly as most of the patrons of a bail bond licensee are of the criminal element.

1. (g) Other Findings.

Included in finding XI was a finding to the effect that petitioner had falsely stated to Jordan, a representative of the commissioner, and to Oakland police personnel, in the course of a lawful investigation of petitioner's books, that the Clary adding machine was a part of the equipment acquired by petitioner from his brother. This portion of the finding is supported by the evidence which we have heretofore discussed and was used as a basis for additionally determining that petitioner was not a fit person to hold a license. The trial court further found and the evidence supports the findings, that because of the matters hereinbefore discussed petitioner does not have a proper understanding of the obligations and duties of bail, has demonstrated incompetency and dishonesty, untrustworthiness in the conduct of his bail business, and constituted cause for disciplinary action under the provisions of the Insurance Code. The evidence fully supports the trial court's action.

2. The Insurance License.

The most serious question raised is whether the conduct of petitioner, while directly cause for revoking his bail license under the provisions of the Insurance Code expressly dealing with bail bond licenses, also justifies the revocation of his insurance license under the provisions of the Insurance Code giving grounds for the revocation of insurance agents' licenses. An examination of the Code shows that while the grounds for revoking an insurance license are directly made applicable to bail licenses, the reverse is not so direct. Revocation of bail licenses is expressly provided for in sections 1805, 1806, 1807, 1812 and 1813 in Division 1, Part 2, Chapter 7, Article 1. No other licenses are included in that chapter. Section 1731 in Division 1, Part 2, Chapter 5, Article 3, provides the grounds for revocation of insurance licenses. While section 1731 does not list bail licenses, section 1821 in chapter 7 provides that the provisions of section 1731 shall apply to bail licenses and bail licensees. The only section adapting any provision of chapter 7 to insurance licenses is section 1731, subdivision (g). Thus, our problem is whether petitioner's acts support the conclusions of the commissioner and the court that those acts violated subdivisions (d), (e) and (g) of section 1731.[2]

2. At the time of the commissioner's decision these provided: "(d) Such person has engaged in a fraudulent practice or act or conducted his business in a dishonest manner. (e) Such person has shown incompetency or untrustworthiness in the conduct of his business or has by commission of a wrongful act or practice in the course of his business exposed the public or those dealing with him to the danger of loss. * * * (g) Such person has failed to perform a duty expressly enjoined upon him by a provision of this code, or has committed an act expressly forbidden by such a provision." Stats. 1953, p. 679.

[7, 8] The acts for which petitioner was found to have violated these subdivisions are, failure to keep proper records of bail transactions, accepting as security in a bail transaction property which petitioner suspected or should have known was stolen property, receiving other property which he should have known was stolen property. The records which were improperly kept related exclusively to bail transactions as did the receiving of stolen property as security, and neither related directly to insurance records or matters. The receiving of other stolen property was not necessarily related to bail matters nor directly related to insurance matters. Whether section 1731, subdivisions (d) and (e) apply here does not necessarily depend upon whether the word "business" as used in those subdivisions applies to petitioner's insurance business alone, or whether it includes all of his business which was bail and insurance both. We are convinced that in view of the provisions of section 1731, subdivision (g), hereafter discussed, the fact that petitioner kept proper insurance records would not deny the commissioner the power to revoke the insurance license for failure to keep proper bail records. What of the situation where petitioner who combines bail and insurance businesses, is a receiver of stolen property, suspecting it to be stolen, or under circumstances from which he should have known it to be stolen? Can it be said that while engaged in a part of a joint business he is engaged in a fraudulent practice, does business in a dishonest manner, § 1731, subd. (d), has shown untrustworthiness and by commission of wrongful acts and practices has exposed the public or those dealing with him to the danger of loss, § 1731, subd. (e), but as to part of that joint business he is just the contrary and is honest and trustworthy? To ask the question is to answer it. The whole business is necessarily tainted with his acts in part of the business. Section 1649, subdivision (b), dealing with the issuance of insurance licenses, requires that the granting of the license shall not be against public interest. In determining the questions arising in this case, they should be viewed from the standpoint that the holding of a license should not be permitted to continue when it appears that the acts of the holder are against public interest. The situation is somewhat analogous to that considered in Geibel v. State Bar, 11 Cal.2d 412, 79 P.2d 1073, where the contention was raised that the California Supreme Court had no jurisdiction to discipline an attorney for unprofessional acts in federal court litigation. That court held that it had such jurisdiction and suspended the licenses to practice of the attorneys involved.

[9] Section 1731, subdivision (g), applies to a person who has failed to perform a duty expressly enjoined upon him by a provision of the Insurance Code or committed an act expressly forbidden by such a provision. This subdivision is not limited to duties required under chapter 5 which deals primarily with insurance licensees, but refers to duties required anywhere in the entire Insurance Code. Thus, a person holding an insurance license who, having also a bail license, violates any requirements of chapter 7, the bail license chapter, may be disciplined under section 1731, subdivision (g). Section 1805, subdivision (d), requires that a bail licensee "has not participated in or been connected with any business transaction which, in the opinion of the commissioner tends to show unfitness to act in a fiduciary capacity or to maintain the standards of fairness and honesty required of a trustee or other fiduciary." The evidence shows that petitioner has violated that requirement.

Section 1812 provides that the commissioner "may make reasonable rules necessary, advisable, or convenient for the administration and enforcement of the provisions of" chapter 7. Pursuant thereto, sections 2089 and 2102, among others, California Administrative Code, Title 10, were adopted. Section 2089 provides that no bail licensee shall charge or collect in any bail transaction any sum in excess of the premium and other charges there permitted.

The Branch transaction shows and the commissioner found that petitioner violated that section. Section 2102 provides that every bail licensee shall keep complete records of all business done under the authority of his license, which records shall be open to the commissioner at all times and shall include, among other matters, (k) "The date of each and every collection of premium or guard fee or service charge fees," and (r) a statement of any consideration other than money received directly or indirectly as premium or fee. The evidence amply supports the commissioner's finding that petitioner did not keep such records. Therefore, petitioner "failed to perform a duty expressly enjoined upon him by a provision of this code" and "has committed an act expressly forbidden by such a provision." § 1731, subd. (g).

Section 1639 provides that the purpose of chapter 5 "is to protect the public by requiring and maintaining professional standards of conduct on the part of all insurance" licensees. The evidence clearly shows that petitioner violated those standards.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

48 Cal.2d 159

In re Thomas Francis WREN III, a Minor, on a Writ of Habeas Corpus.

Cr. 6007.

Supreme Court of California,

In Bank.

March 21, 1957.

Original habeas corpus proceedings by mother for custody of minor child. The Supreme Court, Spence, J., held that where valid Mississippi divorce decree granted custody of minor child to mother for nine months of the year with no restrictions as to removal of the child from Mississippi and mother moved to California with the minor child, California courts had jurisdiction to determine the question of whether there were any changed circumstances which would warrant a modification of the custody provisions of the Mississippi divorce decree.

Superior Court directed to take further proceedings.

1. Habeas Corpus ⇐20

Under Mississippi law, habeas corpus proceedings may not be used as a device to amend child custody provisions of an existing Mississippi divorce decree.

2. Habeas Corpus ⇐25(1)

The law of Mississippi that courts of that state, under certain circumstances, may modify on habeas corpus child custody provisions of prior divorce decree of a sister state upon a showing of changed circumstances is in accord with the law of California.

3. Habeas Corpus ⇐99(1)

Where sole issue in previous Mississippi habeas corpus proceeding was the right to custody of minor child as between the mother and paternal grandparents, order of Mississippi court which purported to award permanent custody of the child to the father who was not a party to the proceeding was void.

4. Judgment ⇐243

A judgment may not be entered either for or against a person who is not a party to the proceeding, and any judgment which does so is void to that extent.

5. Judgment ⇐251(1)

Any judgment that goes beyond the issues litigated is void insofar as it exceeds those issues.

6. Habeas Corpus ⇐112

Where valid Mississippi divorce decree granted custody of minor child to mother for nine months of year without restrictions as to removal of child from Mississippi, order of Mississippi court in habeas corpus proceeding which purported to deprive the mother of her custody rights was void, and mother who moved to California with the child was not in contempt of a lawful order of a Mississippi court. West's Ann.Code Civ.Proc., § 1209, subd. 5.

7. Habeas Corpus ⇐112

Where purported finding of constructive contempt made by Mississippi court because of violation of order, in habeas corpus proceeding, purporting to deprive mother of custody rights awarded to her by prior valid Mississippi divorce decree, failed to recite any facts relative to notice or hearing preliminary to the finding of contempt, purported finding of constructive contempt was void. West's Ann.Code Civ. Proc., § 1209, subd. 5.

8. Constitutional Law ⇐273

Since the charge of contempt is essentially criminal in nature, due process requires notice and an opportunity to prepare a defense before an adjudication of constructive contempt can be made.

9. Habeas Corpus ⇐41

Where valid Mississippi divorce decree granted custody of minor child to mother for nine months of year without restrictions as to removal of minor child from Mississippi and mother moved to California with the minor child, California court had jurisdiction in habeas corpus proceeding to determine the question of whether there were any changed circumstances which would warrant the modification of the custody provisions of the Mississippi divorce decree.

10. Habeas Corpus ⇐44

The Superior Court rather than Supreme Court is the logical forum for habeas corpus proceedings to consider changed circumstances relating to the fitness of the parents or the best interests of the child which would warrant a modification of custody provisions of foreign divorce decree.

Paul D. Morse, Oakland, for petitioner.

J. F. Coakley, Dist. Atty., Alameda, John C. Baldwin, Deputy Dist. Atty., Fitzgerald, Abbott & Beardsley and Stacy H. Dobrzensky, Oakland, for respondent.

SPENCE, Justice.

This is the second habeas corpus proceeding instituted in this state involving the respective claims of Thelma B. Wren, the mother, and Thomas Francis Wren II, the father, to the custody of their son Thomas Francis Wren III. The boy is their only child, and he is now five years of age.

The first proceeding in this state was instituted by the father in the Superior Court of Alameda County. The present proceeding was instituted by the mother in this court after the superior court had expressly made its orders subject to such disposition as might be made by a higher court. In the meantime the boy has been ordered by the superior court into the custody of the Sheriff of Alameda County.

Prior to the commencement of the California proceedings the mother had moved to California with the boy and had become a resident of this state. The father is a career member of the United States Air Force and is presently stationed at Elgin Field, Florida. The family formerly resided in Mississippi, and the child's paternal grandparents continue to reside in that state. The mother and father were divorced in Mississippi in 1953.

The mother contends that the merits of her custody claim should be adjudicated in this state as *parens patriae* on the basis of the best interests of the child as determined by a court of this state. Titcomb v. Superior Court, 220 Cal. 34, 39, 29 P.2d 206; also Sampsell v. Superior Court, 32 Cal.2d 763, 780, 197 P.2d 739. We have concluded upon the record before us that this contention should be sustained. We have further concluded that such determination should be made in the proceeding in the superior court and that, pending such determination, the child should be remanded to the temporary custody of the mother.

An understanding of the proceedings in the courts of this state requires a statement of the background of this litigation. The 1953 Mississippi divorce decree provided for divided custody of the child—the mother having custody for nine consecutive months and the father for three consecutive months of each year—with visiting privileges for either party during the other parent's custody. The decree contained no restrictions as to where the child should be kept while in the custody of either parent. The father was ordered to pay thirty dollars per month for support of the child during the nine months' custody with the mother.

Following the 1953 divorce decree, the mother, having no financial means for her own support and receiving no support money for the child from the father, placed the child with his paternal grandparents in Mississippi until such time as she could provide for the child. The father, being in military service, was and is without an established home of his own for the care of the child. In the spring of 1956, the mother became so situated that she could provide for the child. She sought to obtain him from the grandparents but they refused to relinquish him to her. The mother then instituted a habeas corpus proceeding in Mississippi against the grandparents. The father was not a party to that proceeding. After a hearing, the Mississippi court by decree of July 12, 1956, purported to award the custody of the child as follows: to the father until July 20, 1956, then to the mother from July 20, 1956, to September 1, 1956, and if by the latter date a final decree should not be entered, then the court reserved the right to enter such supplemental custody award as it might deem proper.

On August 31, 1956, the mother brought the child to California, settling in Alameda County. On September 28, 1956, the Mississippi court made its decree in the pending habeas corpus proceeding. Following a statement of the previously made custody provisions, the decree recited that the court had orally charged the mother to return the child to the father or paternal grandmother by September 1, 1956, until further order; that on the last-mentioned date it had not rendered a further decree because of the mother's "contemptuous action" and its inability to discover the child's whereabouts; and that having since been advised that the child was in California, it awarded "permanent custody" to the father, with the right to leave the child with the paternal grandparents when the father should be absent on military service.

On October 3, 1956, the father filed proceeding numbered 27654 in the Superior Court of Alameda County. That proceeding was based upon the theory that the father's right to custody had been validly determined by the decree in the Mississippi habeas corpus proceeding dated September 28, 1956. Upon filing his petition, the father sought and obtained a warrant for the detention of the child under the provisions of section 1497 of the Penal Code. Since that time the child has been in the custody of the sheriff except for certain times, including the Christmas holidays, when the child has been released by order of the superior court to the temporary custody of the mother upon filing a bond. The superior court apparently concluded that the Mississippi habeas corpus decree was valid and controlling. It therefore took no evidence and made no findings concerning the fitness of the parents or the best interest of the child. Its final order in favor of the father was entered after the filing of the present proceeding and was expressly made subject to any order of this court pertaining to the custody of the child.

There is no question concerning the validity of the 1953 Mississippi divorce decree and its right to full faith and credit in this state as an adjudication of all matters therein settled at that time. Foster v. Foster, 8 Cal.2d 719, 728, 68 P.2d 719; 27 C.J.S., Divorce, § 316, p. 1183; 16 Cal. Jur.2d, Divorce and Separation, § 312, p. 613. As above recited, that decree provided for divided custody of the child and contained no restrictions as to the child's removal from the state.

The mother maintains that the 1956 Mississippi habeas corpus decree was void because that court had no jurisdiction (1) to modify the provisions of the earlier Mississippi divorce decree, (2) to enter any decree in favor of the father, who was not a party to that proceeding, or (3) to find her guilty of contempt since she did not violate any "lawful" order and had no notice of any contempt hearing. Her position appears to be well taken.

[1, 2] First, it is settled under Mississippi law that habeas corpus may not be used "as a device to amend" an existing Mississippi divorce decree. Hinman v. Craft, 204 Miss. 568, 37 So.2d 770, and cases cited. The decision in the Hinman case was reached with full recognition of the rule in Mississippi that the courts of that state under certain circumstances may modify on habeas corpus a prior divorce decree of a sister state upon a showing of changed circumstances. Haynie v. Hudgins, 122 Miss. 838, 85 So. 99; See also Bassett v. Sims, 220 Miss. 210, 70 So.2d 530. This rule empowering such modification under such circumstances is in accord with the law of this state. Sampsell v. Superior Court, supra, 32 Cal.2d 763, 780, 197 P.2d 739.

[3–5] Second, the Mississippi court purported to award permanent custody of the child to the father, although he was not a party to the proceeding. The sole issue in the Mississippi habeas corpus proceeding was the right to custody as between the parties to that proceeding, who were the mother and the paternal grandparents. It is the general rule that a judgment may not be entered either for or against a person who is not a party to the proceeding, and any judgment which does so is void to that extent. Hutchinson v. California Trust Co., 43 Cal.App.2d 571, 575–576, 111 P.2d

401; Samter v. Klopstock Realty Co., 31 Cal.App.2d 532, 535, 88 P.2d 250; 49 C.J.S., Judgments, § 28, p. 68; see also McCormick v. McKinnon, 219 Miss. 184, 68 So.2d 301, 305. Similarly, any judgment that goes beyond the issues litigated is void insofar as it exceeds those issues. Road Material & Equipment Co. v. McGowan, Miss., 91 So.2d 554, 557; McHenry v. State, 91 Miss. 562, 44 So. 831, 833, 16 L.R.A.,N.S., 1062.

[6–8] Third, it is uniformly held that a constructive contempt can only be predicated on disobedience of a "lawful" order of a court. 17 C.J.S., Contempt, § 12, p. 13; Code Civ.Proc. § 1209, subd. 5. As has been indicated, any order of the Mississippi court in the habeas corpus proceeding purporting to deprive the mother of the custody rights awarded to her by the prior Mississippi divorce decree was void and therefore not a "lawful" order. Furthermore, the purported finding of constructive contempt was void, as it failed to recite any facts relative to notice or hearing preliminary to the finding of contempt. Ex parte Wisdom, Miss., 79 So.2d 523, 525–526. Since the charge of contempt is essentially criminal in nature, due process requires notice and an opportunity to prepare a defense before an adjudication of constructive contempt can be made. Cooke v. United States, 267 U.S. 517, 536–537, 45 S.Ct. 390, 69 L.Ed. 767; Ingold v. Municipal Court, 85 Cal.App.2d 651, 653, 193 P.2d 808; 12 Cal.Jur.2d, Contempt, § 68, pp. 89–90.

There is nothing in Moniz v. Moniz, 142 Cal.App.2d 527, 298 P.2d 710, which on the principle of comity would indicate that because petitioner came to California with the child and allegedly thereby committed a "contemptuous" act, she cannot under the circumstances presented here ask a California court to make an order contrary to the decree in the Mississippi habeas corpus proceeding. In the Moniz case the mother sought to invoke in California the aid of a New Mexico decree purporting to modify the custody provisions of a California decree, which last-mentioned decree had been violated by the mother when she took the children to New Mexico and established residence there. The doctrine of comity was held not to apply for these reasons: (1) the mother was acting in open definance of a valid California decree at the time the New Mexico decree was obtained; and (2) it would be incongruous to recognize the New Mexico decree, for then the California court would be yielding to a foreign decree in disregard of its own valid order. But here the Mississippi divorce decree contained no provisions restricting the removal of the child from the state. It was subject to modification in Mississippi only by direct application in that cause and not by the device of a later habeas corpus proceeding. Hinman v. Craft, supra, 204 Miss. 568, 37 So.2d 770. Thus the mother's act in bringing the child to California did not involve a violation of any "lawful" order of the Mississippi court or any other court.

[9, 10] In view of our conclusion that the Mississippi habeas corpus decree was invalid and that the courts of this state can and should determine the question of whether there are any changed circumstances which would warrant a modification of the custody provisions of the 1953 Mississippi divorce decree, Foster v. Foster, supra, 8 Cal.2d 719, 727, 68 P.2d 719, the question arises as to whether this court or the superior court should make such determination. The parties have submitted themselves to the jurisdiction of both the superior court and this court, but no testimony has been taken in either court on the main factual issues which should be resolved. It is our conclusion that the required determination can be more appropriately made by the superior court in the proceeding there pending. That court is the logical forum for the presentation of evidence concerning any changed circumstances relating to the fitness of the parents or the best interests of the child. Sampsell v. Superior Court, supra, 32 Cal.2d 763, 780–781, 197 P.2d 739. In the meantime it appears that for the immediate best interests of the child, he should be in the temporary custody of one of his parents rather than in the custody of the sheriff. The

mother was awarded the principal custody by the valid Mississippi divorce decree. She is residing in this state, and there is nothing in the record to indicate that she is not fit to have such temporary custody.

It is therefore ordered that Thomas Francis Wren III be remanded to the temporary custody of his mother, Thelma B. Wren, pending further determination by the Superior Court of the State of California in and for the County of Alameda concerning his custody in proceeding numbered 27654 in said court; that the Sheriff of Alameda County be directed to deliver said Thomas Francis Wren III into the custody of Thelma B. Wren upon her furnishing a bond in a reasonable amount to be fixed by said superior court; and that the said superior court be directed to take further proceedings in accordance with the views expressed in this opinion.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and McCOMB, JJ., concur.



48 Cal.2d 136

Carlo FIRATO, Salino Firato, his wife, and Raymond Firato, Plaintiffs and Appellants,

v.

L. B. TUTTLE, Beulah L. Tuttle, his wife, Pietrina Sardina, Orville B. Stanger, Virgie R. Stanger, his wife, Harold D. Edelen, Northwestern Mutual Life Insurance Co., a corporation, Chester A. Berry, Mabel Berry, his wife, et al., Defendants,

Harold D. Edelen, Northwestern Mutual Life Insurance Co., a corporation, Chester A. Berry and Mabel Berry, his wife, Respondents.

S. F. 19296.

Supreme Court of California,

In Bank.

March 19, 1957.

Rehearing Denied April 17, 1957.

Beneficiaries under trust deed brought action against subsequent purchasers and encumbrancers to have trust deed declared a first lien on realty described therein and to cancel purported reconveyance executed by original trustee without authority because indebtedness had not been paid. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., entered judgment adverse to beneficiaries, and they appealed. The Supreme Court, Spence, J., held that where trust deed stipulated that recitals in any deed executed by trustee were conclusive proof of matters recited, and trustee's deed of reconveyance stated that indebtedness had been paid, beneficiaries under trust deed could not prevail over purchasers and encumbrancers, who relied on recordation of reconveyance deed, were not good faith purchasers and encumbrancers unless beneficiaries could prove that purchasers and encumbrancers for value, though deed of reconveyance was issued without authority and indebtedness had not been paid.

Judgment affirmed.

Opinion, 299 P.2d 394, vacated.

1. Vendor and Purchaser ⇐240

In suit by beneficiaries named in trust deed to have the trust deed declared a first lien on realty described therein and to cancel a purported reconveyance by original trustee without authority, because loan had not been repaid in full, beneficiaries had burden of pleading and proving that purchasers of the realty were not innocent purchasers for value. West's Ann.Civ.Code, §§ 870, 2243.

2. Vendor and Purchaser ⇐239(1)

Instruments, which are wholly void, cannot ordinarily provide the foundation for good title, even in the hands of an innocent purchaser, as where a deed has been forged or has not been delivered.

3. Vendor and Purchaser ⇐239(1)

Section of the Civil Code providing that where a trust in relation to realty is expressed in instrument creating estate, every transfer or other act of trustees, in contravention of the trust, is absolutely void, when read with section of the Civil Code providing that every one to whom property

is transferred in violation of a trust, holds property as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration, does not make the unauthorized reconveyance of realty, which is covered by trust deed, by trustee named in trust deed void as to a purchaser in good faith, and for a valuable consideration. West's Ann.Civ.Code, §§ 870, 2243.

4. Mortgages ⇐156

Vendor and Purchaser ⇐239(1)

Where trust deed stipulated that recitals in any deed executed by trustee were conclusive proof of matters recited, and trustee's deed of reconveyance stated that indebtedness had been paid, beneficiaries under trust deed could not prevail over purchasers and encumbrancers, who relied on recordation of reconveyance deed, unless beneficiaries could prove that purchasers and encumbrancers were not good faith purchasers and encumbrancers for value, though deed of reconveyance was issued without authority and indebtedness had not been paid. West's Ann.Civ.Code, §§ 869, 870, 2243.

Bressani & Hansen and Gerald B. Hansen, San Jose, for appellants.

Royal E. Handlos, San Francisco, Jones, Griswold & Henley and Bruce P. Griswold, San Jose, for respondents.

SPENCE, Justice.

Plaintiffs sued to have a deed of trust, which named plaintiffs Carlo Firato and Salino Firato as beneficiaries, declared a first lien upon the real property described therein and to cancel a purported reconveyance executed by the original trustee. General and special demurrers of respondents to the first amended complaint were sustained with leave to amend. Plaintiffs appeal from the judgment entered in favor of respondents upon plaintiffs' failure to amend.

The following facts, appearing in plaintiffs' first amended complaint, are the basis for their alleged cause of action.

On June 20, 1947, plaintiffs Carlo Firato and Salino Firato loaned $8,500 to defendants Tuttle, receiving from the Tuttles a promissory note secured by a deed of trust on the real property here involved. One Gladys E. McCormick was named trustee on the deed of trust, which was recorded on the date it was executed. The trustee was authorized, by the deed of trust, to reconvey the trust property only if the loan it secured was paid in full.

On July 1, 1949, the Tuttles deeded the land to defendant Sardina, and the trustee, without authority, executed a reconveyance. The major portion of the loan had not been repaid, but plaintiffs concede that the reconveyance recited that payment had been made. The Tuttles' deed to Sardina and the reconveyance were recorded on July 1, 1949.

In 1950, Sardina conveyed the land to defendants Stanger, who executed a deed of trust on the realty to defendant Edelen, as trustee, securing a loan of $8,800 from defendant Northwestern Mutual Life Insurance Company. In 1953, the Stangers conveyed the property to defendants Berry. On April 8, 1954, plaintiff Raymond Firato was substituted as trustee under the Firato deed of trust in place of McCormick.

While Gladys McCormick's peculations have resulted in other litigation, Hagen v. Silva, 139 Cal.App.2d 199, 293 P.2d 143; Cignetti v. American Trust Co., 139 Cal. App.2d 744, 294 P.2d 490, the previous cases have not, as here, directly involved an attack upon the unauthorized reconveyance itself.

[1] Plaintiffs nowhere allege that respondents were not innocent purchasers for value or that respondents took their title with notice or knowledge of the unauthorized act of the original trustee. Since respondents are shown by the pleadings to hold legal title, the burden is on plaintiffs to plead and prove that respondents were not innocent purchasers for value if such fact would be determinative of the respective rights of the parties. Kowalsky v. Kimberlin, 173 Cal. 506, 510, 160 P. 673;

Ferguson v. Ferguson, 58 Cal.App.2d 811, 814, 137 P.2d 735.

Plaintiffs contend, however, that their deed of trust should be declared a first lien on the realty even if respondents were innocent purchasers for value. They cite section 870 of the Civil Code which states: "Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the Trustees, in contravention of the trust, is absolutely void." This section, enacted in 1872, is similar to an early New York statute. 1 R.S. 730, § 65. In 1859 it was held by a divided court in Briggs v. Davis, 20 N.Y. 15, that this statute made a wrongful reconveyance under a deed of trust absolutely void even as to an innocent purchaser. Since the reconveyance was "inoperative" according to the majority, the beneficiaries under the original trust had not lost their beneficial interests.

While the courts of this state have treated section 870 as applicable to deeds of trust in certain instances, innocent purchasers for value have not been deprived of their rights by these decisions. Mersfelder v. Spring, 139 Cal. 593, 73 P. 452; Savings & Loan Soc. v. Burnett, 106 Cal. 514, 39 P. 922; Phelps v. American Mortgage Co., 40 Cal.App.2d 361, 104 P.2d 880; Hayward Lbr. & Investment Co. v. Corbett, 138 Cal. App. 644, 33 P.2d 41. There is certain language in Phelps v. American Mortgage Co., 6 Cal.2d 604, 59 P.2d 95, which appears to indicate that an innocent purchaser would not be protected; but in that case the parties were alleged to have taken with notice, and the court stated that "an examination of the recorded documents would provide notice of the true priorities." 6 Cal.2d at page 609, 59 P.2d at page 97. It is therefore apparent that the question of the rights of innocent purchasers for value, without either actual or constructive notice, was not before the court.

[2, 3] Instruments which are wholly void cannot ordinarily provide the foundation for good title even in the hands of an innocent purchaser, as where a deed has been forged or has not been delivered. Trout v. Taylor, 220 Cal. 652, 656, 32 P.2d 968. It does not appear, however, that section 870 of the Civil Code should necessarily make the unauthorized reconveyance by a trustee void as to such a purchaser. Section 2243 of that code states: "Everyone to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, *unless he purchased it in good faith, and for a valuable consideration.*" (Emphasis added.) This section was also enacted in 1872 and has been treated as correlative to section 870. Chapman v. Hughes, 134 Cal. 641, 657, 58 P. 298, 60 P. 974, 66 P. 982.

The rule indicated by section 2243, which would protect innocent purchasers for value who take without any notice that the conveyance by the trustee was unauthorized, is in accord with the rule protecting such purchasers who acquire their interests from one who holds a general power and who makes a conveyance for an unauthorized purpose, see Alcorn v. Buschke, 133 Cal. 655, 66 P. 15, and cases cited, or from a trustee under a secret trust. Ricks v. Reed, 19 Cal. 551; Rafftery v. Kirkpatrick, 29 Cal.App.2d 503, 508, 85 P.2d 147; Civil Code, § 869. The protection of such purchasers is consistent "with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business." Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions. Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444.

[4] As section 2243 of the Civil Code must be read with section 870 of the same code and because of the obvious desirability of protecting innocent purchasers for value who rely in good faith upon recorded instruments under the circumstances presented here, we conclude that plaintiffs were required to plead that respondents were not such innocent purchasers for value in order to state a cause of action against them. In the absence of such allegations, the trial court properly sustained respondents' demurrers to plaintiffs' first amended complaint.

The judgment is affirmed.

GIBSON, C. J., CARTER, TRAYNOR and McCOMB, JJ., and VAN DYKE and DOOLING, JJ. pro tem., concur.

Rehearing denied; VAN DYKE and DOOLING, JJ., pro tem., participating in place of SHENK and SCHAUER, JJ.



48 Cal.2d 179

In re FOSSELMAN'S ESTATE.

In the Matter of the Estate of Willinore M. Fosselman, Deceased,

Harriet Palmer, Petitioner and Appellant,

Charles F. Salkeld, as Executor of the Last Will and Testament of Willinore M. Fosselman, Deceased, and Adele Marsh Rowe, Contestants and Respondents.

L. A. 24145.

Supreme Court of California, In Bank.

March 22, 1957.

Proceeding on petition for probate of two holographic documents claimed to be codicils to last will and testament of testatrix. The Superior Court, San Diego County, C. M. Monroe, J., entered judgment denying admission of documents to probate and petitioner appealed. The Supreme Court, Traynor, J., held that evidence was sufficient to support findings of general testamentary incompetency of 88 year old testatrix and that she was suffering from an insane delusion as to petitioner's identity which was the effective cause of execution of purported codicils.

Affirmed.

Opinion, 301 P.2d 127, vacated.

1. Wills ⇐21

To successfully contest a will on ground of lack of testamentary capacity, contestant must prove testamentary incompetency at time of execution of will.

2. Wills ⇐53(2)

Testamentary incompetency on a given day may be proven by evidence of incompetency at times prior to and after the day in question.

3. Wills ⇐52(6)

Once testamentary incompetency is shown to exist and that it is caused by a mental disorder of a general and continuous nature, inference is reasonable that incompetency continues to exist, particularly in cases where decedent is suffering from senile dementia. West's Ann.Code Civ.Proc., § 1963, subd. 32.

4. Wills ⇐55(7)

In proceeding to admit holographic documents to probate as codicils to last will and testament of testatrix, evidence sustained finding of general testamentary incompetency of 88 year old testatrix suffering from senile dementia on day that she executed such documents.

5. Wills ⇐55(3)

In proceeding to admit certain holographic documents to probate as codicils of testatrix' last will and testament, evidence supported finding that 88 year old testatrix was suffering from insane delusion as to identity of person named as beneficiary in purported codicils and that such delusion was the effective cause of the execution of such documents.

6. Wills ⇐52(5)

Where it is sought to set aside document purporting to be will of deceased on ground that its execution was the result of an insane delusion, burden is upon contestants to prove not only that deceased was suffering from an insane delusion but that

such delusion bore directly upon and influenced the creation of the terms of the purported will.

George R. McClenahan, San Diego, for appellant.

Luce, Forward, Kunzel & Scripps and Edgar A. Luce, San Diego, for respondents.

TRAYNOR, Justice.

Harriet Palmer filed a petition for probate of two holographic documents claimed to be codicils to the last will and testament of Willinore M. Fosselman. One reads:

"I give and bequeath to my friend, Harriet Palmer, the sum of ten thousand 10,000 June 17th 1953 to be paid to her after my death (death).

Willinore M. Fosselman
4656—49th St.
San Diego, Cal."

The other reads:

"Jan. 12th, 1955

When I die, I want this house to be given to Mrs. Harriet Palmer for her to live in if she chooses.

Willinore Fosselman
4656—49th St."

Charles F. Salkeld, as executor, and Adele Marsh Rowe, residuary legatee under the will, contested the admission of these documents to probate on the ground that Mrs. Fosselman lacked the mental capacity to make a valid codicil at the times she executed them.

After a trial without a jury the court found:

"* * * that at the time said two purported codicils * * * were written, dated and signed, and continuously up to the death of said decedent, she was suffering from senile dementia and was of such mental incompetency as to render her incapable of executing a Will, and was suffering from an insane delusion to the effect that Harriet Palmer was an old family retainer who had been in her family many years previously, and was a very old friend; and that in fact the said decedent actually had known the said Harriet Palmer as an employee of only a few months standing when the said delusion became fixed, which said delusion was the effective cause of the execution of said instruments and which instruments would not have been executed by the said testator were it not for the said insane delusion." (Finding VII.)

"* * * that at the time of the execution of each of said instruments and continuously up to the time of her death the said decedent was mentally incompetent to execute a Will or codicil and had not sufficient mental capacity to be able to understand the nature of the acts she was doing nor to understand and recollect the nature and situation of her property or her relation to the persons who had claims upon her bounty. * * *" (Finding VIII.)

Accordingly, the court entered judgment denying the admission of the two documents to probate. Petitioner appeals on the ground that the findings of the trial court are not supported by substantial evidence.

Prior to April, 1950, Mrs. Fosselman resided in New York City. She maintained with the Bankers Trust Company a securities-custodian account, which at the time of her death was of the approximate value of $460,000. The account was under the supervision of Charles F. Salkeld, a vice-president of the company, upon whom she came to rely for personal and business advice. In New York, Mrs. Fosselman was considered to be intelligent and quite alert for her age.

In April, 1950, Mrs. Fosselman moved to San Diego, California, intending to make her home there. Shortly after her arrival in San Diego, she tripped and fell in a hotel lobby and suffered a broken hip. She was treated by Dr. R. L. Hippen and removed to Mercy Hospital, where she remained for about seven weeks. While in the hospital she executed a will disposing of

her entire estate and appointing Mr. Salkeld executor. At about the same time she asked Mr. Salkeld and Ralph Bullock, her New York attorney, to take charge of her financial affairs, and to that end she gave Mr. Bullock a general power of attorney. Edgar A. Luce was appointed her local attorney and charged with the management of her affairs in San Diego. Thereafter all bills were presented to Mr. Luce, who transmitted them to New York for payment. A small checking account, the balance not to exceed $500, was established in Mrs. Fosselman's name in a San Diego bank. Mrs. Fosselman drew checks on that account for miscellaneous items until shortly before her death. On several occasions Mr. Bullock thought it advisable to obtain Mrs. Fosselman's consent to the transfer of funds or securities, and for that purpose Mr. Luce obtained Mrs. Fosselman's signature.

Upon her release from the hospital, Mrs. Fosselman was moved to a house, purchased with her funds, at 4656 49th Street in San Diego. She was attended throughout the day and night by three nurses working in shifts of eight hours each. A chauffeur was employed to take her on afternoon drives. Dr. Hippen remained her physician and visited her occasionally. Mr. Luce visited her on the average of once a week.

Petitioner was one of the nurses employed to care for Mrs. Fosselman. She had served originally as a relief nurse, but upon the death of one of the regular nurses in 1952, she was employed to attend Mrs. Fosselman regularly during the hours from 7 a. m. to 3 p. m., and she served in that capacity until Mrs. Fosselman's death. It is undisputed that Mrs. Fosselman appeared to be fond of petitioner. It is also undisputed that Mrs. Fosselman appeared to be equally fond of the other nurses.

Mrs. Fosselman died on March 25, 1955, at the age of 88 years. She was the last survivor of a family of ten children and left as surviving relatives only nieces and nephews.

The purported codicil dated June 17, 1953, was first discovered after Mrs. Fosselman's death. Petitioner testified that she had been requested to clean out Mrs. Fosselman's desk and that in doing so she found a sealed envelope wrapped in tissue. The purported codicil was in the envelope. Petitioner testified that she had no knowledge of it before that time.

The purported codicil dated January 12, 1955, was delivered to petitioner by Mrs. Fosselman during her lifetime. Petitioner testified that on January 12, 1955, Mrs. Fosselman stated that there was something she wanted to do before she forgot it and that Mrs. Fosselman handed her a piece of paper, stating, "Here, honey, you read this." Petitioner read it and replied, "Well, you don't have to do anything for me," and Mrs. Fosselman said, "Well, I know it. Do you think it is all right?" Petitioner replied, "Yes, it is." Mrs. Fosselman then stated, "Now, if you don't think this is all right, you take it to a lawyer and have it checked." Mrs. Fosselman then took the paper to the living room and later returned and handed petitioner a sealed envelope, stating, "Now, you are not to open this until after I die or pass away." She opened the envelope after Mrs. Fosselman's death and found that it contained the paper that Mrs. Fosselman had shown her.

Petitioner testified that on January 12, 1955, Mrs. Fosselman seemed to be aware of what she was doing, that her conversations were logical and reasonable, and that there was nothing in her conduct that would suggest that she was insane. "She was just like she had always been." With respect to Mrs. Fosselman's mental condition on June 17, 1953, petitioner gave her opinion that Mrs. Fosselman was not insane, that in the middle of 1953, Mrs. Fosselman seemed to be aware of what was going on in the world, who her relatives were, and that she had some property. Petitioner admitted that Mrs. Fosselman thought that she had known petitioner in Kansas City as an employee of Mrs. Fosselman's mother and that they were old friends; that when

petitioner would correct her and explain that such was not the case, Mrs. Fosselman would say, "Now, that's right," but would subsequently reassert that she had known petitioner in Kansas City; that Mrs. Fosselman sometimes thought she was in New York; that she sometimes did not know that she owned the 49th Street house, but thought that she rented it from a landlord who was demanding an increase in rent; that she often felt that she did not have sufficient money to pay the household help; that she repeated herself constantly; and that Mrs. Fosselman insisted that the nurse who died in 1952 had stolen some chairs that in fact had been given away by Mrs. Fosselman in New York. Petitioner did not think that this behavior was illogical or irrational. She testified that she would not consider a person insane unless he was totally unconscious of his environment.

Several women who were neighbors of Mrs. Fosselman and who had visited her occasionally during the last five years of her life testified that she was able to converse with them about simple domestic matters and that she was not insane.

Mr. Salkeld visited Mrs. Fosselman five times during the last five years of her life. He testified that her mental condition started deteriorating in October, 1950, and that from that time until her death she became progressively confused. He testified that she remembered old events but nothing recent; that at times she thought she was in New York; that she constantly thought she did not have enough money and that when he tried to explain her property to her, she could not "absorb it"; that she thought she had once owned a house in New York and wondered what had become of it, although she had never owned a house there; that she referred to her deceased brothers as being alive; and that on his last visit in March, 1954, he went to see her on the afternoon of one day and the morning of the next day, but Mrs. Fosselman was unable to recognize him. It was his opinion that from the fall of 1952 until the time of her death Mrs. Fosselman was unable to comprehend the nature and extent of her property or her relation to those who would be the natural objects of her bounty.

Mr. Luce recounted in detail his weekly visits with Mrs. Fosselman. He testified that except for one occasion, on January 31, 1951, Mrs. Fosselman was unable to converse intelligently with him about her property or business affairs; that she could not tell him about her accident in the hotel; that she could not understand the settlement that was made with the hotel's insurer; that despite his repeated explanations, she could not understand the source of the money that was being used to pay the nurses and household expenses; that she referred to some deceased members of her family as being alive and thought that others were dead, who in fact were alive; that she persistently claimed that petitioner had worked for her mother in Kansas City and was an old friend despite repeated explanations that petitioner was not even born at the time referred to. Mr. Luce gave his opinion that from 1952 until the time of her death Mrs. Fosselman was unable to comprehend the nature and extent of her property or her relation to those who would have a natural claim upon her bounty.

Dr. Hippen testified that Mrs. Fosselman was unable to comprehend what was going on around her; that she was never "completely associated about time"; that she frequently thought she was in New York City; that she did not "associate" the persons around her "as being nurses" and "never did quite comprehend who they were or what they were and she frequently got them mixed up with people she had known in the past"; that she thought she was destitute and frequently expressed the fear that she would be unable to pay his bill; that from 1952 on she was suffering from senile dementia, a generalized softening of the brain owing to impaired blood supply, and that in his opinion, Mrs. Fosselman, from 1952 until the time of her death, was unable to comprehend the nature and extent of her property or her relation to those who would be the natural objects of her bounty.

Lola R. Stephens, one of the nurses attending Mrs. Fosselman, testified that Mrs. Fosselman had stated many times that petitioner worked for Mrs. Fosselman's mother, although Mrs. Stephens repeatedly corrected her; that Mrs. Fosselman could not understand any reading; that she was confused as to where she was; and that she thought that her brothers would pay her bills, although her brothers were dead.

Mortimer Lumpkin, Mrs. Fosselman's chauffeur, testified that Mrs. Fosselman thought that she had known petitioner in Kansas City and that she often thought she was in New York.

Dr. Carl Lengyel, a psychiatrist to whose qualification counsel stipulated, in answer to a long hypothetical question based upon the evidence, stated his opinion that from 1952 until the time of her death Mrs. Fosselman was suffering from brain disease, probably arteriosclerosis, and was of unsound mind, and that during that period she could not comprehend the nature or extent of her property or her relation to those who would be the natural objects of her bounty.

The Finding of General Testamentary Incompetency Is Supported by the Evidence.

[1] Relying on the well established rule that successfully to contest a will on the ground of lack of capacity a contestant must prove testamentary incompetency at the time of execution of the will, Estate of Lingenfelter, 38 Cal.2d 571, 580, 241 P.2d 990; Estate of Perkins, 195 Cal. 699, 703, 235 P. 45, petitioner contends that the finding that Mrs. Fosselman lacked testamentary capacity at the times she executed the purported codicils is not supported by the evidence. Petitioner points out that none of the witnesses for contestants testified as to Mrs. Fosselman's mental condition on June 17, 1953 and January 12, 1955, the days on which she executed the purported codicils. She urges that the only evidence of Mrs. Fosselman's mental condition on June 17, 1953 is the purported codicil itself and that it discloses no incompetency, and that the only evidence of Mrs. Fosselman's mental condition on January 12, 1955 is the testimony of petitioner and the purported codicil itself and that this evidence tends to show that Mrs. Fosselman had testamentary capacity.

[2-4] Testamentary incompetency on a given day, however, may be proved by evidence of incompetency at times prior to and after the day in question. Estate of Perkins, supra, 195 Cal. at page 703, 235 P. 45; Estate of Lingenfelter, supra, 38 Cal.2d at page 580, 241 P.2d 990; see Vitale v. Vitale, 147 Cal.App.2d 665, 305 P.2d 690. Once it is shown that testamentary incompetency exists and that it is caused by a mental disorder of a general and continuous nature, the inference is reasonable, see Estate of Baker, 176 Cal. 430, 437–438, 168 P. 881; Vitale v. Vitale, supra), perhaps there is even a legal presumption, Code Civ.Proc., § 1963 (32); see Estate of Schwartz, 67 Cal.App.2d 512, 521, 522, 155 P.2d 76; Byrne v. Fulkerson, 254 Mo. 97, 123, 162 S.W. 171; Bever v. Spangler and Blake, 93 Iowa 576, 601, 61 N.W. 1072, that the incompetency continues to exist. Such an inference is particularly strong in a case such as this in which the decedent was suffering from senile dementia, a mental disorder that becomes progressively worse. Byrne v. Fulkerson, supra, 254 Mo. at pages 121–122, 123, 162 S.W. 171; Bever v. Spangler, supra, 93 Iowa at page 597, 61 N.W. 1072. "Senile dementia begins gradually, is progressive in character, and in its advanced stages 'the brain is well-nigh stripped of its functions.' The difficulty lies in determining the point at which in its progress it has so impaired the faculties that they fall below the mark of legal capacity. * * *" (Byrne v. Fulkerson, supra, 254 Mo. at page 121, 162 S.W. at page 178; see Page on Wills, Lifetime ed., vol. 1, p. 284, § 138.) In the testimony of Mr. Salkeld, Mr. Luce, Dr. Hippen, and Dr. Lengyel there is an abundance of evidence from which the trial court could reasonably conclude that from 1952 until the time of her death Mrs. Fosselman was suffering from senile dementia in an advanced stage and that she could not comprehend the

extent and character of her property or her relation to those who would be the natural objects of her bounty. Petitioner's testimony, the purported codicils themselves, and the fact that Mrs. Fosselman drew checks on a small account established in her name and that on several occasions Mr. Bullock thought it advisable to obtain her consent to the transfer of funds or securities constitute evidence that conflicts with the evidence presented by contestants. The trial court resolved that conflict and found that the decedent was incompetent. We cannot say as a matter of law that the finding was unreasonable.

The Finding that the Decedent Was Suffering from an Insane Delusion as to Petitioner's Identity is Supported by the Evidence.

[5] The evidence supporting the finding of an insane delusion is even stronger than the evidence supporting the finding of general incompetence. There is abundant evidence that Mrs. Fosselman persistently claimed that petitioner was an old friend who had worked for Mrs. Fosselman's mother in Kansas City despite repeated explanations to the contrary. Petitioner herself testified that Mrs. Fosselman entertained that belief. The only evidence that Mrs. Fosselman was ever able to rid herself of this delusion is petitioner's testimony that when petitioner would explain to Mrs. Fosselman that she was mistaken, Mrs. Fosselman would say, "Now, that's right." Petitioner admits, however, that shortly thereafter Mrs. Fosselman would reassert her unfounded belief.

The Finding that the Insane Delusion Was the Effective Cause of the Execution of the Purported Codicils is Supported by the Evidence.

[6] The burden was upon contestants to prove not only that Mrs. Fosselman was suffering from the insane delusion but that that delusion "bore directly upon and influenced the creation and terms" of the purported codicils. Estate of Perkins, supra, 195 Cal. at page 704, 235 P. at page 47. Petitioner points to the uncontradicted testimony that Mrs. Fosselman was fond of petitioner and contends that it could be inferred therefrom that the purported codicils were the result of that affection and not the insane delusion. The court found, however, that the purported codicils were the result of the insane delusion, and that conclusion too is reasonably inferable from the evidence. Although it is undisputed that Mrs. Fosselman was fond of petitioner, it is also undisputed that she was equally fond of the other nurses. It may have been significant to the trial court that no bequests were made to any of the other nurses. We cannot say as a matter of law that the trial court could not find the facts as it did.

The judgment is affirmed.

GIBSON, C. J., and SPENCE and McCOMB, JJ., concur.

SHENK and SCHAUER, JJ., concur in the judgment.

CARTER, Justice (concurring).

I concur in the judgment of affirmance, but I cannot refrain from commenting upon the gracious declaration in the majority opinion, after narrating the overwhelming evidence in support of the finding of the trial court on the issue of testamentary incompetency of the testatrix, that: "We cannot say as a matter of law that the finding was *unreasonable.*" How any finding of fact based upon sufficient competent evidence could be anything but *"reasonable"* is beyond my comprehension. But for a majority of this court to uphold a finding of testamentary incompetency or undue influence in a will contest is such an unusual event that it can only be characterized by unusual language. The majority opinion also states: "Once it is shown that testamentary incompetency exists and that it is caused by a mental disorder of a general and continuous nature, the inference is *reasonable* [citations] * * * that the incompetency continues to exist." It is not my understanding that the reasonableness of an inference or a conclusion reached by a trier of fact on sufficient competent evi-

dence is for this court to determine. On the other hand, when the claim is made that the evidence is insufficient to support the finding of the trier of fact, the function of this court is limited to a determination of whether there is any substantial evidence, including inferences or presumptions which may arise from proven facts, to support the conclusion reached, and when a trier of fact has resolved an issue of fact, its determination is binding upon an appellate court unless the evidence against such determination is such that reasonable minds could come to no other but a contrary conclusion than that reached by the trier of fact. In this process the reasonableness of the inferences to be drawn from the proven facts is for the trier of fact and not for an appellate court. The above quoted language from the majority opinion gives rise to a new concept of appellate court review of factual determinations by trial courts, which concept I assume will be invoked only in will contest cases when this court sees fit to affirm a determination by a trial court that a will is invalid because of the testamentary incompetency of the testator or was procured by the undue influence of the proponent of the will. As I have heretofore pointed out in my dissenting opinions, Estate of Lingenfelter, 38 Cal.2d 571, at page 588, 241 P.2d 990; Estate of Welch, 43 Cal.2d 173, at page 181, 272 P.2d 512; Estate of Bullock, 140 Cal.App.2d 944, 950, 295 P.2d 954, 297 P.2d 633; Estate of Keeney, 140 Cal.App.2d 688, 694, 295 P.2d 479, 297 P.2d 636, that with one single exception, Estate of Teel, 25 Cal.2d 520, 154 P.2d 384, the majority of this court has taken the position that the determination of the factual issues in a will contest is the function of this court and not of the trial court or jury, thus repealing, by judicial fiat, section 19 of article VI of the Constitution of California and section 371 of the Probate Code. While the decision in the case at bar may seem to be a departure from the policy heretofore followed, I am convinced that the same legal philosophy which I have denounced in my dissents in the above cited cases still prevails and will be invoked in future cases involving will contests so long as this court remains as it is now constituted.

In my opinion the evidence of testamentary incompetency is no stronger in this case than it was in any of the cases which I have hereinbefore cited, which the majority of this court held, as a matter of law, was insufficient to invalidate the will involved in those cases, and while a correct conclusion is reached by the majority in the case at bar, the reasoning of the majority in arriving at such conclusion is out of harmony with the settled rule with respect to the function and power of an appellate court to review the determination of an issue of fact by a trial court.



Stephen M. KOVACIK, Plaintiff, Cross-Defendant, and Respondent,

v.

Henry E. REED, Defendant, Cross-Complainant and Appellant.*

Civ. 17151.

District Court of Appeal, First District, Division 2, California.

March 22, 1957.

Hearing Granted May 15, 1957.

Suit for dissolution of contracting joint venture and for accounting. From judgment for plaintiff rendered by the Superior Court, City and County of San Francisco, Milton D. Sapiro, J., defendant appealed. The District Court of Appeal, Kaufman, P. J., held that when contracting joint venture was terminated after losses were sustained, fact that the joint venture had never procured a contractor's license did not warrant denial of recovery by first joint venturer against second joint venturer for losses sustained.

Judgment affirmed.

* Opinion vacated 315 P.2d 314.

1. Joint Adventures ⇐2

Provision to share losses may be implied in a joint adventure agreement. West's Ann.Corp.Code, § 15018(a).

2. Joint Adventures ⇐5(2)

In action for dissolution of contracting joint venture agreement whereby plaintiff and defendant agreed to share profits equally, plaintiff agreed to contribute stated capital and defendant to superintend and estimate jobs but subject of losses was not discussed, evidence of circumstances of agreement justified trial court finding implied agreement to share the losses equally. West's Ann.Corp.Code, § 15018(a).

3. Licenses ⇐11(5)

Purpose of statutes requiring contractors' licenses is to protect the public against unlicensed contractors. West's Ann.Bus. & Prof.Code, §§ 7025, 7026, 7028, 7029.

4. Licenses ⇐39.43

Where contracting joint venture terminated after losses were sustained, fact that the joint venture had never procured a contractor's license did not warrant denial of recovery by first joint venturer against second joint venturer for losses sustained. West's Ann.Bus. & Prof.Code, §§ 7025, 7026, 7028, 7029; West's Ann.Corp.Code, § 15018(a).

John W. Broad, John A. Busterud, San Francisco, for appellant.

Ralph Leon Isaacs, San Francisco, Albert J. McGuire, San Francisco, of counsel, for respondent.

KAUFMAN, Presiding Justice.

This is an appeal from a judgment in favor of plaintiff, cross-defendant and respondent and against defendant, cross-complainant and appellant in an action seeking dissolution of a joint venture and an accounting of joint venture losses. Appellant's amended cross-complaint alleged an employment contract and sought damages for breach of contract. On December 31, 1954, the trial court's interlocutory judgment declared that a joint venture existed, ordered its dissolution and appointed a referee to take an accounting. On July 23, 1955, the final judgment was filed in favor of respondent and against appellant in the sum of $4,339.41, representing half of the net loss of the joint venture plus interest and the referee's fee.

The appeal comes before this court on an engrossed Settled Statement. The record shows that respondent is a building contractor in San Francisco, operating a contracting business as a sole proprietorship under the fictitious name "Asbestos Siding Company". Appellant had worked for some time in San Francisco as a job superintendent and estimator.

Respondent, on or about November 1, 1952, asked appellant to become his job superintendent and estimator in certain kitchen remodeling work for Sears Roebuck Company. Respondent said that he had about $10,000 to invest in the venture, and that if appellant would superintend and estimate the jobs, respondent would share the profits on a 50-50 basis. Respondent did not ask appellant to share losses. The subject of a possible loss was not discussed. Appellant accepted the proposal, commencing work shortly thereafter.

Appellant never was asked to make a capital contribution. Appellant's sole contribution to the venture was his labor. The enterprise was conducted under the name of "Asbestos Siding Company". No fictitious name certificate was ever filed showing that appellant had any interest in the aforesaid company. Respondent held a general contractor's license throughout this time. Appellant had never held a general contractor's license. The venture of Kovacik and Reed never applied for nor held a license of any kind.

The venture bid on several remodeling jobs in San Francisco and appellant actually participated in the management and control of these projects. During August, 1953, respondent who had at all times had possession of the financial records of the venture, informed appellant that it had been unprofitable and demanded contribution

from him for his share of the losses. Appellant had at no time promised or agreed that he was liable for any of the venture's losses, and he refused to make any contribution. Respondent then filed this action on October 8, 1953, asking dissolution and an accounting of the losses.

The trial court found that the joint venture was terminated on August 31, 1953; that respondent supplied labor and materials, paid all debts of the venture, and advanced large sums of money therefor; that neither party was to receive compensation for services rendered but were to share equally in the profits and losses; that appellant actually participated in the conduct of the business and agreed to share equally in the profits and losses. All the pertinent allegations of the First and Second Amended Cross-Complaints and of the Affirmative Defense were found to be untrue, and respondent was found to be entitled to an accounting of profits and/or losses of the venture.

Appellant maintains that a party supplying only personal services to a joint venture is not liable for its losses in the absence of an express agreement to that effect. It is true, as appellant states, that the Settled Statement shows that there was no express agreement to share losses. In Dugan v. Pettijohn, 134 Cal.App.2d 133, 285 P.2d 339, 342, it was said that the rule is settled that in the absence of an express agreement, "the one who contributed only services cannot upon dissolution recover from the co-venturor any compensation for same and that the one who has contributed capital must bear his own loss if the assets are insufficient to return his investment in full." The court there relied upon a statement in 48 C.J.S., Joint Adventures, § 11, p. 839 that where "one member has supplied money and the other labor, it has been held that neither member is liable to the other for contribution for any loss sustained." In support of that statement the text cites two Kentucky cases. Bowling v. Duvall, 270 Ky. 494, 109 S.W.2d 1200; Heran v. Hall, 1 B.Mon., Ky., 159. The sentence just preceding that quoted, in the same paragraph of 48 C.J.S., Joint Adventures, § 11, p. 839, states: "In the absence of an express limitation in the agreement between them, every party to a joint adventure is bound by the nature of his relation to his associates to share with them the losses sustained in the enterprise." Authorities cited in reference to this proposition are Campagna v. Market Street Ry. Co., 24 Cal. 2d 304, 149 P.2d 281; Universal Sales Corporation v. California Press Mfg. Co., 20 Cal.2d 751, 128 P.2d 665. Later, in the same section of the text it is said that the members of a joint venture will be presumed to have intended that the losses be shared in the same proportions as the profits unless the agreement fixes a different ratio. In Irer v. Gawn, 99 Cal.App. 17, 24, 277 P. 1053, 1056, the court cited section 2404 of the Civil Code now section 15018 (a), Corporations Code, providing that " 'an agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated.' " The court then stated that this section, and section 2403 of the Civil Code were in accord with the common law rule applicable to the relationship of joint venture where the contract is silent as to losses. The trial court's finding that the parties to the joint venture were bound to participate in the losses was upheld. The Supreme Court denied a hearing in this case, whereas in the Dugan case, supra, relied on by appellant no petition for hearing was filed. And see, Kirkpatrick v. Smith, 113 Cal.App.2d 409, 248 P.2d 534; Parker v. Trefry, 58 Cal.App.2d 69, 136 P. 2d 55. The latter rule based on the Corporations Code, § 15018(a) above cited, is therefore controlling. It may also be noted that the Dugan case was a suit against an estate and not concerned with losses of a joint venture. It was an action on a promissory note which was given as security for advances made and to be made to the venture and the trial court found that plaintiff had not filed any claim for an indebtedness of deceased arising out of such enterprise.

[1, 2] It is settled that a provision to share losses may be implied in a joint ven-

ture agreement. Fitzgerald v. Provines, 102 Cal.App.2d 529, 227 P.2d 860; Martter v. Byers, 75 Cal.App.2d 375, 171 P.2d 101. The finding that losses were to be shared equally is therefore supported.

Appellant also contends that since the joint venture never procured the general contractor's license required by the Business and Professions Code, Division 3, Chapter 9 (See §§ 7025, 7029, Business & Professions Code), the trial court may not lend its aid to enforce the illegal agreement. Appellant relies upon the decision in Wise v. Radis, 74 Cal.App. 765, 242 P. 90, a case in which a real estate salesman sought to recover his share of a commission from his partner. No real estate broker's license had been obtained by the partnership. The court held that he could not recover since he must necessarily disclose the illegal contract as the basis of the claim. Appellant admits that the District Courts of Appeal have somewhat limited the scope of this decision in subsequent cases, but that it still stands as authority for the proposition that one joint venturer cannot obtain an accounting against the other for contribution to partnership losses where the partnership, or both partners individually are without licenses required by law. It is admitted that it has been held in subsequent decisions that a share of illegal partnership profits may be obtained on the theory of unjust enrichment where the dissolution of the partnership is complete and the illegality has spent itself. Matchett v. Gould, 131 Cal.App.2d 821, 281 P.2d 524; Norwood v. Judd, 93 Cal.App.2d 276, 209 P.2d 24. Appellant would distinguish these cases because they are all based on *profits* of an illegal enterprise and the theory of unjust enrichment.

Respondent contends that the later cases in this state have followed Norwood v. Judd, supra. Galich v. Brkich, 103 Cal. App.2d 187, 229 P.2d 89, relied upon the Norwood case, and permitted recovery of a share of the profits where one of the partners held a general contractor's license but the partnership was unlicensed. Here, as hereinbefore noted, respondent at all times held a valid general contractor's license. And in Wilson v. Stearns, 123 Cal.App.2d 472, 482, 267 P.2d 59, 66, the following language of the Norwood case was again relied on: "'Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.'" Petitions for hearing were denied by the Supreme Court in these cases, as well as in the Norwood case. The language quoted above appears to have been unnecessary to the decision in the Norwood case, for the court found in that case that plaintiff after disassociating himself from the business, could have his suit for an accounting on the express agreement to divide the assets and profits which was made by the parties after the termination of the partnership. In Denning v. Taber, 70 Cal.App.2d 253, 160 P.2d 900, it was also held that equity will grant relief where the court is not required to base such relief on the illegal partnership agreement, but can predicate it on a new promise arising out of the executed partnership agreement.

We do not have a promise made subsequent to the termination of the venture in the present case. Of course that element was lacking in the Galich v. Brkich and Wilson v. Stearns cases, supra. But all of the cases above involved assets or profits. None of them dealt with losses of an unlicensed partnership.

In Norwood v. Judd, supra, the court referred to Wise v. Radis, 74 Cal.App. 765, 242 P. 90, and stated that if that case was still the law in California it would require an affirmance in the case then before the court, and that the Denning case, supra, had in effect overruled the Wise case.

In the present case appellant holds no profits of the venture, but is being sued for half of the losses. To enforce this liability,

there can be do doubt that the joint venture contract must be made the basis of the suit for any right to recover such loss must be based squarely on the contract out of which the implied agreement to share losses on a 50–50 basis arises. In this case there was no agreement subsequent to dissolution as in the Denning and Norwood cases which might be said to be free of the illegality of the joint venture contract.

In Tiedje v. Aluminum Taper Milling Co., 46 Cal.2d 450, 296 P.2d 554, the court reiterates the rule that a contract made contrary to public policy or against the express mandate of a statute may not be the basis of an action in law or in equity, because the higher interest of the public demands that such transactions be discouraged. An exception is recognized where the illegality is due to facts of which one party is justifiably ignorant and the other party is not, and it is a matter of proof whether the parties are equally guilty. In the cited case, which was an appeal from a decision sustaining a demurrer without leave to amend, the court said that the plaintiff, while he was chargeable with knowledge of the law prohibiting the transaction, having pleaded lack of knowledge of the facts which would bring that law into operation, an issue of fact was presented to be determined by the trial court. The cited case is not factually here in point and is not inconsistent with Norwood v. Judd, supra.

[3] The Tiedje case, supra, recognizes that there are exceptions to the rule in favor of a party who is not in pari delicto with the other party to the contract, but discussed but one of those exceptions, the one on which appellant in that case relied. That case implies, therefore, that other exceptions are recognized. In view of the denial of petitioner's hearing by the Supreme Court in the Norwood and Stearns cases, supra, it may be said that the situations in those cases fall within another recognized exception to the general rule. In the present case, as in those, the statute violated was enacted to protect the public against unlicensed contractors, and the venture having terminated the public interest is no longer involved. The business engaged in was not prohibited by statute or against public policy. Here, too, one of the partners was individually licensed and, as noted in Sautter v. Contractors' State License Bd., 124 Cal.App.2d 149, 157, 268 P.2d 139, a partnership license may be secured if one of the partners meets the qualifications.

Appellant's affirmative defense in paragraph I alleged the requirements of §§ 7026, 7028 and 7029, Bus. and Prof.Code, that the joint adventure of appellant and respondent engaged in the business of a contractor without such license, that it was thereby engaging in such business contrary to the provisions of Chapter 9, Division 3 of the Bus. and Prof.Code, and that respondent is therefore not entitled to relief. The trial court found the allegations of the paragraph to be untrue, despite the fact that the Settled Statement shows, and the briefs of the parties admit, that it was at times an unlicensed joint venture. While it may be said that in this sense this finding is unsupported by the evidence, if the finding is considered as a whole, it essentially finds that recovery between the joint venturers is not prevented by the fact that such venture is unlicensed.

[4] It is our view that the public interest is not involved under the facts disclosed in the record before us and accordingly the judgment of the trial court is supported by the facts and the law. Appellant would be unjustly enriched under the facts of this case if judgment that he share the losses were not entered. Norwood v. Judd, supra; Galich v. Brkich, supra.

Judgment affirmed.

DOOLING, J., and STONE, J. pro tem., concur.

149 Cal.App.2d 404

LIBERTY MUTUAL INSURANCE COMPANY, a corporation, Plaintiff and Appellant,

v.

Samuel KLEINMAN and Herman Hertzberg, etc., et al., Defendants and Respondents.

Civ. 21868.

District Court of Appeal, Second District, Division 3, California.

March 25, 1957.

Rehearing Denied April 19, 1957.

Hearing Denied May 22, 1957.

Action by insurer as subrogee of insured against owners of liquor store at which manager of insured's subsidiary had cashed checks payable to insured resulting in loss which insurer had paid under its policy covering losses due to dishonesty of employees. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., entered judgment for defendants and insurer appealed. The District Court of Appeal, Shinn, P. J., held that finding that liquor store owners were not negligent in cashing some 80 checks for manager over a period of 27 months was not unsupported by the evidence.

Affirmed.

1. Insurance ⇐606(5)

Right of subrogation does not exist in favor of a surety on a fidelity bond except against person who participated in the wrongful act against surety's principal and right of surety to recover from third party is governed by equitable principles and there can be no recovery unless equities in favor of surety are superior.

2. Appeal and Error ⇐766

Where it was urged on appeal that a material finding was unsupported by the evidence but there was no statement in appellant's brief as to evidence bearing upon issue, since the facts were simple, District Court of Appeal would consider the point notwithstanding failure of counsel to obey court rule.

3. Insurance ⇐606(5)

In action by insurer as subrogee of insured against owners of liquor store at which manager of insured's subsidiary had cashed checks payable to insured resulting in loss which insurer paid under policy covering loss due to dishonesty, finding that owners of liquor store were not negligent in cashing some 80 checks for manager over a period of 27 months was not unsupported by the evidence. West's Ann.Civ.Code, § 3102.

Virgil R. Wells and Stegman & Stegman, Los Angeles, for appellant.

Jerome Weber, David Hoffman, Los Angeles, for respondents.

SHINN, Presiding Justice.

Liberty Mutual insured Dietzgen Company against loss suffered through the dishonesty of its employes. Los Angeles Blue-Print Company, a subsidiary of Dietzgen Company, was covered by the policy. Leon Tanner Eddy, manager of Blue-Print, took 80 checks payable to his employer, stamped the employer's endorsement, added his name as manager, cashed the checks and appropriated the proceeds to his own use, in the total amount of $7,446.19. Plaintiff paid this amount under its policy. Defendants Kleinman and Hertzberg cashed 54 of the checks in the total amount of $4,556.51 and the present action against Kleinman and Hertzberg is by the insurer, claiming as subrogee of Blue-Print. At the conclusion of the trial the court made findings in favor of plaintiff and entered judgment in its favor. Upon motion for a new trial the court vacated the findings and conclusions, made new ones, and entered judgment for defendants. Plaintiff appeals.

[1] There was no conflict in the evidence and there appears to be no doubt as to the applicable legal principles. It was held in Meyers v. Bank of America Nat. Trust & Savings Ass'n, 11 Cal.2d 92, 102, 77 P.2d 1084, that the right of subrogation does not exist in favor of a surety on a fidelity bond

except against persons who participated in the wrongful act against the surety's principal; the right of the surety to recover from a third party is governed by equitable principles and there can be no recovery unless the equities in favor of the surety are superior. In accord J. G. Boswell Co. v. W. D. Felder & Co., 103 Cal.App.2d 767, 230 P.2d 386. The factual issue at the trial was whether defendants were guilty of negligence. The complaint alleged that defendants knew or should have known that Eddy had no authority to cash the checks. This was treated as a sufficient allegation of negligence and was denied by the answer. The court found the allegation to be untrue. The finding is assailed as being without support in the evidence.

[2] When we are urged to hold that a material finding is unsupported by the evidence we look to the opening brief of the appellant expecting to find a statement of the evidence bearing upon the issue. There is no statement in either of appellant's briefs as to the relations between Eddy and defendants over a period of more than three years nor as to the circumstances under which defendants cashed the checks. However, the facts are simple and we have decided to consider the point, notwithstanding the failure of counsel to obey the rule.

For some nine years Eddy served as manager of Blue-Print under appointment by Dietzgen, using cards furnished him which designated him as manager. He was manager in fact as well as in name and had full control over all normal operations. His maximum salary was $325 per month. In 1950 he became a customer of defendants' liquor store. He made purchases at least once a week for several years and was extended credit. He was generally known about the store as the manager of Blue-Print. He introduced other employes to defendants, paid his bills regularly and came to be regarded as a responsible business man. In 1951, after he had been a customer of the store for a year, he cashed the first of the checks that were payable to Blue-Print. During the ensuing 27 months he cashed 53 other checks with defendants, receiving the full amounts in money and merchandise. Defendants did not question his authority or make any inquiry of his employer. All the 80 or more checks cleared without incident.

[3] If defendants had knowledge of any facts which made it their duty, in the exercise of ordinary care, to make inquiry of Blue-Print, they were chargeable with knowledge of Eddy's want of authority to negotiate the checks. We do not doubt that there is reason to suspect the authority of an agent who endorses his principal's name upon checks, by himself as agent, and openly cashes them for his own use. The principal is not bound unless the agent has acted within his actual authority. Civil Code, § 3102. This, however, is not the question. Blue-Print sustained the loss, has received indemnity, and the crucial question on the appeal is whether it appears, as a matter of law, that defendants were guilty of negligence. Defendants' transactions with Eddy were irregular, to say the least. Evidently defendants did not think so. They saw nothing wrong or even suspicious in Eddy's practice of cashing checks that were payable to his company. They asked him no questions and he told them nothing. While we would find it difficult to reconcile defendants' methods with the use of ordinary business judgment, we do not believe the court was required to find defendants guilty of negligence. Mr. Eddy inspired confidence in many people other than defendants. His employer did not suspect him or make a check of his records. Apparently no one doubted his honesty. Defendants had done business with him for more than a year before he cashed the first check. Hertzberg testified "we knew him that he is a good nice man * * * he pays his debts all the time before, since he was taking stuff on credit he always did pay * * *." and Kleinman testified "we had known Mr. Eddy for a radius of a year before he had ever asked to be issued credit." It took Blue-Print 27 months to discover Eddy's

defalcations although a simple audit would have disclosed them.

In its first findings the court did not make a finding whether defendants were negligent. Upon motion for new trial, as we have stated, the court found that defendants were not negligent. The court also found that Blue-Print was negligent "in not checking or auditing defendant Leon Tanner Eddy, and permitting the misappropriation of checks to continue over a period of 27 months." It also found that Blue-Print employed Eddy as its manager and "by said act, created an actual agency" and caused Eddy "to believe himself to possess an actual authority," and "by want of ordinary care, caused defendants to believe that defendant, Leon Tanner Eddy, was an agent of the Los Angeles Blue-Print Company and clothed the said Leon Tanner Eddy with ostensible authority. That by want of ordinary care, the Los Angeles Blue-Print Company caused or allowed the defendants to believe that the said Leon Tanner Eddy possessed an ostensible authority." We are at a loss to know what these findings mean. If they should be construed as findings that Blue-Print was estopped to question the authority of Eddy to cash the checks we would seriously question the sufficiency of the evidence to support them. Defendants sought leave to amend their answer to plead estoppel and although permission was granted they did not amend their answer and the court did not make a finding or draw a conclusion that Blue-Print was estopped to question the authority of Eddy. We do not construe the findings to mean that Blue-Print was estopped to question the authority of Eddy. There are elements of the doctrine of estoppel that were not pleaded or considered to be in issue and which were not touched upon in the evidence. We shall not digress to enumerate them.

Although defendants made repeated efforts to prove that Blue-Print did not cause an audit to be made of Eddy's accounts, they were prevented from proving that fact by plaintiff's objections, which were sustained. It nevertheless appeared without question that Eddy's defalcations continued over a period of 27 months before they were discovered. The court could properly have inferred that Blue-Print had no system of auditing Eddy's accounts or checking upon his activities, and that if the accounts had been audited the defalcations would have been detected at an early date. In the balancing of the equities as between plaintiff and defendants the question of defendants' negligence was the critical one. The fact that for 27 months the checks cashed by defendants cleared without incident was a circumstance of considerable weight in the decision of that question. And it was a fact which defendants would naturally take into consideration whether it came about by reason of Blue-Print's negligence or despite the use of diligence. We, therefore, construe the findings to mean that the failure of Blue-Print to discover the defalcations was one of the reasons for the confidence defendants reposed in the integrity of Eddy. We, therefore, attach no importance to the finding that Blue-Print was negligent.

Our conclusion is that the question of defendants' negligence was one of fact as to which the determination of the trial court is based upon reasonable inferences and that the finding is controlling upon appeal. The court concluded that the equities favoring defendants were superior to those favoring plaintiff and, upon the facts found, we agree.

We have limited our discussion of the principles of subrogation to the issues that were tried and the points argued in the briefs.

There are several findings which, if taken literally, would be absurd. Among them was a finding that the action was barred by the Statute of Limitations. They are contrary to other specific findings, to admissions of the pleadings and to the evidence. Errors of this sort are frequently found when broad findings are made by reference

to the pleadings. We must attribute the conflicts and inconsistencies in the present findings to carelessness of the author and inadvertence on the part of the court.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



Walter WEBB and Irma Webb, Plaintiffs and Respondents,

v.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation; Floyd Wimberly; Hartford Fire Insurance Company; and Home Fire and Marine Insurance Company, Defendants,

Standard Oil Company of California, a corporation, and Floyd Wimberly, Appellants.

HARTFORD INSURANCE COMPANY and Home Fire and Marine Insurance Company, Cross-Complainants and Respondents,

v.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, and Floyd Wimberly, Cross-Defendants and Appellants.

Civ. 8892.

District Court of Appeal, Third District, California.

March 21, 1957.

Rehearing Denied April 19, 1957.

Hearing Granted May 15, 1957.

Action by owners for damages, sustained when fire destroyed residence, against oil company which installed propane gas tanks. The Superior Court, Colusa County, Warren Steel, J., rendered judgment for owners, and company appealed. The District Court of Appeal, Warne, J. pro tem., held that questions of whether company's employee failed to properly check gas tanks, tubing and regulator, whether fire occurred when leaking gas from tanks came in contact with burner of gas refrigerator, and whether employee's negligence was direct and proximate cause of fire, were for court sitting without jury.

Affirmed.

1. Appeal and Error ⇐930(1)

In determining whether evidence was sufficient to sustain verdict for plaintiffs reviewing court must view evidence in light most favorable to plaintiffs.

2. Gas ⇐20(4)

In action for damages sustained when fire destroyed residence, questions of whether employee of oil company failed to properly check gas tanks, tubing and regulator, whether fire occurred when leaking gas from tanks came in contact with burner of gas refrigerator, and whether employee's negligence was direct and proximate cause of fire, were for court sitting without jury.

3. Gas ⇐20(6)

In action for damages sustained when fire destroyed residence, wherein occupant of residence testified that she was awakened by a heavy sound and thereafter discovered fire coming from washroom where gas unit was located, failure to make specific finding that explosion occurred preceding fire did not preclude finding that fire was caused by negligent installation of gas unit.

4. Gas ⇐20(2)

In action by owners for damages sustained when fire, allegedly caused by failure of employee of oil company to properly inspect propane gas installation, destroyed residence, Liquefied Petroleum Gases Safety Orders were properly admitted into evidence. West's Ann.Labor Code, §§ 6312, 6500.

5. Gas ⇐2

Liquified Petroleum Gases Safety Orders were intended not only to protect employees but are also as safeguards for public generally against injury. West's Ann.Labor Code, §§ 6312, 6500.

6. Evidence ⇐474(19)

Owner of personal property was competent to estimate its worth whether generally familiar with values or not.

7. Damages ⇐138

Award of $12,000 to owner of ranch and gun-club house and residence building for damages to personal property caused by fire resulting from defective installation of propane gas tanks was not excessive.

8. Appeal and Error ⇐1047(5)

Refusal of trial court to order owner to produce copies of his state and federal income tax returns covering the year in which fire destroyed his property, to determine whether he placed a different value upon property in claiming allowable casualty loss from value claimed in his action against defendant, was not prejudicial error, in view of fact that returns were produced in reviewing court and revealed that the claimed loss was the same.

Devlin, Diepenbrock & Wulff, Sacramento, for appellant Standard Oil Co.

Cooney & Littlejohn, Colusa, for appellant Wimberly.

Stanley J. Gale, Sacramento, and Richard E. Patton, Colusa, for respondents Webb.

Cooley, Crowley, Gaither, Godward, Castro & Huddleson, San Francisco, for respondent Ins. Companies.

WARNE, Justice pro tem.

Walter and Irma Webb brought this action against appellants to recover their uninsured loss and damages sustained by them when fire destroyed their residence in Colusa County. They charged that the fire was caused by the negligence of Standard Oil Company's agent, Floyd Wimberly, in the installation of certain Flamo gas tanks whereby Flamo gas (bottled propane gas) was fed into the burner of a certain Servel refrigerator. Respondents Hartford Insurance Company and Home Fire and Marine Insurance Company, who had insured the Webbs against loss and damage by fire in the total sum of $10,000 had each paid the Webbs $5,000 and were brought into the case as parties defendant under the right of subrogation. Each insurance company filed a cross-complaint against the appellants to recover the $5,000 it had paid. The case was tried by the court without a jury and judgment was in favor of the plaintiffs and cross-complainants. Appellants appeal from the judgment.

The Webbs owned a ranch and gun club on which was located the club house and residence building destroyed by the fire. They resided in this building. At the time of the fire Mrs. Webb was alone on the premises. Located in the building on the westerly side was a Servel refrigerator which was operated by bottled propane gas. This refrigerator had not been in use for about a year. The Servel refrigerator was cut into the wall between the washroom and the kitchen with the door almost flush with the kitchen wall and the bulk of it protruding back into the washroom. The washroom was 9 feet wide, 10 feet long and had a ceiling height of 8½ feet. It contained two windows which were nailed shut. Located in this room was an electric motor and compressor unit for an electric refrigerator which was located on an outside porch, an electric washing machine, a disconnected old gas heater, and the Flamo apparatus consisting of a cabinet containing two tanks, a pressure reducing device called a regulator, a gauge indicating which of the two cylinders or tanks was in use and some tubing running along the floor to connect the refrigerator. When the Webbs purchased the property a portion of the Flamo equipment, including the cabinet, tubing and regulator, was contained in the building. Defendant Standard Oil Company claimed to be the owner of this equipment. At various times during the years defendant Wimberly repaired the equipment, furnished some new parts for it and claimed rental on said equipment for the Standard Oil Company. The metal tanks in which the Flamo gas was stored and delivered, at all times, were the property of the Standard Oil Company.

Mrs. Webb had trouble with the electric refrigerator and disconnected the cord and shut off the electric switch. She then phoned the Standard Oil Company and ordered Flamo gas for the purpose of putting the Servel refrigerator in operation. Between 6 and 8 p. m. on the night of June 12, 1952, appellant Wimberly delivered two tanks of Flamo gas to the Webbs' residence. He placed the two filled tanks in the cabinet in the washroom and connected one or both with the Servel refrigerator. He also brought a third tank partially filled, that had been on the porch, and placed it in the washroom for use in an emergency. After Wimberly turned on the gas Mrs. Webb asked him to check the unit for leakage. She told him that she could smell escaping gas when the tanks were last in use the year before. She suggested that he use soap to test the installation for leaks. He said he did not consider that necessary and proceeded to test the connections with burning matches and by smelling for the noxious odor of the gas. The test did not disclose any leaks. He then cleaned the burner of the refrigerator, tested the "lock up" pressure of the refrigerator and then lit the burner. Before retiring for the evening Mrs. Webb checked the refrigerator and found it operating but not cold enough to use, so she shut the refrigerator door. She did not touch or disturb the installation of the Flamo unit. She did not notice anything wrong nor did she smell anything. Next she closed the washroom door and retired. This was about 9 p. m.

Mrs. Webb slept on a porch on the easterly side of the building some 40 or 50 feet from the washroom. About 1:30 or 2:00 o'clock that night she was awakened by a heavy noise. She arose and went to the kitchen. She discovered there was a fire in the washroom where Wimberly placed the cylinders. The wall between the kitchen and the washroom was ablaze. She attempted to telephone the fire department but the fire had cut off the service. She then went for help in her car. As she went to the car she noticed that the blaze was either in the washroom or on the porch adjacent thereto. The premises were completely destroyed. Mrs. Webb did not know the cause of the fire. The only source of ignition was the burner in the refrigerator which was about 9 inches above the floor level.

There was expert testimony that Flamo gas is heavier than air and as it escapes from a cylinder it settles to the floor and spreads out and that it was only necessary for the gas to pile up to a height equal to the burner on the Servel refrigerator for an explosion to occur. There was also testimony that the escape of one cubic foot of gas would be sufficient, and while there would be air currents in the room the gas would not circulate and diffuse.

The trial court, in addition to finding specific acts of negligence and finding that such negligence on the part of the appellants was the proximate cause of the fire, also relied upon the doctrine of res ipsa loquitur.

Appellants contend that the proof was insufficient to establish that any negligence of either defendant proximately caused the fire or to establish the cause of the fire.

[1] In determining whether the evidence is sufficient we must view it in the light most favorable to the plaintiffs. Rudolph v. Tubbs, 46 Cal.2d 55, 291 P.2d 913.

After Wimberly had made the test for gas leakage above mentioned, Mrs. Webb asked him to again check everything before he left. He then went in the kitchen, opened the door of the refrigerator, looked at it and said everything was "O.K." Wimberly at no time tested the assembly line after he pressed the button to let gas through the line; nor did he test the Flamo regulator; nor make any test whatsoever of the soft plugs for leaks. Wimberly admitted that he brought into the washroom, in addition to the two cylinders of gas, a third tank which was partially filled that had been on the porch, and made no tests of it for gas leakage. There was evidence that the soft plugs may become loosened in the handling of the tank. The record shows

also that Wimberly violated express instructions of appellant Standard Oil Company as to the proper method of inspection. Its manual provides that in testing for leaks soapsuds or a light lubricating oil should be used; that matches never should be used. The manual also provides that "Under no circumstances will Standard Flamo cylinders or regulators be installed in the interior of buildings * * *". It was admitted that these regulations were good, sound safety practice. There was also testimony that the installation made by Wimberly violated the rules of the Petroleum Gas Safety Orders in this respect: That the tanks and pressure regulator were placed within the enclosed four walls of the building; that no soap tests were made for gas leakage; that the tanks were within ten feet of the source of ignition (the burner on the refrigerator) and also that a storage tank filled but not connected to the system was stored within the same room. Wimberly was uncertain in his testimony as to whether he had connected both tanks to the system. There was also testimony that the circulation of air caused by the operation of the refrigerator would have a tendency to draw the gas pockets formed on the floor over into the lower part of the refrigerator, thereby igniting it.

[2] The above facts and circumstances taken as a whole constitute substantial evidence from which the trial court could reasonably infer that Wimberly failed to properly check the tanks, tubing and regulator and as a result the fire was caused by leaking gas coming in contact with the burner on the refrigerator, and that appellants' negligence was the direct and proximate cause of the fire which destroyed plaintiffs' building and their personal property contained therein.

[3] Appellants also urge that the failure of the trial court to specifically make a finding that an explosion occurred preceding the fire precludes a finding that the fire was caused by negligence on their part. With this contention we do not agree. Mrs. Webb testified that she was awakened by a heavy sound which she described as a "thump" and that thereafter she went into the kitchen and discovered fire coming from the washroom where the installation was located. It is a reasonable inference that the "thump" was the repercussion from an explosion. We believe it is common knowledge that a person suddenly awakened by some kind of a noise rarely is able to definitely describe it. The trial court in his memorandum opinion stated that Mrs. Webb was awakened by some disturbance. Implied, under the facts and circumstances of the case, it was an explosion.

[4] Appellants also contend that the court erred in applying the Liquefied Petroleum Gases Safety Orders (California Administrative Code, Title 8, Sections 4900–5041) to the case to establish negligence. That such orders apply only to employer-employee relationship. These safety orders were issued in conformity with the provisions of sections 6312 and 6500 of the Labor Code. Safety order 4950 in part provides that all piping shall be tested after assembly and proved free from leaks at 20 psi; that the test shall be made with soapy water; that no open flame shall be used, and that all outlets shall be closed during the test. Section 4935 provides that no cylinder shall be located within a building enclosed on four sides, nor within five feet of a source of ignition. Section 4950 (b) provides that initial pressure-reducing devices shall be installed outside of buildings, unless such building is used exclusively for the housing of such pressure-reducing devices, and section 5005 provides that fuse plugs shall not be used for the relief of pressure.

[5] That these safety orders were intended to not only protect employees but are also safeguards for the public generally against injury is now established law in this state. Pierson v. Holly Sugar Corp., 107 Cal.App.2d 298, 237 P.2d 28; Armenta v. Churchill, 42 Cal.2d 448, 453, 267 P.2d 303; Nungaray v. Pleasant Valley etc. Ass'n., 142 Cal.App.2d 653, 300 P.2d 285; Bragg v. Mobilhome Co., 145 Cal.App.2d 326, 302

P.2d 424. The safety rules were properly admitted in evidence.

[6, 7] Appellants next contend that the evidence is insufficient to support the finding as to the personal property damages. Mr. Webb testified that in his opinion the personal property destroyed by the fire was worth $31,000. While the trial court stated that Webb's testimony as to values was somewhat speculative, it nevertheless awarded the Webbs $12,000. Mr. Webb, being on owner of the property, was competent to estimate its worth, whether generally familiar with values or not. (19 Cal. Jur.2d 101.) It was for the trial court to decide what weight should be given to the testimony. We conclude that there was sufficient substantial evidence to sustain the finding.

[8] Lastly it is contended that the trial court committed prejudicial error in refusing to order Mr. Webb to produce copies of his state and federal income tax returns covering the year of the fire to determine whether he placed a different value upon the property in claiming an allowable casualty loss.

That this court might have before it a copy of the Webbs' California income tax return for the year 1952 for the sole purpose of assisting us in determining whether appellants suffered any prejudice by reason of the trial court's refusal to order Mr. Webb to produce it at the trial, an order was made for the production of said return, upon the application of appellants. It is now a part of the record in the case. We have carefully examined its contents and compared it with other evidence and exhibits in the case, and upon doing so we find that the claim of loss, the property lost in the fire and the values thereof are identical to those claimed in plaintiffs' Exhibit No. 15, that is, the statement of loss and damage furnished to the Philadelphia Fire and Marine Insurance Company. Since the appellants already had the information they were seeking it follows that they could not have been prejudiced in not having the income tax returns before them at the trial.

We do not consider it necessary to discuss the doctrine of res ipsa loquitur as applicable to this case in view of the trial court's finding of specific acts of negligence and proximate cause.

The judgment is affirmed.

VAN DYKE P. J., and PEEK, J., concur.



COUNTY OF ALPINE, Plaintiff and Appellant,

v.

COUNTY OF TUOLUMNE, County of Calaveras and County of Amador, Defendants and Respondents.*

Civ. 8933.

District Court of Appeal, Third District, California.

March 29, 1957.

Rehearing Denied April 26, 1957.

Hearing Granted May 24, 1957.

Suit seeking a judicial determination of boundaries between counties. Judgments for defendant in the Superior Court, Stanislaus County, H. L. Chamberlain, J., and the plaintiff appeals. The District Court of Appeal, Peek, J., held that the action would not lie, in view of proceeding previously instituted by the plaintiff county and still pending before the Lands Commission for a survey of the boundary.

Judgment affirmed.

1. Administrative Law and Procedure ⇐229

Where an administrative remedy is provided by statute, relief must be sought from the administrative body and the remedy exhausted before the courts will act.

2. Administrative Law and Procedure ⇐228

Administrative agency has the power to determine in the first instance and before judicial relief may be obtained whether a given controversy falls within statutory grant of jurisdiction.

* Opinion vacated 322 P.2d 449.

3. Administrative Law and Procedure ⇐229

Jurisdiction to entertain an action for judicial relief is conditioned upon a completion of the administrative procedure.

4. Counties ⇐7

In action to determine boundaries between counties where prior to proceedings the board of supervisors of the plaintiff county requested the State Lands Commission to make a survey and the survey was taken but it was concluded that no action should be taken to survey pending the outcome of the present litigation, the court was without power to proceed to determine the controversy.

Jeremy C. Cook, Turlock, and Wade H. Coffill, Oakdale, for appellant.

Hardin & Gorgas, Sonora, for respondent Tuolumne County.

Joseph S. Huberty, San Andreas, for respondent Calaveras County.

Anthony Caminetti, Jr., Jackson, for respondent Amador County.

PEEK, Justice.

Plaintiff Alpine County appeals from a judgment of dismissal entered pursuant to an order of the court sustaining defendant counties' demurrers without leave to amend.

By its complaint Alpine County sought a judicial determination of the boundary between it and the defendant counties and to restrain said counties from exercising jurisdiction over the territory alleged to be situated within its boundaries and to belong to it. Each of the defendants demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action; that the court had no jurisdiction of the persons of the defendants or of the subject matter of the action; and that there was another action pending between the parties for the same causes alleged in said complaint.

In view of the fundamental issue as to the exhaustion of administrative remedies as disclosed by the record before us, it would appear to be wholly unnecessary to discuss in detail the evidence and history of the controversy or the additional contentions now made on appeal by Alpine County. It is sufficient to note that prior to instituting the present proceeding, the board of supervisors of Alpine County, by resolution, requested the State Lands Commission to make a full and complete investigation and survey of the disputed boundary between it and the defendant counties; that pursuant to such request the Lands Commission commenced its survey; that the minutes of the final meeting the Commission held on the matter show that certain findings were approved but it was concluded that no action should be taken to survey and mark said boundary pending the outcome of the present litigation.

[1–4] Thus at the outset if the trial court did not have jurisdiction to entertain the action by reason of the proceeding previously instituted by Alpine County and still pending before the Lands Commission, that court was without power to proceed and the defendants' demurrers were properly sustained. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715. It is too well established to warrant extended citation of authority that "* * * where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." 17 Cal.2d 280, 292, 109 P.2d 942, 949. Furthermore, "* * * it lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction." United States v. Superior Court, 19 Cal.2d 189, 195, 120 P.2d 26. It necessarily follows that "jurisdiction to entertain an action for judicial relief is conditioned upon a completion of the administrative procedure." 19 Cal.2d 189, 194, 120 P.2d 26, 29; Abelleira v. District Court of Appeal, supra.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

149 Cal.App.2d 305

Marta J. TEILHET, Plaintiff and Respondent,

v.

The COUNTY OF SANTA CLARA, a political subdivision of the State of California, Defendant and Appellant.

Civ. 16948.

District Court of Appeal, First District, Division 2, California.

March 20, 1957.

Action against county for injuries and property damage sustained in automobile collision allegedly caused by dangerous condition of county highway created by smoke from weeds and grass being burned along highway. The Superior Court, Santa Clara County, Edwin J. Owen, J., entered judgment on a verdict in favor of plaintiff, and from such judgment and orders denying motion for judgment notwithstanding verdict, motion for new trial, and motion of nonsuit, defendant appealed. The District Court of Appeal, Dooling, Acting P. J., held that the evidence was sufficient to satisfy conditions of liability under West's Ann. Gov.Code, § 53051, providing for liability of local agency for injuries to person and property resulting from dangerous or defective condition of public property.

Judgment and order denying judgment notwithstanding verdict affirmed and appeals from orders denying nonsuit and new trial dismissed.

1. Appeal and Error ⇐105, 110, 870(2, 6)

Orders denying defendant's motions for new trial and for nonsuit were not appealable, but they could be reviewed on appeal from judgment entered on verdict for plaintiff.

2. Municipal Corporations ⇐847

The use or general plan of operation of government operated property, as well as a structural defect, may make condition of public property dangerous within statute providing for liability of local agency for "dangerous or defective condition" of public property. West's Ann.Gov.Code, § 53051.

See publication Words and Phrases, for other judicial constructions and definitions of "Dangerous or Defective Condition".

3. Automobiles ⇐267

Practice of county of annually burning weeds and grass along county highway in such manner that, from time to time, smoke was blown across highway in such quantity as to completely obscure view of motorists was sufficient to make highway dangerous within statute providing for liability of local agency for "dangerous or defective condition" of public property. West's Ann.Gov. Code, § 53051.

4. Automobiles ⇐308(6)

In action against county for injuries and property damage sustained in automobile collision, allegedly caused by dangerous condition of county highway created by smoke from weeds and grass being burned along highway, whether county exercised ordinary care to prevent injury to persons using highway was a question for jury under the evidence. West's Ann.Gov. Code, § 53051.

5. Automobiles ⇐306(4)

Evidence that, though he knew view of motorists would be obscured from time to time by smoke from weeds and grass being burned along county highway and that no provision had been made for proper control of traffic under such circumstances, assistant road commissioner for county, having charge of crew engaged in burning weeds and grass and authority to remedy any dangerous condition thereby created, took no action to remedy such condition or protect public against it was sufficient to satisfy conditions of liability of county under statute for injuries and property damage sustained in automobile collision caused by such condition. West's Ann.Gov.Code, § 53051.

6. Municipal Corporations ⇐847

Where person authorized to remedy dangerous condition of public property has notice in advance that because of manner in which work is done a dangerous condition will probably occur and he takes no steps to remedy such condition, the condi-

tions of liability of local agency under statute for dangerous or defective condition of public property are satisfied. West's Ann. Gov.Code, § 53051.

7. Automobiles ⇐245(46)

Whether operation of automobile at such speed that it cannot be stopped within range of driver's vision constitutes negligence is ordinarily a question of fact.

8. Automobiles ⇐308(11)

In action against county for injuries and property damage sustained in automobile collision allegedly caused by dangerous condition of county highway created by smoke from weeds and grass being burned along highway by county, whether plaintiff was contributorily negligent in driving through smoke so thick so as to obscure her view was a question of fact for jury. West's Ann.Gov.Code, § 53051.

9. Automobiles ⇐309(1)

In action against county for injuries and property damage sustained in automobile collision, allegedly caused by dangerous condition of county highway created by smoke from weeds and grass being burned along highway by county, county's proposed instruction as to reasonable time to "repair" a dangerous or defective condition after notice was misleading by reason of use of quoted word. West's Ann.Gov. Code, § 53051.

10. Counties ⇐143

Under statute providing for liability of local agency for injuries to person and property resulting from dangerous or defective condition of public property, it is failure of county, for a reasonable time after knowledge or notice of such condition, to take action reasonably necessary to protect the public against such condition, and not the existence of dangerous condition itself, which renders county liable. West's Ann.Gov.Code, § 53051.

11. Automobiles ⇐304(1)

In action against county for injuries and property damage sustained in automobile collision allegedly caused by dangerous condition of county highway, plaintiff had the burden of proving that county failed to take action reasonably necessary to protect the public against such condition within a reasonable time after county had knowledge of such condition or that a dangerous condition would be created by act which county directed be done. West's Ann.Gov.Code, § 53051.

12. Automobiles ⇐267, 275, 277

Existence of dangerous condition in county highway at time of automobile collision by reason of smoke from weeds and grass being burned by county along highway, notice to assistant road commissioner for county that such condition was reasonably foreseeable, failure of customary method of doing the burning to provide reasonably adequate protection for the public, and failure of assistant road commissioner, with knowledge of such facts, to adequately provide for protection of the public were essential conditions of liability of county under statute for injuries and property damage sustained in collision. West's Ann.Gov. Code, § 53051.

13. Appeal and Error ⇐216(2)

Instruction that all elements of statute providing for liability of local agency for injury to person or property resulting from dangerous or defective condition of public property must be proved to warrant recovery against county for injuries and property damage sustained in automobile collision allegedly caused by dangerous condition of county highway negatived the possibility of recovery on basis of respondeat superior, and, having failed to request specific instruction as to nonliability for negligence of county employee, county could not complain on appeal that such instruction was not given. West's Ann.Gov.Code, § 53051.

O. Vincent Bruno, San Jose, for appellant.

Boccardo, Blum, Lull, Niland & Teerlink, San Jose, for respondents.

DOOLING, Acting Presiding Justice.

[1] This is an appeal from a judgment entered pursuant to a jury verdict in favor

of plaintiff. Defendant County of Santa Clara states in its notice of appeal that it is also appealing from orders denying a motion for judgment notwithstanding the verdict, denying a motion for new trial, and denying a motion of non-suit. Although the latter two orders are non-appealable they can be reviewed on the appeal from the judgment.

Respondent sought in this action to recover for personal injuries and damage to her automobile incurred as a result of an automobile collision on Junipero Serra Boulevard, a highway of appellant County. It is respondent's theory that the cause of this collision was the dangerous or defective condition of appellant's highway at the time of the accident.

On July 24, 1952, appellant County was engaged in burning weeds along its right of way adjacent to its highway where the accident occurred. At about 2:30 p. m. on that day respondent, driving in a northerly direction in her Morris-Minor convertible car, approached the area where the burning operation was being conducted. She had about two hours previous to this time passed this same area while burning operations were in progress. Respondent stopped her car behind a black car which had stopped a few feet south of a concentration of smoke that was across the road. At this point there was a fire to her right and in front of her along the right of way. Respondent testified that a wisp of smoke was coming across her car at this time. The black car moved on through the smoke and respondent then proceeded in first gear up the highway. She had traveled about one or two car lengths through the smoke when she collided with another car coming from the opposite direction. At this time she was not driving over ten miles an hour. She did not see this car before the impact, but testified that immediately before the impact she could see about a car length ahead of her.

Liability is sought to be imposed upon appellant County under the terms of section 53051 of the Government Code. That section provides:

> "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:
>
> "(a) Had knowledge or notice of the defective or dangerous condition.
>
> "(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

Appellant first argues that there was no showing of a dangerous or defective condition of public property in this case. In making this contention it asserts that the dangerous or defective condition contemplated by the statute must be a tangible defect and that smoke in the atmosphere over a public highway cannot constitute such a condition.

[2] Appellant bases its argument in this respect on a distinction between "condition negligence" which appellant concedes properly falls within Government Code, section 53051 and "activity or conduct negligence" which it asserts can under no circumstances fall under that section. There are several cases in our reports which demonstrate that under the broad language of the section: "dangerous or defective condition of public property," the condition of the public property may be rendered "dangerous" within the meaning of the section by "the use or general plan of operation of government operated property, as well as by a structural defect." Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 153, 108 P.2d 989, 995; Harper v. Vallejo Housing Authority, 104 Cal.App.2d 621, 624–625, 232 P.2d 262; Plaza v. City of San Mateo, 123 Cal.App.2d 103, 108, 266 P.2d 523. Specifically the carrying on of burning operations on public property according to an established procedure has been held sufficient to render the property

"dangerous" within the meaning of the section in Huff v. Compton City Grammar School Dist., 92 Cal.App. 44, 47, 267 P. 918; Pittam v. City of Riverside, 128 Cal.App. 57, 65, 16 P.2d 768; Osborn v. City of Whittier, 103 Cal.App.2d 609, 230 P.2d 132.

[3] Here the evidence shows that the procedure adopted by the County in annually burning the weeds and grass along the border of this highway had been established and uniform for a great many years. It was known from past experience that with the prevailing winds at that time of year smoke had from time to time been blown across the highway in such quantity as to completely obscure the view of drivers of automobiles using the highway. To argue that such a recurring condition could not render the highway "dangerous" to those drivers using it at the time is to ignore the plain implication of the cases above cited. In Bauman v. City and County of San Francisco, supra, a small child playing in a sand box in a public playground maintained by the defendant was injured by a ball batted by larger children playing baseball in the immediately adjoining area. The practice of older children of playing baseball in this area had continued for a considerable period of time. The court said at page 153 of 42 Cal.App.2d, at page 994 of 108 P.2d: "The jury was justified in finding that the playground was dangerous and defective for any of the following reasons: That the playground was rendered dangerous or defective by the negligence of appellant in permitting the playing of hard baseball in dangerous proximity to the sand box; that under the circumstances here existing it was the duty of appellant, if hard baseball was to be permitted to be played * * * to erect some barrier for the protection of those playing in the small children's section; or the appellant negligently failed to properly supervise the playground by either failing to prevent the boys from playing hard baseball in dangerous proximity to the small children's section or in negligently failing to keep the small children away from the sand box while hard baseball was being played nearby."

Every alternative suggested by the court in this quoted passage except the absence of a barrier is "activity or conduct negligence" and not "condition negligence" as appellant uses those terms in his brief. The reasonably foreseeable occasional batting or throwing of a ball over or into the sand box, as a result of the known activity of hard baseball being played in its vicinity, was the basic fact which rendered the condition of the sand box "dangerous" in the Bauman case. The reasonably forseeable intermittent obscuring of the vision of motorists using the highway by smoke from the burning grass and weeds was the basic fact which rendered the highway dangerous in the case before us. On principle we cannot distinguish the one from the other, nor from the other cases above cited in all of which a customary activity in the use of the property was held sufficient to render the property "dangerous."

Appellant persists in the argument that it has been erroneously held liable under the doctrine of *respondeat superior*, for some momentary negligence of its employees. This is not the basis of its liability, but rather as we have shown, a dangerous condition of the highway created by its customary and usual method of burning weeds along its edges.

Cases from other jurisdictions, and notably Warren v. State, 219 App.Div. 124, 219 N.Y.S. 530, relied upon by appellant, dealt with statutes containing narrower language than the "dangerous or defective condition" of Government Code, 53051. They are not helpful in construing our statute in which the word "dangerous" has been construed broadly by the cases. Smith v. County of San Mateo, 62 Cal.App.2d 122, 130, 144 P.2d 33.

[4] Appellant argues further that even if we regard the evidence as sufficient to show a dangerous condition of the highway it adopted adequate safeguards for the public using it. The evidence shows that two of the men had red flags to control passing motorists when necessary for their safety. No instructions were given the men as to

the manner in which traffic was to be controlled. The evidence shows further that only one man in practice used the red flag at any time, the other man supplied with a flag being unable to do so because necessarily engaged in the burning operation. This resulted in no control of traffic passing through the smoke from one direction, even if one man was stationed with a flag to control traffic passing in the other direction. Whether this was such a control of traffic under the circumstances as to amount to an exercise of ordinary care to prevent injury to persons using the highway certainly presented a question for the jury.

[5, 6] The evidence shows that one McGill, Assistant Road Commissioner for appellant, although not present at the time of the accident, had charge of the crew engaged in this burning operation. It further shows that he had knowledge of the customary method of procedure and that such procedure was being followed on that day. Appellant admits that McGill was a "person authorized to remedy the condition" within the meaning of Government Code, section 53051. He knew that in the course of the burning smoke from time to time would probably obscure the view of motorists traveling over the highway as it had done in the past, he knew that no directions were given to the workmen as to the control of traffic and that no provision was made to control traffic in both directions no matter how much the vision of motorists might be obscured and he failed to take any steps to remedy this condition. The conditions of liability, if the jury found the facts favorable to plaintiff, were therefore complete. Where the person authorized to remedy the dangerous condition has notice in advance that because of the manner in which the work is done a dangerous condition will probably occur and takes no steps to remedy it the conditions of liability of the statute are satisfied. Fackrell v. City of San Diego, 26 Cal.2d 196, 206–207, 157 P.2d 625, 158 A.L.R. 773; Mulder v. City of Los Angeles, 110 Cal.App. 663, 668, 294 P. 485.

There is nothing in Watson v. City of Alameda, 219 Cal. 331, 26 P.2d 286, inconsistent with this rule. In that case the city's employees who were painting white lines on the street were apparently furnished with barriers to protect the public from walking on the freshly painted surface but failed to use them. The opinion points out, 219 Cal. at page 332, 26 P.2d at page 287: "Nor does the record contain any suggestion that the absence of warning signs or barricades was actually made known to any of these officers." In our case the method of traffic control which the jury found inadequate was well known to McGill from long experience.

[7] Appellant's argument that respondent was guilty of negligence as a matter of law in driving through smoke so thick as to obscure her vision is contrary to the California law. While some jurisdictions have adopted the rule that it is negligence as a matter of law for a driver to proceed where he cannot stop his car within the range of vision this rule has not been followed by our courts. "Ordinarily it is not negligence as a matter of law for a motorist to drive at [such] a speed that he cannot stop within the range of his vision; it is a factual question. [Citing many cases.]" Peri v. Los Angeles Junction Ry., 22 Cal.2d 111, 127, 137 P.2d 441, 450.

[8] In Bixby v. Pickwick Stage Co., 131 Cal.App. 739, at page 741, 21 P.2d 972, one of the cases cited with approval in the Peri case, the court said: "It is almost uniformly the rule that whether the conduct of a person in driving into smoke, fog, dust, or mist offends the doctrine of ordinary care is ordinarily a question to be determined by the court or jury." The question of respondent's contributory negligence was properly left to the jury. Appellant was not entitled to its proposed instruction that if plaintiff had knowledge of the condition of the road the jury should return a verdict for the county.

[9, 10] Appellant's proposed instruction on what constitutes a reasonable time to "repair" a dangerous or defective condition after notice was misleading under the facts. It was not a question of *repairing* anything.

How does one *repair* smoke across a highway? The statute uses the verb "remedy," and in any event the jury was properly instructed under the facts of this case:

"* * * it is not * * * the existence of a dangerous condition itself which renders the County liable, but the failure, if any, of the County, for a reasonable time after knowledge or notice of the condition, to take action reasonably necessary to protect the public against the condition.

[11] "Now, here again, the burden of proof is on the plaintiff, that is, the plaintiff must persuade you by a preponderance of the evidence that the County failed to take action reasonably necessary to protect the public against the condition within a reasonable time after it had knowledge of such a dangerous condition or that a dangerous condition would be created by the act it directed to be done."

[12] Appellant's criticisms of this and other instructions given by the court on the subject of the basis of its liability depend largely on its arguments already disposed of. The jury was instructed that the only basis of liability must be found in Government Code, section 53051, which was read to it in full. The court then took up each requirement of that section and carefully and properly instructed the jury thereon. The jury to find appellant liable under these instructions must have found: 1. that a dangerous condition existed in the highway at the time of the collision; 2. that McGill had notice that such condition was reasonably foreseeable; 3. that the customary method of doing the burning did not provide reasonably adequate protection for the public against this dangerous condition; and 4. that McGill, with knowledge of that fact, failed for a reasonable time to provide for such adequate protection.

[13] The court made it perfectly clear that the only basis of liability must be a dangerous condition of the highway, coupled with the other conditions set out in Government Code, section 53051. The appellant requested no instruction in terms that liability could not be based on the individual negligence of one of the employees on the job, although the instruction that all of the elements of section 53051 must be proved to warrant a recovery by plaintiff negatives the possibility of a recovery on the basis of *respondeat superior*. Having failed to request such specific instruction appellant cannot complain that none was given. Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531.

Judgment and order denying judgment notwithstanding the verdict affirmed. Appeals from orders denying nonsuit and new trial dismissed.

KAUFMAN, J., and DRAPER, J. pro tem., concur.



149 Cal.App.2d 334

Lloyd STEADMAN, Petitioner and Appellant,

v.

F. Britton McCONNELL, as Insurance Commissioner of the State of California, Respondent.

Civ. 21793.

District Court of Appeal, Second District, Division 1, California.

March 20, 1957.

Rehearing Denied April 9, 1957.

Hearing Denied May 15, 1957.

Mandamus proceeding. The Superior Court of Los Angeles County, Bayard Rhone, J., denied the relief sought, and the petitioner appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding that life insurance agent had made false and fraudulent representations for purpose of inducing persons to take out policies of insurance; that he had engaged in fraudulent acts and had conducted business in dishonest manner; that he had been guilty of incompetency and untrustworthi-

ness in conduct of business; that he had committed wrongful acts subjecting those dealing with him to danger of loss; and that he had knowingly misrepresented terms and effect of insurance policies while acting in course of business; and held that suspension of his license for period of one year had been proper punishment.

Affirmed.

1. Insurance ⇐12

Accusation, charging licensed life insurance agent with misrepresentation, dishonest conduct, incompetency and untrustworthiness, stated grounds for revocation or suspension of license.

2. Mandamus ⇐168(4)

In mandamus proceeding brought by life insurance agent whose license had been suspended, evidence warranted finding that petitioner had not come into court with clean hands.

3. Insurance ⇐12

Where life insurance agent was experienced expert in field, whereas insurance applicant was a mere layman, relationship was a fiduciary one in which applicant was entitled to believe agent's material statements with regard to so-called "Bank Loan Life Insurance Plan", which involved various complications, highly technical in nature.

4. Insurance ⇐12

In disciplinary proceeding culminating in one-year license suspension, evidence sustained finding that life insurance agent had made false and fraudulent representations for purpose of inducing persons to take out policies of insurance; that he had engaged in fraudulent acts and had conducted business in dishonest manner; that he had been guilty of incompetency and untrustworthiness in conduct of business; that he had committed wrongful acts subjecting those dealing with him to danger of loss; and that he had knowingly misrepresented terms and effect of insurance policies while acting in course of business.

Paul Goodsell Sullins, Pasadena, for appellant.

Edmund G. Brown, Atty. Gen, Lee B. Stanton, Deputy Atty. Gen., for respondent.

DORAN, Justice.

On May 25, 1953, an accusation was filed with the Insurance Commissioner charging the appellant, Lloyd Steadman, a licensed life insurance agent, with misrepresentation dishonest conduct, incompetency and untrustworthiness, in violation of the Insurance Code. To this Steadman filed a general denial and requested a hearing, but did not demur or otherwise object to the pleading. At the hearing both documentary and testimonial evidence was received and the matter submitted on receipt of written argument.

The Insurance Commissioner found the appellant guilty of making false and fraudulent representations for the purpose of inducing persons to take out policies of insurance; engaging in fraudulent acts and conducting business in a dishonest manner; incompetency and untrustworthiness in the conduct of business; commission of wrongful acts having subjected those dealing with appellant to danger of loss; and knowingly misrepresenting the terms and effect of insurance policies while acting in the course of business. Appellant's license was suspended for a period of one year.

A petition for reconsideration having been denied, Steadman filed this petition for writ of mandate which, after a hearing, was denied. The Superior Court found the Insurance Commissioner was not without jurisdiction, that Steadman received a fair trial, that the Commissioner's decisions were supported by the findings and that the Commissioner's findings are supported by substantial evidence; that there was no abuse of discretion by the Commissioner, that Mr. and Mrs. Stokes to whom the insurance had been sold, had been damaged in excess of $300 per year since purchasing the insurance, and that Steadman did not come into court with clean hands.

The so-called "Bank Loan Life Insurance Plan", sold by appellant Steadman to Mr. and Mrs. Charles H. Stokes, as found by the trial court, operates essentially as follows: "The insured pays the first annual premium on a ten-payment life insurance policy. The policy is subsequently assigned as collateral for a bank loan, proceeds of which loan are applied to payment of the second annual premium. * * * On each anniversary date a new note is excuted in the amount then outstanding on the old note plus premium then due. Interest on each note is at the rate available when the note is executed. When the fifth annual premium comes due, the bank pays the remaining premiums due in advance on a discounted basis and the insured executes a last note to cover said advance premiums and the balance outstanding on the then current note. To make this changeover, an agreement by the insurance company to receive such advance premiums on a discounted basis is necessary. Furthermore, if the insurance company would not agree to return upon request unused premiums so paid in advance, during the insured's lifetime, the policy would thereby be reduced in value as collateral for such loan.

"The bank loan is not intended to be paid in full until the end of the ten-payment period. However, each note is made due and payable at the next annual premium payment date. The borrower is personally liable on the note.

"The cash value of the policy is substantially less than the amount of the premiums and, consequently, of the note executed by the insured. In addition to interest payments on the note, the borrower must pay part or all of the difference between cash value and premiums or must provide additional collateral security to the bank or must have personal credit standing satisfactory to the bank, or any combination thereof.

"At the end of the ten-payment period, the insured may surrender the policy and receive cash value less the amount of the loan then outstanding. * * * Under the Bank Loan Plan, dividends may be left to accumulate at interest with the insurer and taken in cash at the time the policy is surrendered, or they be left to purchase paid-up insurance, or dividends may be applied to subsequent premiums payments and thereby reduce the amount of the bank loan required for premiums. If dividends are left to accumulate, they will increase the value of the policy as collateral for the loan.

"Interest on the bank loan is an expense which is deductible each year from the insured's gross income in calculating net taxable income. * * * This tax saving reduces the net cost of the bank loan. The amount of the tax saving increases or decreases as interest charges or the insured's tax bracket increase or decrease."

The trial court found that in 1948 Steadman sought to negotiate life insurance policies with Mr. and Mrs. Stokes who were stated to be seeking an investment of about $1,000 annually for the purpose of providing an educational fund. Appellant Steadman explained some but not all of the features of the bank plan.

"Steadman represented that premiums of a $25,000.00 ten-payment life insurance policy * * * could be financed through such a bank loan plan by an initial payment of $2,544.00 and nine equal annual payments of $528.35; that Steadman represented that if such payments were made Mr. Stokes would receive between $15,000.00 and $20,000.00 in cash from the policies at the end of the ten-payment period"; that the Stokes were induced by such representations to take out two policies on the life of Mr. Stokes, "and were further induced to become personally liable on promissory notes * * * to the First National Bank of St. Joseph, Missouri".

It was further found "That said representations were false and misleading and untrue in that the total cash receivable or available from said policies * * * would be approximately $5,000.00 less than said minimum amount of $15,000.00", and that Steadman "knew or should have known that said statements and representations were false, untrue and misleading".

Steadman also represented that the annual payments for carrying the policies would be approximately $528.25 for each policy, but did not inform Mr. and Mrs. Stokes "that said payments would increase with an increase in interest rates, or otherwise. That said annual payments did increase almost $400.00 per annum; said increase occasioned hardship and difficulties to said Mr. and Mrs. Stokes in meeting the annual payment and has exposed them to serious danger of loss which might be occasioned by discontinuance or lapse of the policies due to the inability of the Stokeses to meet said annual payment".

Likewise, Steadman "did not inform them * * * that no agreement had been made with said New York Life Insurance Company or that no consent had been secured from said Company whereby if premiums were paid in advance said Insurance Company would return unused premiums upon request", and that at the times in question it was the policy of the company not to return advance premiums. It was also found that Steadman represented that death benefits would be payable upon the death of either Mr. or Mrs. Stokes, whereas, in fact, no benefits would be payable upon the death of Mrs. Stokes. The record discloses substantial evidence in support of these findings. As stated in a similar case, Collins v. Caminetti, 24 Cal.2d 766, 772, 151 P.2d 105, 154 A.L.R. 1141, the evidence must be reviewed in the light most favorable to the commissioner".

[1] Appellant's contentions that "The accusation fails to state grounds for revocation or suspension of petitioner's license", must be deemed specious and untenable. Perusal of the accusation as a whole leaves no doubt that the appellant is being charged with misrepresentation and fraud inducing Mr. and Mrs. Stokes to purchase policies of insurance, and conduct indicating "incompetency or untrustworthiness in the conduct of his business", etc. for which disciplinary action is authorized. Regardless of whether appellant may have waived such objection by failure to raise the same prior to this appeal, the accusation is clearly adequate.

[2] As stated in the respondent's brief, "The statutory purpose (is) to ensure the honesty of insurance agents, brokers and salesmen". The proceeding here involved is equitable in nature and the trial court was warranted in finding that petitioner, seeking a writ of mandate, did not come into court with clean hands. In this connection it may be noted that the reviewing court is not here confronted with a criminal prosecution, a civil action for fraud and deceit, nor an action for breach of contract. Principles applicable to such actions are not necessarily involved in the present inquiry which relates solely to the question to whether disciplinary action should be taken in respect to appellant's conduct.

As said in Collins v. Caminetti, 24 Cal.2d 766, 772, 151 P.2d 105, 108, "Proof of a misrepresentation specified in either section 780 or 781 of the Insurance Code does not require a showing of reliance by the policyholder, his ignorance of the falsity of the representation, or damage to him as a consequence of such reliance". Again, appellant's argument that disciplinary action should not be taken for no more than "one or two disconnected acts in one case", suggestive of the common law "one bite" doctrine relating to dogs, is not persuasive and seems to entirely miss the nature of the proceedings and the protective purpose of the statute.

The meaning of such words as dishonesty, untrustworthiness, etc. as used in the statute, is well understood and should not be given a forced and unnatural interpretation. To adopt appellant's position in this regard would in effect emasculate the Insurance Code and give an insurance agent the utmost leeway in selling insurance without regard for ethical principles. Obviously, this concept is far removed from the evident legislative intent.

[3] In this connection it is well to note that the policy in question was one involving various complications, highly technical in

nature. The appellant was an experienced expert in the field; the insured a mere layman who was led to believe that the bank plan would meet certain expressed objectives. Certainly the relationship was a fiduciary one in which Mr. and Mrs. Stokes were entitled to believe appellant's material statements. Had the Stokes been correctly informed as to the true situation, the insurance would not have been purchased.

[4] Consideration of the entire record leads to the conclusion that the appellant was in all respects accorded full and fair hearings both before the Insurance Commissioner and again in the Superior Court; that no prejudicial error was committed, and that the findings, conclusions and judgment are fully supported by substantial evidence.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



149 Cal.App.2d 277

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Luigi DI MICHELE, Defendant and Appellant.

Cr. 5662.

District Court of Appeal, Second District, Division 2, California.

March 19, 1957.

Defendant was convicted on all counts of three informations charging forgery. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment, and defendant appealed. The District Court of Appeal, Fox, J., held that use of prior felony conviction of defendant in all counts of informations charging forgery, was not illegal, on ground that it placed defendant in double jeopardy.

Judgment affirmed.

1. Criminal Law ⇐163

Use of prior felony conviction of defendant in all counts of informations charging forgery, was not illegal, on ground that it placed defendant in double jeopardy. West's Ann.Pen.Code, § 470.

2. Criminal Law ⇐1202(1)

A prior conviction is not a part of the offense charged.

3. Criminal Law ⇐1202(1)

Purpose of alleging a prior conviction is not to try defendant again for the former offense, but rather to advise the Board of Prison Terms and Paroles of the fact to enable the board to determine the proper term of punishment in event of conviction.

4. Indictment and Information ⇐114

Allegation of same prior conviction against defendant in each count of three informations charging forgery, was not improper. West's Ann.Pen.Code, §§ 470, 969, 969a.

5. Criminal Law ⇐984

Sentence of defendant, who was convicted under all counts of three informations which charged forgery, and which were consolidated for trial, was not illegal because trial court ordered sentence on certain counts to run consecutively with that imposed on other counts. West's Ann.Pen. Code, §§ 470, 969.

6. Criminal Law ⇐260(11), 1159(2, 4)

Questions as to the credibility of a witness and the weight to be given his testimony are for the jury and trial court.

Luigi DiMichele in pro. per.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was charged in two informations with nine counts of forgery of fictitious name, a violation of section 470, Penal Code, by fraudulently and feloniously uttering certain fictitious checks with intent to defraud certain named persons.

In a third information defendant, together with one Mary Amezcua, was charged with five additional such counts. In each information defendant was charged with a prior conviction of grand theft, a felony. This charge was made with respect to each of the several counts. Defendant admitted the prior conviction. The three informations were consolidated for trial. The jury found defendant guilty as charged on all counts. He was sentenced to the state prison, sentences in two of the cases to run concurrently with each other and consecutively with the sentence in the other case. Defendant appeals from the judgment of conviction in all three cases.

In March, 1954, defendant requested Mrs. Mary Amezcua to cash checks under a fictitious name. At his suggestion, Mrs. Amezcua obtained a nurse's registration card under the name of Frances Varga; he assisted her in obtaining the card by driving her to a certain address on Olympic Boulevard in Los Angeles. Mrs. Amezcua was not a nurse. She never used the name Frances Varga other than to pass the checks here in question. It was agreed between defendant and Mrs. Amezcua that he would receive two-thirds and she one-third of the money realized from the checks.

Defendant furnished Mrs. Amezcua with five checks, each in the amount of $46.24, drawn on the Beverly-Vermont Branch of the Bank of America, signed with the name "J. McLaughlin" and made payable to Frances Varga. This bank did not have an account under the name of J. McLaughlin. In the opinion of a handwriting expert, the handwriting on the checks and on an exemplar made by defendant was that of the same person. Mrs. Amezcua passed the five checks at five different places of business, using the name Frances Varga and the nurse's registration card, and received either cash or merchandise therefor. In due course, the checks were dishonored by the bank. Mrs. Amezcua gave the money received to defendant and he returned one-third to her.

In July, 1956, defendant and a Mrs. King undertook a similar venture. Defendant furnished her with 100 identical checks; they were each for $57.65, drawn on the Highland-Hollywood Branch of the Security-First National Bank, signed with the name "Dr. Allen A. Corman" and made payable to Alice Burns. Defendant informed Mrs. King that the writing on the face of the checks was his.

There was no account at this bank in the name of Dr. Allen A. Corman. It was proved that the writing on an exemplar made by defendant and that on the checks given to Mrs. King were made by the same person.

Defendant provided Mrs. King with instructions as to cashing the checks. She was directed to cash them on Friday, Saturday and Monday, "because the checks started coming back on the third day." She was advised to obtain a false address, and defendant went with her when she chose an address on Palmer Street in Los Angeles. Also, in cashing the checks, Mrs. King was instructed to buy just a little merchandise and was to try to obtain as much in cash from the checks as was possible.

Defendant suggested that Mrs. King use the name "Alice Burns" as "A's and B's are easier to make on checks and that the name Alice Burns sounds good." Mrs. King, at defendant's direction, obtained a temporary driver's license under the name of Alice Burns, and he went with her to show her how to obtain the license without being fingerprinted. Also defendant showed he where to obtain a social security card under the name of Alice Burns. Defendant advised Mrs. King with respect to how she was to dress while cashing checks: "that a person if they are a nurse, people have more faith in you, they trust you a little more." Mrs. King was not a nurse and never used the name Alice Burns before this incident.

Mrs. King proceeded to cash the checks at various business establishments. She wore a nurse's uniform and used identification bearing the name Alice Burns. The checks were, of course, dishonored by the

bank. Mrs. King shared with defendant the money obtained from cashing these checks. At the conclusion of her activities, Mrs. King returned all uncashed checks to defendant, who destroyed them.

[1–4] Defendant argues that it was illegal to use his prior felony conviction in all the counts charged against him because this had the effect of placing him in double jeopardy. This argument is not sound because "A prior conviction is not a part of the offense charged * * *." People v. Stoddard, 85 Cal.App.2d 130, 138, 192 P.2d 472, 476. The purpose of alleging a prior conviction is not to try the defendant again for the former offense but rather "to advise the 'Board of Prison Terms and Paroles' of the fact to enable them to determine the proper term of punishment in the event of conviction." People v. Ashcraft, 138 Cal. App.2d 820, 825–826, 292 P.2d 676, 679. Nor was it error, as defendant contends, that the same prior conviction was alleged against him in each count of the three informations. Pen.Code, secs. 969, 969a; People v. Youders, 96 Cal.App.2d 562, 571, 215 P.2d 743; People v. Ashcraft, supra, 138 Cal.App.2d at page 826, 292 P.2d at page 679.

[5] Defendant vainly argues that his sentence was illegal because the trial court ordered his sentence on certain counts to run consecutively with that imposed on other counts. Penal Code section 969 gives the trial court the power to determine whether sentences shall run concurrently or consecutively where a defendant is convicted on two or more offenses. In People v. White, 100 Cal.App.2d 836, 840, 224 P.2d 868, the defendant was convicted on six felony counts, all of which were of a similar nature and all closely connected in point of time. The trial court meted out six consecutive sentences. It was held that determination of whether several sentences should run concurrently or consecutively is vested in the trial court by law and its determination may not be disturbed on appeal unless abuse of discretion is clearly shown. It was further held that the imposition of six consecutive sentences was not an abuse of discretion where the defendant had a prior conviction.

[6] Defendant further contends that Mrs. Amezcua and Mrs. King were coached by the prosecution and gave perjured testimony under threats of punishment if they did not testify as desired and promises of leniency if they did so testify. These contentions were suggested to the jury by the defendant in his cross-examination of these witnesses. Both denied they were testifying as a result of threats of punishment or promises of reward. Questions as to the credibility of a witness and the weight to be given his testimony are for the jury and the trial court. People v. DePaula, 43 Cal. 2d 643, 649, 276 P.2d 600; People v. Tierney, 131 Cal.App.2d 762, 763, 281 P.2d 259.

Defendant contends that he was not given a fair and impartial trial. He bases this contention on the fact that the trial judge generally ruled in favor of the prosecution and adversely to the defense during the course of the trial. An examination of the transcript clearly indicates that the rulings were correct; in fact, the trial judge took great pains to see that the defendant had a fair and impartial trial.

Defendant's final contention is that the prosecution failed to assist him in obtaining evidence to prove his innocence. He particularly complains that his repeated requests to the prosecution to secure a certain checkwriting machine were denied. The record, however, fails to disclose that he made any such request. Furthermore, it is difficult to see how the production of this machine would have assisted defendant's case since the handwriting on the checks was identified as defendant's by handwriting experts. The record indicates that the prosecution was entirely fair to the defendant.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

149 Cal.App.2d 184

Patti Mora ANDERSON, Plaintiff and Appellant,

v.

J. O. HANDLEY, Defendant and Respondent.

Civ. 17169.

District Court of Appeal, First District, Division 1, California.

March 18, 1957.

Action for fraud. From a judgment of the Superior Court, County of Monterey, Anthony Brazil, J., in favor of defendant after sustaining a general demurrer to the complaint and the plaintiff's declination to amend, the plaintiff appealed. The District Court of Appeal, Agee, J. pro tem., held, inter alia, that in action for fraudulent representations by building materials dealer as to competency of building contractor, complaint alleging that plaintiff relied on such representation and "in" such belief and reliance plaintiff entered into contract with the contractor, sufficiently pleaded reliance as against a general demurrer, the word "in" having meaning of "by means of, with, by, through".

Judgment reversed.

1. Fraud ⇐3

The essential elements in action for damages for false representations are false representations made by defendant, knowledge by defendant of their falsity, intent by defendant to induce plaintiff to act thereon, belief by plaintiff in truth of such representations, reliance thereon by plaintiff, and damage to plaintiff resulting therefrom.

2. Pleading ⇐34(1)

Pleadings must be liberally construed, with a view to doing substantial justice. West's Ann.Code Civ.Proc., § 452.

3. Fraud ⇐20

In action for fraud, defendant's representations need not be the sole cause of damage, but if they are substantial factor in inducing plaintiff to act, even though he also relies in part upon advice of others, reliance is sufficiently shown.

4. Fraud ⇐46

In action for fraudulent representations by building materials dealer as to competency of building contractor, complaint alleging that plaintiff relied on such representation and "in" such belief and reliance plaintiff entered into contract with the contractor, sufficiently pleaded reliance as against a general demurrer, the word "in" having meaning of "by means of, with, by, through". West's Ann.Civ.Code, § 1568.

See publication Words and Phrases, for other judicial constructions and definitions of "In".

5. Fraud ⇐11(1)

Mere expression of opinion as to character or skill of another is not actionable, but where such expression of opinion is dishonestly made to one who is entitled to rely upon it, the one giving the opinion is liable for such fraud provided the other elements of fraud are present.

Charles Reagh, San Francisco, for appellant.

Thompson & Thompson, Monterey, for respondent.

AGEE, Justice pro tem.

Plaintiff appeals from a judgment entered in favor of defendant after the sustaining of a general demurrer to the complaint and plaintiff's declination to amend. The sole question is whether the complaint states a cause of action.

It alleges as follows: that plaintiff owned a parcel of unimproved land in Monterey County of a value of $15,000; that she desired to build a residence thereon and to that end had commenced to negotiate with one Lewis, a building contractor; that she intended to do without the aid of an architect and therefore it was of the utmost importance to her that she select a competent, reliable and honest building contractor to do the work; that she explained all of the foregoing to defendant and re-

quested him to advise her of the competency, reliability and honesty of Lewis; that defendant stated in response that Lewis was a completely honest, competent and reliable building contractor; that defendant so stated with the intent that plaintiff would rely thereon and in order to induce her to employ and contract with Lewis as such building contractor to do said work; that when defendant made said statements he well knew that Lewis was not a competent or reliable or honest building contractor but was on the contrary completely incompetent, dishonest and unreliable; that for many years defendant had been engaged in the area in the business of selling building materials and was well acquainted with Lewis and well knew that Lewis overly indulged in the use of alcohol and by reason thereof had become utterly incompetent and thoroughly unreliable as a building contractor and was deeply in debt to defendant and many others and was not financially able to undertake the building of said residence; that plaintiff believed in, relied on, and trusted said statements made to her by defendant and in such belief, trust and reliance entered into a written contract with Lewis for the building of said residence; that thereafter and by reason of the said incompetency and dishonesty of Lewis, the residence was not constructed as required by the contract and plaintiff was thereby damaged. (The items of damages are set forth in great detail but are not pertinent on this appeal.)

[1] The essential elements in this action for damages for false representations are as follows: 1. false representations made by defendant; 2. knowledge by defendant of their falsity; 3. intent by defendant to induce plaintiff to act thereon; 4. belief by plaintiff in the truth of such representations; 5. reliance thereon by plaintiff; 6. damage to plaintiff resulting therefrom. (See 23 Cal.Jr.2d, 164.) All of these elements were alleged in the complaint.

[2] Defendant contends, however, that plaintiff is required to allege specifically that, had it not been for the false representations, she would not have entered into the contract with Lewis. In support of this contention, defendant cites section 1568 of the Civil Code to the effect that consent (to enter into a contract) is only deemed to be induced by fraud when it would not have been given had such fraud not existed. It is true that plaintiff did not make such an allegation in those words. However, pleadings must be liberally construed, with a view to doing substantial justice. Code Civ.Proc. § 452.

[3] Plaintiff's complaint pleaded reliance upon the alleged fraudulent representations as follows: "Plaintiff believed in, relied on and trusted such representations so made to her by defendant and *in* such belief, trust and reliance she entered into a contract with said Lew E. Lewis for the construction of such a dwelling on said lands." (Emphasis added.) The word "in" was considered in Beatty v. Hughes, 61 Cal.App.2d 489, 143 P.2d 110, 111, in construing the meaning of a statute requiring a county recorder to record "'in a fair hand, or typewriting.'" The recorder wished to photograph documents instead. The appellant court held that the preposition "in" in this context had the meaning of "'by means of; with; by; through,'" quoting, 61 Cal.App.2d at page 493, 143 P.2d at page 112, from the Century Dictionary and held that the recording had to be done through handwriting or tpyewriting. In the instant case, if the allegation had been that "*through* such belief, trust and reliance" plaintiff had entered into the contract, there could not be any question that plaintiff had alleged that a substantial reason or motivating factor which induced her to enter into the contract was the false representations of defendant. It is not necessary that such represenations be the *sole* factor. "In actions for fraud it is not required that a defendant's representations be the sole cause of the damage. If they are a substantial

factor in inducing the plaintiff to act, even though he also relies in part upon the advice of others, reliance is sufficiently shown." Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 717, 128 P. 2d 522, 524, 141 A.L.R. 1358.

[4] We are of the opinion that the complaint sufficiently pleads reliance as against a general demurrer.

[5] Defendant also raises the point that a mere expression of opinion as to the character or skill of another is not actionable. This is indeed the general rule but to this there is a well-recognized exception. Where such expression of opinion is dishonestly made to one who is entitled to rely upon it, the one giving the opinion is liable for such fraud provided the other elements of fraud are present. In Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L.R.A.,N.S., 125, the false representation was made that defendant Woodruff was an architect and designer of great skill and experience. The Supreme Court held that such an expression of opinion can become actionable when it is made dishonestly and with knowledge on the part of the one making it of its falsity.

Defendant relies heavily upon Auckland v. Conlin, 203 Cal. 776, 265 P. 946. In that case plaintiff attempted to plead a cause of action for fraudulent representations against her physician and his son, an attorney. Her complaint alleged that she had told the physician that she wished to consult an attorney and that he had suggested his son; that the physician stated to plaintiff that she would lose her property unless she employed his son; that she did employ his son and ultimately paid him $22,250 for legal services; that in fact she was never in danger of losing her property and that the son's services were of no value; that the physician got part of the fee which his son had charged her; that by reason of the premises she was entitled to recover judgment against both the physician and his son for the amount of said legal fee. A demurrer to this count was sustained and the ruling was upheld on appeal. This case is readily distinguishable. First, there was no allegation that the defendant physician acted fraudulently or dishonestly in recommending his son. As the Supreme Court said, 203 Cal. at page 778, 265 P. at page 947: "Said defendant certainly should not be held liable for recommending his son, a licensed attorney, at a time when the plaintiff was seeking to employ one of that profession." Second, as to the alleged statement that plaintiff would lose her property if she did not get an attorney, there is no allegation or showing that the physician claimed or had any special knowledge, legal or otherwise, which would entitle plaintiff to rely upon any such statement of opinion.

We hold that the complaint states a cause of action and that defendant should be required to answer. The judgment is therefore reversed.

PETERS, P. J., and BRAY, J., concur.



149 Cal.App.2d 205

Alfred W. KELLER, Plaintiff and Appellant,

v.

MORRISON-KNUDSEN COMPANY, Inc., a corporation, and Ford J. Twaits Company, a partnership, Defendants and Respondents.

Civ. 21828.

District Court of Appeal, Second District, Division 3, California.

March 18, 1957.

Action by employee of plumbing subcontractor, against prime contractors, for injuries sustained when he and his coemployees were working at fifth floor window of building under construction, guiding through the window a pipe which was be-

ing raised from ground by hoist operated by defendants employees but which had been fitted for hoisting with choker by plaintiff's coemployee, and choker came loose and pipe broke free and injured plaintiff. The Superior Court of Los Angeles County, Harold W. Schweitzer, J., rendered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that it was for jury to say whether it was more probable that defendants' negligence caused the accident or not, in determining whether to apply res ipsa loquitur rule.

Reversed.

1. Negligence ⇐121(2)

For doctrine of res ipsa loquitur to be available, accident must be of a kind which ordinarily does not occur in the absence of some one's negligence, accident must have been caused by agency or instrumentality within exclusive control of defendant and must not have been due to any voluntary action or contribution on part of plaintiff.

2. Negligence ⇐121(2)

Availability of doctrine of res ipsa loquitur depends on whether it can be said, in light of common experience, that accident was more probably than not the result of defendant's negligence.

3. Negligence ⇐121(2)

The requirement that accident must have been caused by agency or instrumentality within exclusive control of defendant, as prerequisite for application of res ipsa loquitur doctrine, is not an absolute one and plaintiff need not exclude every other possibility than that injury was caused by defendant's negligence and may rely on the doctrine even though he has participated in the events leading to the accident, if evidence excludes his conduct as responsible cause.

4. Negligence ⇐136(6)

Once it is shown that defendant had some control over instrumentality causing injury, it is for jury to say whether it is more probable that defendant's negligence caused the accident or not, in determining whether to apply res ipsa loquitur rule.

5. Negligence ⇐136(6)

In action by employee of plumbing subcontractor, against prime contractors, for injuries sustained when he and his coemployees were working at fifth floor window of building under construction, guiding through the window a pipe which was being raised from ground by hoist operated by defendants but which had been fitted for hoisting with choker by plaintiff's coemployee, when choker came loose and pipe broke free and injured plaintiff, evidence on issue of whether accident was caused by agents within exclusive control of defendants, so as to permit application of res ipsa loquitur doctrine, was for jury.

Raoul D. Magana, Los Angeles, and Walter P. Christensen, Beverly Hills, for appellant.

Veatch & Thomas, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of nonsuit in an action for damages for personal injuries sustained when he was struck by a piece of pipe as it fell after it became loose from the hook of a cable while being lowered by a hoist owned and operated by defendants. The action was tried before a jury.

The rules which govern trial courts in the determination of a motion for a judgment of nonsuit and reviewing courts on appeal from such a judgment should be well known and need not be repeated.

The question is whether an inference of negligence was raised under the doctrine of res ipsa loquitur.

Plaintiff was an employee of Mehring and Hanson, the plumbing and heating subcontractors of defendants Morrison-Knudsen Company, Inc., and Ford J. Twaits Company, the general contractors in the construction of the police facilities building in Los Angeles. The accident oc-

curred during a pipe raising maneuver from the ground to the fifth floor of the building where plaintiff and two coemployees were waiting to guide the pipe through a window, unload it, and stack it. The pipe was hooked by a choker to the end of a cable which was operated by a stationary hoist in a small shack on the ground. The cable hung from the tip of a boom which was attached near the top of a tower of steel rigging constructed close to the building. The boom could be swung in a 270-degree arc; it could be swung over the roof of the building; its movement was controlled by a signalman on the roof pulling on a tagline. His job was to swing the boom toward the building when a load had reached its proper height.

In a loop at the end of the cable was a hook. The hook had a safety latch which extended across the opening of the hook; it could be pressed downward but when released snapped back toward the opening of the hook and closed it. Above the hook was a 200-pound cement ball, called a headache ball. Its purpose was to keep the cable taut as it hung from the boom. The tagline handled by the signalman on the roof was attached above the headache ball. It looped around the cable and slid free when the cable went up and down. Below the headache ball was another tagline which was fastened tight to the loop of the cable just above the hook. This tagline was handled by a signalman on the ground. The tagline men controlled the swaying of the load as it was raised and lowered. The hoist operator controlled only the general up-and-down movement. He could see only straight up through the roof of his shack, not to the sides where the taglines were. He relied on signals from the tagline men to raise and lower a load. The hoist operator and the two tagline men were employees of defendants.

The general procedure in preparing a length of pipe to raise it was to wrap a piece of cable with an eye on one end, called a choker, around the pipe together with softeners, small pieces of wood used to hold the pipe in the choker. This process is called rigging. The eye was slipped through the safety latch onto the hook, and the safety latch then snapped back against the hook. The slack was then taken out of the choker and the load was started up.

When a length of pipe reached a point above the fifth floor the tagline man on the roof of the building swung it close to the building. It was then lowered. When it reached a fifth floor window plaintiff and his two coemployees, standing on a wooden platform which jutted out of the window 18 to 24 inches, got hold of the tip of the pipe and guided it in through the window until it rested on the wooden platform which extended into the building 8 to 10 feet. When over half of the pipe was in the building it would be lowered onto the platform. The choker would be disengaged from the pipe by LaVallie, one of plaintiff's coemployees, and the pipe would be pushed down a ramp from the platform into the building. The hook would not come into the building.

On the occasion in question, at the insistence of plaintiff as union steward, Willson, the foreman of Mehring and Hanson, did the rigging. Willson testified as to the steps he took in rigging the pipe:

> "I would take the cable and thread it around the pipe, put the softeners around the cable, kick the cable down so it is good and tight, nod over to Mr. Taylor [the hoist operator] to lower the ball so I could snap the loop onto the hook. * * * Then I would kick the loop down to be sure it is good and tight, with the softeners around the wood. * * *
>
> "Q. When the hook came down you put it in the hook? A. I would nod to Mr. Taylor when I had the thing ready. This headache ball was always up above, you know, up above my head so that I would not be bumping my head against it. As soon as I get the cable around the pipe, then I nod to Mr. Taylor. He lowers the headache ball and I hook and I just snap it in

the safety catch and I step back.
* * *

"Q. When you say that you would snap it onto the hook, what did you mean by that? A. The loop that I would hold in my hand after I had it secured around the pipe itself.

"Q. You would snap that over the safety catch right onto the hook? A. That is right, right onto the hook."

He further testified:

"Q. At the time that the accident happened did you hook up the material the same way that you have done it on prior occasions? A. Yes, sir.

"Q. Did you look at the hook to make sure that you had the cable in the hook? A. Sure, you can hear it snap. There is a strong spring in that safety catch.

"Q. Was the cable, the inside of the safety catch like it is depicted in the photograph? [The photograph shows the choker properly fastened in the hook.] A. Yes, sir.

"Q. After you got that hooked up there what did you do? A. I stepped back and nodded to him and he started pulling her up.

"Q. By 'stepped back,' how far back did you step? A. Well, in order to get out of the way of the pipe in case it is setting at an angle I didn't want to get hit with it. After all, if the boom isn't straight it will swing the pipe over; so I stepped back beyond the end of the pipe, away from it.

"Q. When you put this choker around the pipe whereabouts on the pipe did you put it? A. About a third from either end.

"Q. Either end? A. That is right.

"Q. So that when it is raising in the air it is at an angle? A. Yes, sir, vertical.

"Q. Vertical? A. Pretty near vertical."

The hoist operator testified:

"Q. So that the pipe was attached by the use of the choker, the slip knot, the chunking, and put on to the hook in the same way that Mr. Johnson [the tagline man on the ground] would do it, isn't that right? A. Yes, sir.
* * *

"Q. All right, now, No. 5. No. 5 approximately simulates the manner in which Mr. Willson did hook up the load, and the way he did it, he did it right, is that right? A. Yes, sir.

"Q. That is hooked up properly, is it not? A. Yes, sir."

The pipe being raised was about 20 feet in length and weighed between 500 and 1,000 pounds. As it went up from the ground it dangled at an angle. It was raised from a point about 30 feet from the building and was brought over close to the building by defendants' employee pulling on the tagline from the roof. When the load had gone above the fifth floor, one of plaintiff's coemployees who was with him on the fifth floor signaled to the tagline man on the ground, who relayed it to the hoist operator. The hoist operator lowered the pipe. As the pipe came up it was about 10 feet from the window. It went by the window and out of sight of plaintiff and his coemployees in the building. It then reappeared and came back down where they could reach it. As the pipe was lowered the long end drifted into the window. Plaintiff, LaVallie, and his other coemployee then placed their hands on the tip of the pipe and started to guide it into the window. They did not lift it; they just balanced it. When it was about waist-high, coming into the building at about a 20-degree angle and the end about 4 or 5 feet inside the building and about two feet above the platform, the pipe suddenly jerked out of their hands, dropped, struck the platform, bounced to the ceiling, teetered, and fell out the window to the ground. As it did, it struck plaintiff, causing the injuries complained of. Pipe had bounced on the platform before but not that hard.

At the time the pipe fell the hook and choker were outside of the building. No one unsnapped the eye from the hook. No part of the pipe had touched the platform before it dropped. The end of the pipe was not bounced upon the platform by plaintiff or either of his coemployees before it dropped.

In some manner the choker had come out of the hook and safety catch. When the pipe came to rest on the ground the choker and the softeners were still around the pipe but in a different position. The loop of the choker was no longer in the hook of the cable. The pipe with the entire choker had come down; the cable, headache ball, and hook were still above. There was no break or damage to the hook, the eye, or the loop of the choker, or to the safety catch. Defendants continued to work with the same hook and choker after the accident.

Defendants' motion for a judgment of nonsuit was granted. Plaintiff appeals. He contends the doctrine of res ipsa loquitur is applicable.

[1, 2] The doctrine of res ipsa loquitur has three conditions: 1. The accident must be of a kind which ordinarily does not occur in the absence of some one's negligence. 2. It must have been caused by an agency or instrumentality within the exclusive control of the defendant. 3. It must not have been due to any voluntary action or contribution on the part of the plaintiff. Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258; Nungaray v. Pleasant Valley etc. Ass'n, 142 Cal.App.2d 653, 659, 300 P.2d 285. The applicability of the doctrine depends on whether it can be said, in the light of common experience, that the accident was more probably than not the result of the defendant's negligence. Seneris v. Haas, 45 Cal. 2d 811, 824, 291 P.2d 915; Burr v. Sherwin Williams Co., 42 Cal.2d 682, 687, 268 P.2d 1041. "The reason for the application of the doctrine of *res ipsa loquitur,* and the very hypothesis of the doctrine, is that 'ordinarily the one injured is not in a position to know more than that, by some unusual movement of the instrumentality, he was injured, whereas the one who operates the instrumentality should know and be able to explain the precise cause of the accident.'" Alexander v. Wong Yick, 25 Cal.App.2d 265, 269, 77 P.2d 476, 478.

[3, 4] The evidence is sufficient to meet the requirements of conditions one and three. Defendants argue the evidence is insufficient to meet the requirements of condition two in that exclusive control by them of the instrumentality causing the accident was not shown. The requirement of control is not an absolute one. "In order that a plaintiff be entitled to the benefit of the doctrine of res ipsa loquitur, he need not exclude every other possibility that the injury was caused other than by defendant's negligence." Seneris v. Haas, 45 Cal.2d 811, 826, 291 P.2d 915, 924. A plaintiff may rely on the doctrine even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause. Simmons v. Rhodes and Jamieson, Ltd., 46 Cal.2d 190, 195, 293 P.2d 26.[1] The courts hold that all that is required is that the defendant exercise some

1. In Baker v. B. F. Goodrich Co., 115 Cal. App.2d 221, at page 228, 229, 252 P.2d 24, 28, the court stated: "'As recently held by the Supreme Court of Oregon in a well reasoned opinion, a plaintiff may properly rely upon res ipsa loquitur even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause. Gow v. Multnomah Hotel, 191 Or. 45, 224 P.2d 552, 555–560, 228 P.2d 791.'

"The foregoing quotation would seem to dispose of respondent's contention that simply because the accident occurred while appellant was engaged in mounting the tire, in the accomplishment of which it was necessary to exert various forces thereon, the doctrine of res ipsa loquitur is necessarily rendered inapplicable. * * *

"How and to what extent plaintiff must account for his own conduct is explained by the same learned authority [Prosser] in his oft-cited article 'Res Ipsa Loquitur in California,' 37 Cal.L.Rev. 183, 201, as follows:

"'(T)he plaintiff's mere possession of a chattel which injures him does not

control over the article involved in the accident, or exercise a right of control. Once it is shown that the defendant had some degree of control over such instrumentality, it is for the jury to say whether it is more probable that defendant's negligence caused the accident or not. Prosser, Res Ipsa Loquitur in California, 37 Cal.L. Rev. 183, 199 et seq. Black v. Partridge, 115 Cal.App.2d 639, 252 P.2d 760, 764, was an action for wrongful death. The deceased was asphyxiated by carbon monoxide gas from a heater in a rented room. The court said in 115 Cal.App.2d at page 646,

"It is appellant's theory that the evidence shows that decedent exercised some control over the adjustments on the heater and that he controlled the ventilation of the room. The heater was in his possession, and appellant points out that there is no evidence that he did not tamper with the adjustments prior to death, and that there is some evidence that he did so. Those are factors that have been declared to be important in some factual situations. [Citations.] But the more recent cases on this subject recognize the principle that the existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact, and carefully preserve the right of the jury to find those facts. [Citations.] These principles apply to the question of the degree of control that must be exercised before the doctrine is applicable."

The Supreme Court in Seneris v. Haas, supra, 45 Cal.2d 811, at page 826, 291 P.2d 915, at page 924, said:

"In Baker v. B. F. Goodrich Co., 115 Cal.App.2d 221, 229, 252 P.2d 24, 29, it was said: 'Where the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur are present. Roberts v. Bank of America, 97 Cal.App.2d 133, 137, 217 P.2d 129. [Citations.] The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence even though the court itself would not draw that inference; the court must still leave the question to the jury where reasonable men may differ as to the balance of probabilities. (Res Ipsa Loquitur in California, Prosser, 37 Cal.L.Rev. 183, 194–195). The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it. [Citation.] The existence of the conditions upon which the operation of the doctrine is to be predi-

prevent a res ipsa loquitur case where it is made clear that he has done nothing abnormal *and has used the thing only for the purpose for which it was intended.*

" 'The plaintiff need only tell enough of what he did and how the accident happened to permit the conclusion that the fault was not his. Again he has the burden of proof by a mere preponderance of the evidence, *and even though the question of his own contribution is left in doubt, res ipsa loquitur may still be applied under proper instructions to the jury*'. (Emphasis added.)

"Therefore, unless it can be said that the evidence here, as a matter of law, does not exclude 'his (appellant's) conduct as a responsible cause', the fact that the accident occurred while he was engaged in the act of mounting and inflating the tire would not deprive him of the benefit of res ipsa loquitur. Where the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur are present. Roberts v. Bank of America, 97 Cal.App.2d 133, 137, 217 P.2d 129." (See annotation 169 A.L.R. 958.)

cated is a question of fact and the right of the jury to find those facts must be carefully preserved [citations]."

The facts in Doke v. Pacific Crane & Rigging, Inc., 80 Cal.App.2d 601, 182 P.2d 284, were similar to those at bar. Acme had been engaged to install a spark arrester on an incinerator. The defendant operated a crane lift in lifting the arrester. Acme made a sling over the arrester to permit the lifting. A U-shaped hook, 6 to 8 inches in length, was used in the process. The decedent was an employee of Acme and had attached the hook to the sling several times to get the proper balance on the load. A coemployee of the decedent then attached a rope to the arrester to prevent it from turning in the air. The decedent went to the top of the incinerator to signal the crane operator where to place the arrester. The load was lowered on a signal from the decedent. The decedent then signaled a halt in the lowering. Fifteen to twenty seconds after stopping, the load fell, killing the decedent. Immediately after the fall the sling was still in the hook. The defendants claimed control was divided since employees of Acme made and attached the sling to the arrester and then hooked the arrester to the hook hanging from the boom of the crane. This court held that res ipsa loquitur applied and stated in 80 Cal.App.2d at page 607, 182 P.2d at page 287:

"The record discloses that Phillips [the crane operator] not only had exclusive control of the crane and its hoisting equipment, but that he also had exclusive control of the arrester prior to and at the time of the accident. * * * [P]laintiffs should not be deprived of the benefit of the doctrine merely because some agency over which defendants had no control could have caused the accident."

See Nungaray v. Pleasant Valley etc. Ass'n, 142 Cal.App.2d 653, 660, 300 P.2d 285.

[5] A permissible view of the evidence meets the second element of the doctrine. It cannot be said as a matter of law that the evidence does not exclude plaintiff's conduct and that of his coemployees as the responsible cause of the accident. It sufficiently appears that neither plaintiff nor either of his coemployees did anything abnormal. The evidence is uncontradicted that Willson properly rigged the choker to the pipe and properly fastened the choker to the safety hook. It is without conflict that the hook was not at any time within reach of plaintiff or his coemployees on the fifth floor and that neither plaintiff nor either of his coemployees bounced the end of the pipe on the platform before it dropped. From the time the pipe was rigged and the choker fastened to the hook, defendants' employees were in complete control of the mechanism which regulated the movement of the pipe, whether slow or fast, smooth or jerky; the hoisting apparatus, the boom, the cable, the raising and lowering of the pipe, the swinging of the cable were at all times under the exclusive control of defendants' employees. They were in complete control of the mechanism and the mechanics of lifting and lowering the pipe and bringing it to the fifth floor window. The jury could have inferred that the hoist operator jerked the hoist, or that there was a defect in the hoisting apparatus, or that the signalman on the roof in pulling the tagline caused slack in the cable, or that the pipe was lowered too rapidly and then stopped suddenly. The balance of probabilities suggests negligence on the part of defendants' employees, who were responsible for the raising and lowering of the pipe, rather than that the accident was unavoidable or due to negligence of plaintiff or his coemployees. We think the evidence is such that it can be said the accident was more probably than not the result of the negligence of defendants.

We conclude that under the evidence the jury could find, aided by the inference permitted by res ipsa loquitur instructions, that the reasonable probability was defendants were negligent in operating the hoist or the cable or both, and that such negligence was a proximate cause of the ac-

cident. Seneris v. Haas, 45 Cal.2d 811, 827, 291 P.2d 915; Black v. Partridge, 115 Cal.App.2d 639, 646, 252 P.2d 760.

Reversed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I concur in the judgment. In order for the eye of the choker to slip out of the hook it would be necessary for the safety catch to be held down against the tension of a spring and while this was taking place for the choker to slide up and off the hook. I do not see how anyone could have anticipated this freakish action of inanimate objects. While it seems to me that the accident was unavoidable in a legal sense and not the proximate result of any action of defendants, I think the evidence presented a question for the jury.



149 Cal.App.2d 273

Katherine DE FELICE, Plaintiff and Respondent on Appeal, and Appellant on Cross-Appeal,

v.

Wendell R. TABOR, Defendant and Appellant on Appeal, and Respondent on Cross-Appeal.

Civ. 21992.

District Court of Appeal, Second District, Division 2, California.

March 19, 1957.

Rehearing Denied April 8, 1957.

Hearing Denied May 15, 1957.

Paternity action. The Superior Court of Los Angeles County, Edward R. Brand, J., rendered judgment for defendant but granted plaintiff a new trial, and cross appeals were taken. The District Court of Appeal, Ashburn, J., held that new trial motion, grounded on allegedly newly-discovered evidence, cannot be granted in absence of affidavit of moving party showing his or her ignorance and diligence.

New trial order reversed and judgment affirmed.

1. New Trial ⇐110

In granting new trial, court cannot act upon ground not specified in notice of intention. West's Ann.Code Civ.Proc., § 657, and subd. 4; West's Ann.Rules on Appeal, rule 3(a).

2. Appeal and Error ⇐933(4)

It was conclusively presumed that new trial order was not based on insufficiency of evidence, where it did not so specify. West's Ann.Code Civ.Proc., § 657, and subd. 4; West's Ann.Rules on Appeal, rule 3(a).

3. New Trial ⇐150(1)

New trial motion, grounded on allegedly newly-discovered evidence, cannot be granted in absence of affidavit of moving party showing his or her ignorance and diligence. West's Ann.Code Civ.Proc., § 657, and subd. 4; West's Ann.Rules on Appeal, rule 3(a).

4. Appeal and Error ⇐1001(1), 1010(1)

As a general rule, reviewing court will not uphold judgment or verdict based upon evidence inherently improbable, and testimony which merely discloses unusual circumstances does not come within that category.

5. Appeal and Error ⇐994(3)

To warrant rejection of statements given by witness who has been believed by trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

6. Appeal and Error ⇐994(2, 3), 1002, 1011(1)

Conflicts, and even testimony which is subject to justifiable suspicion, do not justify reversal of judgment; it being exclusive province of trial judge or jury to determine credibility of witnesses and truth or falsity of facts upon which determination depends.

Gold & Gold, Harry Gold, Hyman Gold, Santa Monica, for plaintiff, respondent and appellant.

Royal M. Galvin and Walter R. Baranger, Beverly Hills, for defendant, appellant and respondent.

ASHBURN, Justice.

This is a paternity action in which the court, after trial without a jury, found that defendant is not the father of the child and rendered judgment in his favor. Plaintiff moved for a new trial and it was granted upon the ground of newly discovered evidence complying with the requirements of Code of Civil Procedure, § 657, subdivision 4. Defendant appeals from that order and plaintiff takes a cross-appeal from the judgment pursuant to rule 3(a) of the Rules on Appeal.

[1, 2] The motion for new trial was made upon three specified grounds,—insufficiency of the evidence to justify the decision, accident or surprise which ordinary prudence could not have guarded against, and newly discovered evidence material for the party making the application which she could not with reasonable diligence have discovered and produced at the trial. The clerk's minute order says: "Motion granted;" a later order signed by the judge says, "the motion of plaintiff for a new trial is now by the Court granted, on the grounds of newly discovered evidence." It is conclusively presumed that the order was not based on insufficiency of the evidence because it does not so specify. Code Civ.Proc. § 657, last par. There is no suggestion that the order is sustainable on the ground of surprise. This reduces the ruling to one based on newly discovered evidence, for the court cannot act upon a ground not specified in the notice of intention. Dynes v. Bekins Van & Storage Co., 175 Cal. 72, 73, 165 P. 12; 4 Cal.Jur.2d § 539, pp. 393–394.

In support of the motion plaintiff presented two affidavits. One, made by Jack Sylvester, was to the effect that plaintiff had been employed by him from August 1951 through September 1952 (a period ending two years before the child was born), that during said period she resided in the home of himself and wife, usually watched television during the evening, and had no social contacts with men. According to plaintiff's physician the child was conceived in January 1954 and born in eight months, August 29, 1954. Obviously, plaintiff knew at all times the facts set forth in this affidavit (if they be facts), and knew that Sylvester was cognizant of them. She gives no explanation of her failure to produce his evidence at the trial, nor does Sylvester's affidavit do so.

The affidavit of Dr. Bertram J. Meyer is to the effect that he examined plaintiff and found her pregnant on February 11, 1954, that pregnancy began in the first part of January 1954, that plaintiff had certain physical variations from normal and he therefore expressed the opinion that when she "became pregnant in or about the first part of January 1954 that she was almost a virgin." This same doctor testified at the hearing on order to show cause re temporary support, etc., on July 23, 1954. The commissioner's findings indicate that a caesarean delivery was expected, and this must have been based upon the doctor's testimony. His affidavit does not state that he never told plaintiff or her attorney the things he sets forth in the document; they are closely related to the expected caesarean birth, and neither plaintiff nor her attorney filed any affidavit showing ignorance of the facts stated by the doctor. No showing whatever is made that they or either of them exercised any diligence to procure and present the evidence now claimed to have been newly discovered. No affidavit made by the attorney or the client was presented to the court.

This failure to show diligence is fatal to the order granting a new trial. "While the granting or denial of a motion for a new trial upon the ground of newly discovered evidence is generally a matter within the discretion of the trial court, and such an

order will be affirmed unless a clear abuse of discretion is shown, this rule has no application where the affidavit or other evidence upon which the order is made furnishes no basis for the exercise of such discretion. Such is the situation in the case at bar. The affidavit of plaintiffs is so lacking in essential particulars that it afforded no basis for the exercise of the discretion of the trial court in granting the motion." Slemons v. Paterson, 14 Cal.2d 612, 615, 96 P.2d 125, 127. "Although it is well settled that the granting or denial of a motion for a new trial is discretionary with the trial court and its determination will not be disturbed even though this court might be inclined to rule differently if passing on the motion de novo. * * * 'This rule has no application where the affidavit or other evidence upon which the order is made furnishes no basis for the exercise of such discretion.'" Kauffman v. De Mutiis, 31 Cal.2d 429, 433, 189 P.2d 271, 274. To the same effect see, Edwards v. Floyd, 96 Cal.App.2d 361, 362, 215 P.2d 117; Pierce v. Nash, 126 Cal.App.2d 606, 620, 272 P.2d 938; Boynton v. McKales, 139 Cal.App.2d 777, 782, 294 P.2d 733; Henningsen v. Howard, 117 Cal.App.2d 352, 355, 255 P.2d 837; Forman v. Goldberg, 42 Cal.App.2d 308, 317, 108 P.2d 983.

[3] Appellant's cited cases are not to the contrary. Dry v. City & County of San Francisco, 83 Cal.App.2d 790, 794, 189 P.2d 761, 764, does say: "None of these cases are authority for a requirement that the party moving for a new trial on the ground of newly discovered evidence should have his counsel file an affidavit that he had no knowledge of the newly discovered evidence prior to the verdict." This seems a doubtful proposition, but certain it is that the motion cannot be granted in the absence of an affidavit of the moving party showing his or her ignorance and diligence. Arnold v. Skaggs, 35 Cal. 684; People v. Buck, 46 Cal.App.2d 558, 567, 116 P.2d 160; People v. Lindsey, 90 Cal.App.2d 558, 568, 203 P.2d 572; Bennett v. Pacific Greyhound Lines, 147 Cal.App.2d 74, 304 P.2d 721. There was no basis in the present instance for the exercise of any judicial discretion and the order must be reversed.

The brief in support of the cross-appeal is confined to an attack upon the judgment on the basis of insufficiency of the evidence to sustain the findings in favor of defendant. It is but an argument directed to the weight of the evidence and made upon the assumption of the truth of appellant's own testimony.

[4–6] Plaintiff argues that certain of the evidence is inherently improbable and hence ceases to be substantial evidence within the doctrine of Herbert v. Lankershim, 9 Cal.2d 409, 471, 71 P.2d 220. That case can have only narrow application, for the general rule is as stated in People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759: "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."

Pertinent to this case are the following observations. Pores v. Purity Milk Co., 135 Cal.App.2d 305, 309, 287 P.2d 169, 172: "It is not the province of a reviewing court to comment on each evidentiary conflict or disagreement or to present a detailed argument on the sufficiency of the evidence to support the findings." Sonkin v. Hershon, 130 Cal.App.2d 491, 492, 279 P.2d 156, 157: "It is not the province of a reviewing court to present a detailed argument on the sufficiency of the evidence to support the findings where it appears that the question is one purely of determining which side shall

be believed. The trial court having determined this with the witnesses before it, the controversy is settled."

The order granting a new trial is reversed and the judgment is affirmed.

MOORE, P. J., and FOX, J., concur.



149 Cal.App.2d 481

Mrs. R. J. AMAVISCA, Plaintiff and Respondent,

v.

CITY OF MERCED, a municipal corporation, and Crocker-Huffman Land and Water Company, a corporation, Defendants,

Crocker-Huffman Land and Water Company, a corporation, Appellant.

Civ. 8934.

District Court of Appeal, Third District, California.

March 27, 1957.

Action against water company for injuries sustained by plaintiff when she stepped into cutoff valve hole in alley while attempting to escape falling tree limb. The Superior Court, Merced County, R. R. Sischo, J., granted plaintiff a new trial on all issues after the jury returned a verdict deemed grossly inadequate, and defendant appealed. The District Court of Appeal, Schottky, J., held that award of $15.72, to previously healthy woman who was almost completely disabled as result of leg abrasions and ensuing infection, was grossly inadequate.

Affirmed.

1. Appeal and Error ⇐1015(1)

On appeal from order granting new trial for insufficiency of evidence to justify verdict, order will not be set aside if there is any substantial evidence which would support verdict and judgment contrary to that entered.

2. Appeal and Error ⇐933(1)

On appeal from order granting new trial for insufficiency of evidence to justify verdict, all conflicts in evidence and all conflicting inferences which may be drawn from evidence will be resolved in favor of moving party in determining whether there was sufficient evidence.

3. Appeal and Error ⇐979(2)

On appeal from order granting new trial for insufficiency of evidence to justify quantum of verdict, trial court's order will not be disturbed in absence of showing of abuse of discretion.

4. Waters and Water Courses ⇐209

In action against water company for injuries sustained by plaintiff when she stepped into cutoff valve hole in alley while attempting to escape falling tree limb, evidence would sustain finding that defendant had known of dangerous condition and had negligently failed to remedy it; and evidence did not require finding as a matter of law that plaintiff had been guilty of contributory negligence or that she had assumed risk.

5. Damages ⇐130(4)

Award of $15.72, to previously healthy woman who was almost completely disabled as result of leg abrasions and ensuing infection, was grossly inadequate.

6. New Trial ⇐75(1)

A new trial may be granted, upon ground of insufficiency of evidence, for reason that damages awarded are inadequate.

7. New Trial ⇐157

Upon motion for new trial based upon contention that damages are inadequate, trial court should review evidence, not only with respect to issue of damages but also with respect to issue of liability.

8. New Trial ⇐9

Where verdict is so grossly inadequate as to indicate that it is result of compromise on issues of liability and damages, it is not error to grant new trial on all issues.

Gant & Gant, Modesto, defendant-appellant.

C. Ray Robinson, by Robert McCartney, Merced, for plaintiff-respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against the city of Merced and Crocker-Huffman Land and Water Company to recover damages for claimed injuries resulting from a fall in a public alley in the city of Merced. Her complaint alleged that defendants maintained a dangerous and defective condition of public property and were negligent in maintaining a water valve and the area surrounding it in the alley in a dangerous and defective condition. Plaintiff alleged injuries as the result of the negligence of the defendants and that such injuries consisted of abrasions and contusions of both legs, resulting in cellulitis and thrombophlebitis, and that such injuries were permanent in nature.

The record shows that on May 24, 1954, the plaintiff, Mrs. R. J. Amavisca, was standing in the alley behind the residence of her neighbor, Mrs. Velasquez. She and Mrs. Velasquez were talking to each other over a fence separating the Velasquez property from the alley. The plaintiff was in the alleyway, whereas Mrs. Velasquez was across the fence and within her own property. While the conversation was taking place, a limb or a branch of a tree nearby cracked and fell onto the roof of the Velasquez property. The limb fell some ten feet away from where the two women were standing. The limb was some 15 or 20 feet long and made a loud cracking noise when it fell. On hearing the noise, the women became startled and attempted to get away from the scene so as to avoid the danger. There was a hole in the alley close to the fence. Within the hole there was a cutoff valve leading down to the water pipe which furnished water to the Velasquez residence. Around the cutoff valve there was a telescopic metal housing designed to cover the cutoff valve. While getting away from the danger area the plaintiff ran or walked into the hole and fell, striking both of her legs on the metal cutoff valve or on the housing covering this valve.

The case was tried before a jury which returned a verdict in favor of the plaintiff and against the Crocker-Huffman Land and Water Company in the sum of $325, and in favor of the city of Merced and against the plaintiff. The plaintiff made a motion for a new trial as to the Crocker-Huffman Land and Water Company, solely on the issue of the amount of the damages, or, in the alternative, against that company and the city of Merced on all of the issues. This motion was based on all the statutory grounds, but the principal ground relied on by plaintiff in support of said motion was that the damages awarded were inadequate, the specific ground being the statutory ground of insufficiency of the evidence to justify the verdict. The court granted a new trial against the Crocker-Huffman Land and Water Company, but as to all the issues in the case, upon the ground of insufficiency of the evidence, and denied the motion as to the defendant city of Merced.

[1–3] Appellant first contends that the court abused its discretion in granting respondent's motion by reason of the inadequacy of damages awarded, because the evidence is wholly insufficient to sustain a judgment against appellant at all. Before discussing this contention it is well to state the following well settled rules which govern an appeal from an order granting a new trial for insufficiency of the evidence to justify the verdict: (1) The order will not be set aside if there is any substantial evidence which would support a verdict and judgment contrary to that entered; (2) In determining whether there is such evidence, all conflicts in the evidence and all conflicting inferences which may be drawn from the evidence must be resolved in favor of the moving party, the respondent; (3) The ground of insufficiency of the evidence to justify the verdict, in that the amount of the verdict is inadequate, on a motion for a new trial,

appeals peculiarly to the discretion of the trial court and its order should not be disturbed on appeal in the absence of a showing of abuse of discretion.

And as stated in Brooks v. Metropolitan Life Insurance Co., 1945, 27 Cal.2d 305, at page 307, 163 P.2d 689, at page 690:

> "In passing upon a motion for a new trial based upon the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence [citations]. In considering the sufficiency of the evidence upon such motion the court may draw inferences opposed to those drawn at the trial [citation], and where the only conflicts consist of inferences deduced from uncontradicted probative facts, the court may resolve such conflicts in determining whether the case should be retried [citation]. It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court."

We are here confronted with the rather unusual situation of a defendant against whom an award of damages has been made appealing from an order granting a new trial, but in explanation of this appellant states that "the award was relatively small and although we are satisfied that the plaintiff was not entitled to that or any other award, it is obviously cheaper and a saving of time and effort for the appellant to pay the existing judgment rather than to go through the expense of a new trial."

We are satisfied that there is substantial liability evidence to support a judgment against appellant.

The testimony as to the size and depth of the hole was in conflict and ranged from 18 inches wide and 6 inches deep to approximately 36 inches by 30 inches wide and approximately 1 foot deep. A city engineer testified that the hole was in the alley and approximately 8 inches from the Velasquez property line. He also testified that he took an elevation of the valve stem with respect to the center line of the alley and that the valve stem was about 10 inches below the center line of the alley. Mr. Lee Hampton testified that from October, 1952, through November, 1953, he resided on the property which at the time of the trial was the Velasquez property. He testified that he knew of the existence of this hole during the period of his residence at that address and that in his frequent mowings of the grass in the alleyway he could not straddle the hole with the wheels of his lawn mower, but had to go around it because otherwise one or the other of the wheels would go into the hole. The lawn mower was standard size.

Mr. Otto Farmer testified that he was the service man for the appellant water company and that he made a call to the water valve in question for the purpose of turning on the water on March 15, 1954, which was nine weeks prior to the plaintiff's fall. He testified that the hole existed then and that it was at least 18 inches across and some 6 inches deep, with the cutoff valve and housing extended up from the bottom of the hole for at least one and one-half or two inches. Despite this condition, he testified that he left it as he found it after turning on the water and that he did nothing whatever towards filling the hole or leveling it off, nor did he report this condition to his superiors. As to his instructions, he testified as follows:

> "Q. Did you have any instructions on that particular matter from your superiors as to filling the holes after digging them out to expose the valve? A. Yes.
>
> "Q. And what were the circumstances? A. To be sure that you filled the hole back in if you had to dig one out.
>
> "Q. To the original ground level? A. Yes."

[4] The records kept by the water company show that numerous service calls were

made to the water valve in question. Mr. Farmer further testified that the hole appeared to have been there for a long time. The combined effect of the foregoing evidence is sufficient to support an inference that a dangerous or defective condition had existed and was permitted to exist by the defendant around its water cutoff valve, and that the defendant knew of this condition and of its existence for a long time prior to the injury of plaintiff, and that neither defendant nor any of agents, representatives, or service men did anything whatever to remedy the situation.

Appellant argues that the evidence proves that the respondent was in the act of running at the time she allegedly fell in a portion of the alley in which the water company or Mr. Farmer could not reasonably foresee a person's running, and, moreover, it also proves that she was running, at the time of her alleged fall, in a portion of the alley where it was extremely hazardous to do so because it was a portion never intended for pedestrian use and unmaintained. Appellant argues further that in doing so the respondent created an unreasonable risk of harm toward herself, and was guilty of contributory negligence as a matter of law or of assumption of risk.

There can be no question as to the duty of appellant water company to maintain its water valves in a safe condition, and whether in the instant case the water valve in the alley was maintained in a safe condition was an issue upon which the most that can be said in favor of appellant is that the evidence was conflicting. Likewise, the most that can be said in appellant's favor as to the issue of contributory negligence or assumption of risk on respondent's part is that the evidence was conflicting. The evidence being conflicting, and the trial court having the power and right to weigh the evidence upon a motion for a new trial, there is no merit in appellant's contention that the evidence is wholly insufficient to sustain a judgment against appellant at all.

[5] Appellant's next contention, "That, assuming the water company to be liable, there is no substantial evidence that the damages awarded to the plaintiff by the jury are clearly or grossly inadequate to fully compensate her for any detriment she suffered by reason of her fall, and, therefore, the court in granting plaintiff's motion for a new trial abused its discretion," is equally without merit.

The plaintiff testified that by falling into the hole she had received injuries consisting of skinned places on both legs and that she was shocked and dazed; that she put hot compresses on her ankles and took aspirin for about three days and then went to see Dr. Hicks. He treated her and prescribed some medicine. The pain became worse and on June 7th she returned to the doctor.

Dr. Shelby M. Hicks testified that he had examined her legs which had abrasions and skinned places, were swollen, red, hot, beginning to become infected, and the veins had been damaged to where there was occlusion or stoppage of the blood flow. He gave her antibiotics and instructions to go home and elevate her legs and keep off of them and to use compresses. On her later visit to him he sent her to the hospital. At this time there was no improvement as far as the blood flow was concerned, the legs were discolored, there was swelling caused by edema or extra amount of fluid being held in the legs and feet, and there were abrasions, damage to the veins, a traumatic thrombophlebitis or blood clots in the veins, with inflammation, swelling because of the damage to the veins, infection, and stasis-dermatitis where the skin gets swollen and is too tight, so that it peels off and becomes reddened and thin. Dr. Hicks did not treat her while she was in the hospital, but had been treating her regularly since her release therefrom. He testified that her condition had not shown much improvement and that she will probably not improve greatly during the remainder of her life. He has instructed her to remain off of her feet except for bathroom privileges and getting up to eat and going to and from one room to another. He testified that he did not think she will ever get

around too well again. Dr. Hicks testified further that from the medical history that she had told him, he believed that her injuries were caused by the falling into the hole on the iron in question.

There was also testimony of two other doctors describing respondent's injuries and treatment. In addition, plaintiff's husband and witnesses Carter, Descalso, Green, Hampton, and Simpson all testified in effect that plaintiff was in good physical condition prior to her fall and that she did extensive work both in and outside of her home but that after the accident she was in serious physical condition and was greatly handicapped as a result of her fall.

While appellant points to other evidence minimizing the injuries to respondent, such evidence merely creates a conflict which, as hereinbefore pointed out, it was the function of the trial court to weigh upon the motion for a new trial. Respondent's special damages amount to $309.28 and it seems highly improbable that the sum of $15.72, which was the difference between the amount of special damages and the amount of the verdict, would be adequate to compensate respondent for her injuries.

[6–8] Appellant's final contention is that the trial court abused its discretion in granting a new trial on all issues when respondent's motion was for a new trial upon the issue of damages only. We do not agree with this contention. We believe that the law is correctly stated in Harper v. Superior Air Parts, Inc., 124 Cal.App. 2d 91, 92, 268 P.2d 115, 116, as follows:

> "A new trial may be granted upon the ground of insufficiency of the evidence for the reason that the damages awarded are inadequate. Franklin v. Bettencourt, 16 Cal.App.2d 511, 514, 60 P.2d 1017. Upon a motion for a new trial based upon the contention that damages are inadequate the trial court should review the evidence, not only with respect to the issue of damages but also with respect to the issue of liability. See Bakurjian v. Pugh, 4 Cal.App.2d 450, 454, 41 P.2d 175."

What was said by our Supreme Court in Clifford v. Ruocco, 39 Cal.2d 327, at page 330, 246 P.2d 651, at page 653, is quite applicable to the instant case:

> "In view of this conflict in the evidence, and considering that the damages awarded were less than plaintiff's undisputed special damages and loss of earnings, it would appear that the verdict was the result of a compromise on the issues of liability and damages, and substantial justice requires that the case be retried in its entirety."

No other points raised require discussion. The order is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



149 Cal.App.2d 312

Paul ZAMUCEN, a Minor, by his Guardian ad litem, Ampara Zamucen, Diane Zamucen, a Minor, by her Guardian ad litem, Ampara Zamucen, and Ampara Zamucen, and Mary Zamucen, Plaintiffs and Appellants,

v.

William L. CROCKER, Jr., Black & White Company, a corporation, Red & Blue Company, a partnership, First Doe, Second Doe, Third Doe, Fourth Doe and Fifth Doe, Defendants and Respondents.

Civ. 17008.

District Court of Appeal, First District, Division 2, California.

March 20, 1957.

Action arising out of intersection collision between vehicle in which plaintiffs were riding and oncoming vehicle, which was endeavoring to make left turn at time of accident. The Superior Court, Contra Costa County, Norman A. Gregg, J., rendered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, Dooling, Acting P. J., held that

the trial court had committed prejudicial error in refusing a proper instruction on the legal effect of driving a vehicle while intoxicated.

Reversed.

1. Automobiles ⇐157

It is negligence as a matter of law to drive a vehicle upon public highway while in an intoxicated condition. West's Ann. Const. art. 6, § 4½.

2. Automobiles ⇐246(42)

In action arising out of intersection collision between vehicle in which plaintiffs were riding and oncoming vehicle, which was endeavoring to make left turn at time of accident, wherein there was sufficient evidence from which jury might have found that driver of turning vehicle had been intoxicated, it was error to give instructions having effect of setting off driving while intoxicated as not falling in same category as other conduct in contravention of Vehicle Code and as not constituting negligence per se, and to fail to instruct that driving a vehicle on public highway while intoxicated constituted negligence as a matter of law. West's Ann.Const. art. 6, § 4½.

3. Appeal and Error ⇐1170(9)

In determining whether error, in refusing to give proposed instruction correctly stating principle of law was prejudicial, reviewing court must look to facts of particular case. West's Ann.Const. art. 6, § 4½.

4. Appeal and Error ⇐1170(9)
Automobiles ⇐246(16)

In action arising out of intersection collision between vehicle in which plaintiffs were riding and oncoming vehicle, which was endeavoring to make left turn at time of accident, failure to give applicable instruction, that intoxication was negligence as a matter of law, constituted reversible error, in view of fact that question of defendant's negligence was a close one on facts presented and that it could not be said that if jury had been correctly instructed it might not have found that he had been guilty of negligence which contributed as proximate cause to plaintiffs' injuries. West's Ann.Const. art. 6, § 4½.

5. Automobiles ⇐245(14)

In action arising out of intersection collision between vehicle in which plaintiffs were riding and oncoming vehicle, which was endeavoring to make left turn at time of accident, evidence did not require finding as a matter of law that driver of turning vehicle had been negligent.

6. Automobiles ⇐171(9)

Motorist making left turn at intersection was required to maintain reasonable lookout for oncoming vehicles, both before starting his turn and while making his turn; but he was not obliged to maintain a continuous lookout, a "reasonable" lookout being required.

Barbagelata, Zief & Carmazzi, Arthur C. Zief, Rinaldo A. Carmazzi, San Francisco, for appellants.

Hoey, Hoey, Hall & Conti, Francis Hoey, Martinez, for respondent William L. Crocker, Jr.

DOOLING, Acting Presiding Justice.

Plaintiffs appeal from an adverse judgment pursuant to a jury verdict in an action to recover for personal injuries.

This action arose out of an automobile collision at the intersection of San Pablo Avenue and Wall Street in the City of El Cerrito on Saturday, September 12, 1953 at about 11:45 p. m. At this point San Pablo Avenue is a four-lane highway, with two northerly and two southerly lanes of traffic divided by a concrete island. Appellants Paul, Diane, Ampara and Mary Zamucen were passengers in a car being driven by Nicholas Zamucen. The driver of the car is the father of Paul and Diane who are minors, the husband of Ampara, and the son of Mary Zamucen. He is not a party to the action. At the time of the accident he was driving the Zamucen auto-

mobile in a southerly direction on San Pablo Avenue. He collided with the car of respondent William L. Crocker, Jr., as it turned left from San Pablo Avenue into Wall Street.

Respondent Crocker testified that at about 8 p. m. on the evening of the accident he and a friend, one Edith Dausch who is now his wife, went to a restaurant where they had dinner. After dinner respondent and his companion went across the street from the restaurant to a cocktail lounge and bar where respondent had about four bourbon and soda drinks. After about an hour and a half respondent and his companion left this cocktail lounge and drove to a moving picture theater on San Pablo Avenue where they had previously arranged to pick up Mrs. Dausch's son. This was about 11:20 p. m. They parked in front of the theater and talked to the boy for a few minutes and then decided to go to Della's Drive In on San Pablo Avenue to get something to eat. This drive-in is located at the southwest corner of San Pablo Avenue and Wall Street and is approximately eight blocks north of the theater.

Respondent estimated his speed to be about twenty or twenty-five miles per hour as he drove north on San Pablo Avenue toward the drive-in. When he was about 100 feet from Wall Street he slowed down to approximately fifteen miles per hour and continued slowing down as he approached the intersection. The electrically controlled traffic signal was green as he approached Wall Street. Respondent signaled his intention to turn left and then turned into Wall Street. He indicated his intent to turn with a hand signal and with the automobile turn lights. When respondent was about 40 or 50 feet from the intersection he saw the Zamucen car about a half a block down the street coming from the opposite direction. He saw it again just before he made his turn. The next time he saw the car was at the time of impact. The Zamucen car was in the right-hand lane of the highway at that time.

The driver of the Zamucen car testified that prior to the accident he was proceeding in a southerly direction on San Pablo Avenue in the right hand lane at a speed of about 35 miles per hour. His speed was about 30 miles per hour when he was about one or two car lengths from the beginning of the intersection. At this time respondent suddenly made a left turn toward him. He applied his brakes, skidded and collided with respondent's car. His speed at the time of impact was about 18–20 miles per hour. He testified that he smelled alcohol on respondent's breath when he talked with him after the collision and that he noted beer cans and an odor of alcohol in the back of respondent's car. He also stated that respondent told him that he was making a U–turn into Della's restaurant just prior to the collision. Respondent denied this.

A witness to the accident estimated the speed of the Zamucen car at about 40–50 miles per hour at the time of the collision. He admitted that this estimate was based on the squealing of tires heard by him and the condition of the cars after the collision. He also testified that he was within two feet of respondent immediately after the accident and that he did not smell any liquor on his breath.

[1, 2] Appellants' first contention is that the trial court committed prejudicial error in refusing a proper instruction on the legal effect of driving a vehicle while intoxicated.

The trial judge after reading certain applicable provisions of the Vehicle Code instructed the jury:

"Conduct which is in violation of any of the Vehicle Code sections just read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was ex-

cusable, justifiable and such as might have been expected from a person of ordinary prudence * * *."

Immediately following this instruction the court gave the instructions on intoxication requested by appellants, BAJI Nos. 152 (1950 Supp.) and 153 (1950 Supp. Pocket Parts), but omitted therefrom the first sentence reading:

"A person who, while under the influence of intoxicating liquor, drives a vehicle upon a public street or highway is guilty of negligence as a matter of law."

The instructions actually given on the subject of intoxication, after striking the above sentence therefrom, read as follows:

"Whether or not a person involved in an accident was then intoxicated is a proper question for the jury to consider in determining his conduct and whether or not he was negligent. However, intoxication is no excuse for failure to act as a reasonably prudent person would act. An intoxicated person is held to the same standard of care as a sober person.

"The taking of one or more drinks of alcoholic liquor is not of itself illegal and does not necessarily constitute negligence. The circumstances and the effect must be considered; and whether or not a person was intoxicated at a certain time is a question of fact for the jury to decide.

"A person is under the influence of intoxicating liquor when, as a result of drinking thereof, his nervous system, brain or muscle is so affected as to impair to an appreciable degree his ability to operate the vehicle in a manner like that of an ordinarily prudent person in full possession of his faculties, using reasonable care, and under like conditions."

The effect of these instructions, particularly in view of the fact that immediately preceding them was an instruction that certain other conduct in contravention of the Vehicle Code was negligence per se, was to set off driving while intoxicated as not falling in the same category and therefore as not constituting negligence per se. This was clearly error. All of the decided cases on the subject recognize that it is negligence as a matter of law to drive a vehicle upon a public highway while in an intoxicated condition. Stickel v. San Diego Elec. Ry. Co., 32 Cal.2d 157, 195 P.2d 416; Guerra v. Balestrieri, 127 Cal.App.2d 511, 274 P.2d 443; Mehling v. Zigman, 116 Cal.App.2d 729, 254 P.2d 141; Christensen v. Harmonson, 113 Cal.App.2d 175, 247 P.2d 956.

It is not disputed in this case that there was sufficient evidence from which the jury might have found that respondent was driving while intoxicated within the accepted meaning of that term as correctly defined in the last sentence of the instruction on that subject quoted above. People v. Haeussler, 41 Cal.2d 252, 261–263, 260 P.2d 8. That being so it was clear error not to include the sentence stricken from the instruction that driving a vehicle on a public highway while intoxicated is negligence as a matter of law.

[3, 4] The only remaining question on this particular subject is whether this error was prejudicial to the appellants. Cal. Const., Art. VI, § 4½. In this connection respondent relies on the Stickel case, supra, 32 Cal.2d 157, 195 P.2d 416, and the Christensen case, supra, 113 Cal.App.2d 175, 247 P.2d 956, as supporting his position that the error in this respect was not prejudicial.

These cases are both distinguishable on their facts. In the Christensen case the court held that the evidence of plaintiff's contributory negligence was so clear that the error was not prejudicial. 113 Cal. App.2d at page 183, 247 P.2d at page 960. In the case before us the jury was correctly instructed that the contributory negligence of the driver of the car in which appellants were riding could only be imputed to his wife Ampara and could not operate as a defense as to any of the other plaintiffs. The jury must, in bringing in verdicts against the plaintiffs other than the driver's wife, have concluded that the respondent was not guilty of any negligence which contributed as a proximate cause to their injuries.

In the Stickel case the court noted that the instruction as proposed included the portion of the section which made driving while intoxicated a crime. The court pointed out that: "The refusal to instruct as to the criminal responsibility of an intoxicated driver was correct * * *." 32 Cal.2d at page 169, 195 P.2d at page 423. This was sufficient to dispose of the question since the court is under no duty to reframe an incorrect instruction to embody the correct principle of law suggested therein. Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 235, 282 P.2d 69; Prescott v. Ralph's Grocery Co., 42 Cal.2d 158, 162, 265 P.2d 904; Tossman v. Newman, 37 Cal.2d 522, 525, 233 P.2d 1. In our case the instruction refused stated a correct principle of law and therefore the refusal to give it, as distinguished from the failure to modify and give as modified a patently incorrect instruction in the Stickel case, was clearly error.

In determining whether the error in refusing to give a proposed instruction which correctly states a principle of law is prejudicial under California Constitution, Article VI, section 4½ we must look to the facts of the particular case. Here the question of defendant's negligence was a close one on the facts presented and we cannot say that if the jury had been correctly instructed that one who drives while intoxicated is guilty of negligence as a matter of law they might not have found that defendant was guilty of negligence which contributed as a proximate cause to the plaintiffs' injuries.

[5, 6] Appellants' next contention is that the evidence is insufficient to sustain the judgment as to appellants minor children and grandmother. They argue that even assuming that the driver of the Zamucen car was negligent, thus barring any recovery by his wife, the evidence also clearly shows that respondent was negligent. Thus they assert that judgment should be entered in the other appellants' favor. In making this contention appellants point out that there was testimony presented that the skid marks of their car went about 1½ feet past the middle of the intersection. They thus argue that respondent's car was on the wrong side of the street when it was struck and that this constituted negligence per se on respondent's part. However the same witness who testified to the skid marks also testified that the point of impact, as recorded on a diagram made by him at about the time of the accident, was closer to the northern portion of the intersection than to the center of the intersection. Respondent also testified that the impact took place in the northern part of the intersection just as the Zamucen car entered the intersection. The jury could have believed that the point of impact was in the northern part of the intersection and that appellants' car continued to move for a few feet after the impact, thus explaining the skid marks beyond the center of the intersection.

Appellants' last contention is that the evidence shows that respondent was negligent as a matter of law in that he did not continue to observe the Zamucen car after starting his turn and that he did not yield the right of way in making his turn. While respondent was required to maintain a reasonable lookout for vehicles approaching from the opposite direction both before starting to make his turn and while making his turn this does not mean that he was obliged to maintain a continuous lookout for vehicles approaching from the opposite direction but only that he was required to maintain a "reasonable" lookout—in other words to use ordinary care. Whether or not in the exercise of ordinary care respondent should have realized that the Zamucen car was an immediate hazard was a question for the jury. Chambers v. Spada, 133 Cal.App.2d 231, 236, 283 P.2d 1067; Spear v. Leuenberger, 44 Cal.App.2d 236, 247–248, 112 P.2d 43.

For the error in refusing the proposed instruction that one driving while intoxicated is guilty of negligence as a matter of law the judgment is reversed.

KAUFMAN, J., and DRAPER, J., pro tem., concur.

In the Matter of the ESTATE of Frederick Arthur FALLON, also known as Frederick A. Fallon, also known as F. A. Fallon, Deceased.

AMERICAN TRUST COMPANY, Special Administrator of the Estate of Frederick Arthur Fallon, Deceased, Appellant,

v.

Margaret FALLON, Respondent. *

Civ. 17277.

District Court of Appeal, First District, Division 2, California.

March 25, 1957.

Rehearing Denied April 24, 1957.

Hearing Granted May 24, 1957.

Estate wherein the Superior Court, City and County of San Francisco, Timothy I. Fitzpatrick, J., rendered order granting widow a family allowance, and the special administrator appealed. The District Court of Appeal held that wife by producing decree which had denied her divorce and granted her maintenance for limited period and by admitting that she had received no support thereafter, presented prima facie implication that she was not entitled to support and where she failed to refute such, it was improper for court to grant her family allowance.

Reversed.

1. Executors and Administrators ⇐194(7)

Order denying special administrator's petition to vacate order granting family allowance was nonappealable in that it was not designated in the Probate Code as an appealable order. West's Ann.Prob.Code, § 1240.

2. Executors and Administrators ⇐194(1)

The Probate Code does not require notice of petition for family allowance, unless petition is made after inventory is filed. West's Ann.Prob.Code, §§ 681, 1200.

3. Courts ⇐202(5)

Only those orders, in probate matters, specified in Probate Code as appealable orders are appealable, with a single exception of orders granting motions for new trial. West's Ann.Prob.Code, § 1240.

4. Executors and Administrators ⇐194(6)

Findings included in order granting family allowance were sufficient.

5. Trial ⇐394(1)

Conclusions of law need not expressly be drawn where they naturally follow from findings or decision.

6. Executors and Administrators ⇐194(7)

Contention that court erroneously entered order giving widow a family allowance was required to be reviewed on basis of facts before lower court at time order was rendered. West's Ann.Prob.Code, §§ 681, 1200.

7. Executors and Administrators ⇐180

Widow's right to family allowance is dependent upon wife's right to support at time of husband's death. West's Ann.Prob. Code, §§ 681, 1200.

8. Executors and Administrators ⇐194(5)

In proceeding to determine widow's entitlement to family allowance, widow by bringing to attention decree which denied her divorce and granted her maintenance for a year only, together with admission that she had received no support for more than seven years after such period of limited maintenance, presented prima facie implication that she was not entitled to his support, and she was required to show subsequent changes in circumstances reviving obligation to support, and when she failed to do so, she was not entitled to family allowance. West's Ann. Civ.Code, § 136; West's Ann.Prob.Code, §§ 681, 1200, 1240.

Lange & Rockwell, San Francisco, for appellant.

Appel, Liebermann & Leonard, San Francisco, for respondents.

PER CURIAM.

This is an appeal by American Trust Company as special administrator of the above captioned estate from two orders granting a family allowance of $1,000 a

* Opinion vacated 317 P.2d 963.

month to Margaret Fallon, widow of deceased and from an order denying appellant's petition for an order to vacate or modify said family allowance.

Frederick Arthur Fallon died on September 18, 1955, probably at the age of 86. On November 30, 1955 American Trust Company filed a petition for probate of his will in which it was appointed executor and for issuance of letters testamentary. On December 15, 1955, respondent Margaret Fallon filed her verified petition for family allowance alleging in substance, that she was the widow of deceased and entitled to a reasonable allowance, that according to her information and belief the value of deceased's estate is in excess of $600,000, that $2,500 per month is a reasonable amount for her maintenance, that the estate has a monthly income adequate to pay such allowance and is not materially indebted. Hearing was set for December 22nd and the attorneys of record of American Trust Company were so informed by letter of December 15th which letter they received.

At the hearing respondent testified that she and deceased were married in 1940, that she had no means except temporary employment at Hale's at that time. After a question by the court whether there had been a divorce, her attorney explained that in 1945–1946 there had been reciprocal divorce actions, which had both been denied; the trial court had provided for maintenance for Mrs. Fallon of $250 a month but for one year only. On Appeal the decision had been affirmed. After the end of the one year the payments had stopped. Respondent testified that at all times she had a flat in a property owned by Mr. Fallon, of which she still had the key and where her personal effects were still stored. She had been a nurse before her marriage. The only opposition consisted in a statement by [illegible] attorney present in behalf of some of [illegible]legatees that $2,500 was a little high at tha[illegible]e. American Trust Company was not re[illegible]ented. (It is stated in its brief but does [illegible]ppear in the record, that the failure to a[illegible] was caused by the fact that its attorney was detained at the Eel River by a flood.)

On December 22, 1955, the court filed an order finding that no inventory had been filed and that all allegations of the petition were true and granting respondent an allowance of $1,000 per month. On December 29, 1955 the court on the petition of American Trust Company appointed it special administrator, with the powers of a general administrator. On January 4, 1956 the court filed again an order granting the petition for family allowance, except for its date identical with the one filed on December 22nd. No notice or hearing preceded it. On January 24, 1956, American Trust Company filed a verified petition for an order to vacate or to modify the order for family allowance. It alleged in substance that the relationship of Mrs. Fallon to deceased did not entitle her to a family allowance, that relation being determined in Fallon v. Fallon, 83 Cal.App.2d 798, 189 P.2d 766 and Fallon v. Fallon, 86 Cal.App. 2d 872, 195 P.2d 878. (The first case cited affirms the denial of the husband's, appellant's, action for divorce on the ground of desertion and the granting of maintenance for one year; the latter case relates only to the payment of attorneys fees and costs on appeal by the husband and is irrelevant here.); that for eight years prior to the death of Mr. Fallon, Mrs. Fallon lived separate and apart from him in White Rock, British Columbia, without family relationship with deceased; that in an inventory of December 6, 1955, filed in guardianship proceedings (after American Trust Company had been appointed guardian of the Estate of Mr. Fallon) the assets had been evaluated at $337,034.01, and that the income from it in 1955 was less than $10,000. At the hearing of this petition after formal notice on February 6, 1956, no further evidence was adduced but the case argued on the above basis. On February 8, 1956 an order was filed denying the petition. The appeal taken on February 17, 1956 was timely as to all three orders.

[1] In so far as the last order denies the special administrator's petition to vacate

the orders granting the family allowance, it is non-appealable because it is not mentioned in Section 1240 of the Probate Code. In re Estate of Caldwell, 67 Cal.App.2d 652, 656, 155 P.2d 380.

[2–5] Appellant's contention that the orders granting the allowance should be set aside because of failure to give notice and to make findings of fact and conclusions of law is without merit. Probate Code, Sections 681 and 1200 require notice of a petition for a family allowance only if made after the inventory is filed, which was not the case. (11a Cal.Jur. 538). The granting of the family allowance without notice prior to filing of the inventory finds its origin in the former law which provided for a preliminary or temporary allowance until the inventory was filed and further allowance during the progress of the estate. (11a Cal.Jur. 506–507). [Because of the circumstance that the family allowance may be granted without notice prior to the filing of the inventory, the fact that the denial of the vacation of the order is nonappealable seems undesirable. However, it is settled law that with the single exception of appeals from orders granting motions for new trial, no appeal will lie from any order in probate not specified in Probate Code, Section 1240. In re Estate of Noonan, 113 Cal.App.2d 899, 900, 249 P.2d 306; In re Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368, in which latter case it was held on that ground that in probate no appeal lies from denial of relief from default under Code of Civil Procedure, § 473.] As stated before findings were included in the order. Such findings are sufficient, Silverstein v. Silverstein, 76 Cal.App.2d 872, 875, 174 P.2d 486. Conclusions of law need not be expressly drawn where they naturally follow from the findings and/or decision. (24 Cal.Jur. 1002 and cases there cited.)

[6, 7] Appellant's contention that respondent was not entitled to any family allowance, because at the time of the death of Mr. Fallon she was not receiving or entitled to support from him must be reviewed on the basis of the facts that were before the lower court at the time of the orders granting the allowance. With respect to the principle itself that the right to a family allowance is dependent upon the wife's right to support at the time of her husband's death there is no longer any doubt. In re Estate of Brooks, 28 Cal.2d 748, 755, 171 P.2d 724; In re Estate of Cooper, 97 Cal.App.2d 186, 193, 217 P.2d 499. Normally, the wife by showing that she was the wife of the deceased at the time of his death makes out a prima facie case for her right to a family allowance and she cannot be required to allege and prove that there were no circumstances by which she lost the right of support normally inherent in her position as a wife. However, in this case she brought to the notice of the court the order which on denial of divorce granted her maintenance for one year only and the fact that since then she did not receive any support. The effect of such situation must therefore be considered. No case treating the effect of an order granting under Civil Code, Section 136 maintenance on denial of divorce for a limited time only has been cited to us or found. In Monroe v. Superior Court, 28 Cal.2d 427, 170 P.2d 473 is found the closely related situation that a wife on her action is granted separate maintenance for a limited period only. It was held that the court could grant additional support in case of changed circumstances although it did not reserve jurisdiction to do so in the decree, because the decree did not end the marriage and the obligation to support which arises from it, but only regulates the extent of that support. It is said in 28 Cal.2d on page 430, 170 P.2d on page 474, that the decree granting separate maintenance for a limited time determined "that given the circumstances in which the parties found themselves when the decree was rendered, petitioner's wife should be given an allowance for 27 months only." The court cites with approval a case in which the Supreme Court of Michigan, Binkow v. Binkow, 298 Mich. 609, 299 N. W. 734 denied further allowance after the originally limited period of separate main-

tenance, on the ground that the wife had made no showing of changed circumstances. Also cases relating to an interlocutory decree of divorce which does not provide for support may be compared because the marriage continues until the final decree, although the relation with the situation before us is much less close. In London G & A Co. v. Industrial Acc. Comm., 181 Cal. 460, 184 P. 864, it was held that the wife in such situation was not entitled to support. It is said in 181 Cal. at page 465, et seq., 184 P. at page 867. "An interlocutory judgment of divorce is * * * so far as it determines the rights of the parties, a contract between them. It is temporary and provisional in its nature, it is true, but it settles the rights of the parties for the time being * * *. They are, by virtue of the interlocutory judgment, living separate by agreement, and if that judgment makes no provision for her support by him, they are living separate by an agreement which does not provide for her support, and under section 175 he is not, during that interval, personally liable for her support. The judgment has the effect of a contract for that purpose. Until that contract is in some manner changed, either in the action or in some independent proceeding, or by a reconciliation, her right to support is suspended." It was held in Re Estate of Brooks, supra, 28 Cal.2d 748, 171 P.2d 724, that the wife whose right to support was in that manner suspended, was not entitled to a family allowance.

[8] We need not decide whether a decree alone granting after denial of divorce maintenance to the wife for a limited period only, necessarily has the effect of a prima facie showing that her right to support was limited to said period, which the wife has to overcome by proof that since the granting of the decree the husband's obligation has been extended or revived. In the case at bar the court had before it, over and above such a decree, the fact that her attorney stated to the court "after that one year period in 1948 Mrs. Fallon has since been in the position of being a wife without any support or maintenance." The combination of the decree and her admission that she had received no support for more than seven years after expiration of the limited period of maintenance, presents a prima facie implication that, at the death of her husband, she was not entitled to his support. It was then incumbent on her to show proceedings or changes in circumstances since the decree granting maintenance for one year which had extended or revived the obligation. The testimony that *at all times* she had "a flat or residence" in one of the pieces of property owned by Mr. Fallon and that she still had the keys to that flat and had her personal effects there, does not indicate a change since the time the limited decree was made and is no substantial basis for an inference of an agreement of Mr. Fallon to support her while living separate and apart. There was then no basis for holding her entitled to support at the time of Mr. Fallon's death and to a family allowance from his estate. The orders granting such allowance must be reversed. At the retrial it will be incumbent on respondent to prove such proceedings or changes in circumstances since the time of the decree which granted her maintenance for one year only as to cause extension or revival of her husband's duty of support.

Because of the reversal of the orders granting the family allowance the appeal from the order denying appellant's petition to vacate or modify said orders has become moot and must be dismissed on that ground. The orders granting Mrs. Fallon a family allowance are reversed, the appeal from the order denying appellant's petition to vacate or modify said orders is dismissed. Appellant to recover costs on appeal.

149 Cal.App.2d 319

William H. JONES, Plaintiff and Appellant,

v.

AMERICAN PRESIDENT LINES, Ltd., S. Souza, Melvin M. Vaughan, et al., Defendants and Respondents.

Civ. 17077.

District Court of Appeal, First District, Division 2, California.

March 20, 1957.

Rehearing Denied April 19, 1957.

Action for damages resulting from alleged conspiracy among port captain, shipping master and shipping company to deny plaintiff his rights to employment as a cook because plaintiff was a Negro. From adverse judgment entered in Superior Court, City & County of San Francisco, Frank T. Deasy, J., after demurrer to complaint had been sustained without leave to amend, plaintiff appealed. The District Court of Appeal, Anthony Brazil, Justice pro tem., held that complaint to recover damages resulting from alleged wrongful concerted action to deprive plaintiff of rights given him under contract between the union and shipping company conferred jurisdiction on state court where no contractual method of redress was provided which afforded plaintiff any remedy even though National Labor Relations Board had exclusive jurisdiction to enforce provisions of contract.

Judgment reversed.

1. Pleading ⇐214(2)

A demurrer admits all the allegations of the complaint which are well pleaded. West's Ann.Code Civ.Proc., § 430.

2. Appeal and Error ⇐917(1)

It must be assumed on appeal from a judgment predicated upon the sustaining of a demurrer that the plaintiff could prove all the facts as alleged in the complaint.

3. Pleading ⇐214(1, 5)

Truth of conclusions of law are not deemed admitted by a demurrer, and the same is true of allegations which are contrary to facts of which a court may have judicial knowledge.

4. Conspiracy ⇐18

To state a cause of action for conspiracy, facts must be alleged showing the formation and operation of a conspiracy and damage resulting from acts done in furtherance of the plan.

5. Conspiracy ⇐6, 18

In action for conspiracy, the cause of action is for the damages suffered, not the mere conspiracy, and facts must be alleged which show that a civil wrong was done resulting in damages to the plaintiff.

6. Civil Rights ⇐1

The right to private employment without discrimination on the basis of race is not one protected by the Constitution, by common law or any statute of California.

7. Labor Relations ⇐63

Applicants for employment are included in a definition of "employees" within Labor Management Relations Act of 1947. Labor Management Relations Act, 1947, 29 U.S.C.A. § 141 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Employees".

8. Labor Relations ⇐510

Complaint to recover damages resulting from alleged conspiracy among port captain, shipping master and shipping company to deprive plaintiff of rights of employment as a cook because plaintiff was a Negro was within jurisdiction of state court, and was not within exclusive jurisdiction of National Labor Relations Board where contract between union and shipping company contained nondiscrimination clause but no method to redress was provided which afforded plaintiff any remedy.

John J. Taheny, San Francisco, for appellant.

Lillick, Geary, Wheat, Adams & Charles, Gary J. Torre, Gordon L. Poole, San Francisco, for respondents.

ANTHONY BRAZIL, Justice pro tem.

The appeal is from a judgment entered after a demurrer to the first amended com-

plaint was sustained without leave to amend. The demurrer, filed by the three named defendants jointly, was based upon only one ground, namely: lack of jurisdiction in the State Court.

The complaint alleges in two counts an action for damages resulting from a civil conspiracy among the three defendants to deny plaintiff his rights to employment aboard two of the company's ships. Whatever determination is made as to one count applies to the other for they merely represent different instances in which appellant was not accepted for work after reference therefor by the registration office.

The complaint alleges that the Pacific Maritime Association, acting for defendant shipping company and other like companies in December 1948, contracted with a cooks' and stewards' union concerning substantive rights of shipping company employees. Detailed provisions were contained for settlement of all disputes connected with the agreement by arbitration under the designation "Grievance Machinery."

In an action filed by the National Labor Relations Board in the United States Court of Appeals, Ninth Circuit, a Consent Decree was entered in May 1952 on behalf of American President Lines and other shipping companies, by which decree it was ordered that all parties desist from performing or giving effect to the 1948 contract. The decree, however, ordered into immediate effect a certain "Outline of Terms and Conditions of Employment of Cooks and Stewards," portions of which are pleaded in the complaint. That Outline provided that the substantive parts of the contract regarding wages, conditions of employment, shall remain in effect and that employees shall continue to have the rights they had under the contract. One of the provisions of the Outline which, in fact, forms the basis of plaintiff's allegation of civil conspiracy and consequent damage is as follows:

"Section 5. Non-Discrimination.

"No employee or applicant for employment shall be discriminated against by reason of sex, race, creed, color, national origin, political views or affiliations, or legitimate union activity."

The Outline then provides for a central registration office for registering applicants for work as maritime cooks and stewards, for a master registration list by which applicants would be hired in sequence of time of registration, and then provides for the appointment of a referee having power to finally adjudicate all disputes and grievances arising out of such employment. Contained in the Outline is the following paragraph:

"3. Grievances. Grievances may be presented by any employee. He may at the outset of each voyage or thereafter designate a delegate from among the ship's stewards department to represent him for the handling of any grievances aboard ship. He may consult in port with a representative of any union regarding the case. He may have such representative present, or assist in the presentation of, his case to the company representative. If the adjustment of the grievance at this step is unsatisfactory, the individual may appeal to a Port Committee step by designating the Port Committee of a stewards department union as his representative. Appeal to the Court appointed referee is the final, or arbitration, step, where an individual may be represented by a representative of the union he has designated."

The Outline gives the referee power to settle disputes on an applicant's qualifications for a position without a formal hearing yet reserving to the unions and Pacific Maritime Association a reasonable opportunity to present relevant evidence. The complaint then alleges (legal conclusions) "that said Decree and said Outline contained no provisions for the arbitration or adjudication of controversies concerning claims for damages on account of conspiracies and other wrongful acts causing damage by the denial of the substantive

rights afforded a seaman by Section 5 of said contract."

Then follow allegations that plaintiff having registration priority and proper qualifications therefor was on December 8, 1954, refused the job of relief cook on the S.S. President Monroe; and in like manner in the second cause of action, on February 1, 1955, he was refused the job of sauce cook on the S.S. President Cleveland. It is alleged that the real reason for the refusal to hire plaintiff was because he was a member of the Negro race. It is next alleged that defendant Vaughan was port captain with general supervision at San Francisco of hiring employees for defendant shipping company and that defendant Souza was its shipping master who had personally refused to hire plaintiff for the two ships.

The plaintiff alleges that the three defendants conspired to defraud plaintiff of his rights, resulting in deprivation of those rights accorded him under Section 5 of the contract to his damage in a stated amount for each cause of action, together with request for punitive damages.

[1–3] We start with some well recognized principles of law: A demurrer admits all the allegations of the complaint which are well pleaded, and it must be assumed on appeal from a judgment predicated upon the sustaining of a demurrer that plaintiff could prove all the facts as alleged. Wirin v. Horrall, 85 Cal.App.2d 497, 193 P.2d 470. Truth of conclusions of law are not deemed admitted by a demurrer, Connecticut Gen. L. Ins. Co. v. Johnson, 8 Cal.2d 624, 67 P.2d 675, and the same is true of allegations which are contrary to facts of which a court may have judicial knowledge.

[4, 5] To state a cause of action for conspiracy facts must be alleged showing the formation and operation of a conspiracy and damage resulting from acts done in furtherance of the plan. The cause of action is for the damage suffered, not the mere conspiracy; and facts must be alleged which show that a civil wrong was done resulting in damages. Respondent concedes there are sufficient allegations of two necessary elements—joint action and injury to plaintiff—but claims no rights of plaintiff have been interfered with for he got none from the Consent Decree, and if he can't find his rights in that court order then they simply do not exist. Joint action causing injury is not sufficient for a civil action; something must be done which without the conspiracy would give a right of action. Perry v. Meikle, 102 Cal.App.2d 602, 228 P.2d 17.

[6] The right to private employment without discrimination on the basis of race is not one protected by the Constitution, by common law or any statute of the state that we are aware of; and so plaintiff has not alleged any violation of state or federal laws. If plaintiff has any rights, the interference with which has caused him damage, they must exist, if at all, under the provisions of the Circuit Court of Appeals Consent Decree of May 1952 or under the terms of the contract between union and employer of December 1948, insofar as those contract rights are preserved by said decree for the benefit of plaintiff.

Respondents contend that the right to enforce the provisions of the decree, it having completely superseded the contract, lies solely with the National Labor Relations Board; that the decree sets up an exclusive method for settlement of disputes by employees about working conditions, which would, of course, include racial discrimination and when the Board has made its order, the Board alone is authorized to take proceedings to enforce it. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 60 S.Ct. 561, 84 L.Ed. 738. However, plaintiff does not seek to enforce the Board's order, as contained in the Consent Decree, but to recover damages for what others have done to him in unlawfully depriving him of certain claimed rights.

It has been held in International Sound Technicians v. Superior Court, 141 Cal. App.2d 23, 296 P.2d 395 (hearing in Supreme Court denied) that a state court has jurisdiction of an action for damages for

wrongful invasion of an employee's right to work, even though said invasion also constitutes an unfair labor practice. The opposite would be true where injunctive relief is sought.

[7] There is little merit in appellant's contention that the Outline, which is a part of the Consent Decree, does not apply to an applicant for work because it refers only to "any employee" for applicants for employment are included in a definition of "employees" within the meaning of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq. John Hancock Mut. Life Ins. Co. v. National Labor Rel. Bd., 89 U.S.App.D.C. 261, 191 F.2d 483. In like manner, appellant's view that jurisdiction is somehow given to the State Court by respondents' failure to apply to the Federal Court to restrain plaintiff from prosecuting the present action cannot be sustained. If exclusive jurisdiction lies in the Federal Court, non-action on defendants' part will not give it to the State Court. Vandalia Ry. Co. v. Keys, 46 Ind.App. 353, 91 N.E. 173 does not support his position, for that case involved concurrent, not exclusive jurisdiction.

[8] The plaintiff's complaint is not aimed at settling a grievance or dispute with the shipping company over rate of pay, priority, discrimination or conditions of employment with a view to getting a job or preventing the company from pursuing any course of action. His complaint sounds in tort for damages resulting from wrongful concerted action which deprived him of rights given him by the 1948 contract and expressly preserved by the Consent Decree of 1952. How or in what manner he may prove damages is not a matter of concern here. If he has these private rights, if they have been wrongfully interfered with, if damage was thereby a proximate result, there is no method of redress set up in the Decree and Outline which affords him any remedy.

The respondents maintain that the Consent Decree created no privately enforceable rights, having in Paragraph 1 thereof clearly abrogated all contracts covering the stewards department, thereby preserving none of the provisions of the contract of 1948. Paragraph 1 of that decree does provide among other things that the parties to the contract "Cease and desist from: * * (2) Performing or giving effect to their contract of December 2, 1948 * * *" Paragraph 6 of the same decree says: "The Outline of Terms and Conditions of Employment of Cooks and Stewards attached hereto as Appendix H shall be immediately adopted, put into effect * * *" etc. Paragraph 1 of Appendix H is as follows:

> "1. In accord with the Board's order, the substantive provisions of the pre-existing contract with respect to wages, rates of pay, hours of work, and other conditions of employment with preference as stated herein *shall remain in effect and employees shall continue to have any rights that they may have acquired under the pre-existing contract* and its supplements and amendments." (Emphasis added.)

The preservation of whatever rights employees (including applicants for employment) may have had under the 1948 contract could not have been expressed in clearer language. It is apparent that the abrogation clause in the decree is subject to and is modified by the foregoing preservation clause and so they are not in conflict with each other but stand together as effective parts of the court's decree.

While not agreeing with respondents' assertion that this court can take judicial notice of the decree of the Federal Court of Appeals, appellant, as he puts it in his closing brief, "does not object to the inclusion of the decree"; all of which obviates the necessity of considering this phase of the case. See Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 207 P.2d 647, re judicial notice. The Exhibit of Pacific Maritime Association, found in the appendix to respondents' brief is no part of the record on appeal, nor does the court take judicial notice of its contents.

The judgment of dismissal having been based upon a demurrer which stated only

one ground—"That the court has no jurisdiction"—we are not here concerned with the presence or absence of any of the remaining grounds for demurrer to be found in section 430 of the Code of Civil Procedure. Specifically, we do not here decide whether the provisions of the Arbitration Statutes, Code Civ.Proc. § 1280 et seq., do or do not apply.

Judgment reversed.

DOOLING and KAUFMAN, JJ., concur.



149 Cal.App.2d 517

Harriet Jane BERTCH, Kathryn L. Brooke, Alfred A. Cheney, Andy T. Cope, Frankie May Cope, Robert Vern Crooks, Carrie N. Crooks, Myrtle Everett, William Guy, Sophia A. Hall, Maude D. Harrel, Edward Loftus, Louise Mackay, Cornelia G. Mattox, Laura Petersen, David L. Robinson, Lillian G. Robinson, Minnie E. Schroder, Eda Strever, Annie Laurie Stewart, Theresa F. Tembreull, and Lillian Wells, Petitioners and Respondents,

v.

SOCIAL WELFARE DEPARTMENT of the State OF CALIFORNIA, Respondent and Appellant.

Civ. 17534.

District Court of Appeal, First District, Division 2, California.

March 28, 1957.

Plaintiffs petitioned for writ of mandate to review an order of the State Social Welfare Board. The Superior Court, City & County of San Francisco, Albert C. Wollenberg, J., entered judgment denying the petition, and the plaintiffs appealed. The Supreme Court, Carter, J., 289 P.2d 485, reversed the judgment. Thereafter the plaintiffs made a motion in the Superior Court for judgment on the remittitur and for attorneys' fees. The Superior Court, City & County of San Francisco, Albert C. Wollenberg, J., entered judgment in accordance with views expressed in the Supreme Court decision and awarded attorneys' fees to each plaintiff, and the Social Welfare Department of the State of California appealed. The plaintiffs made a motion to dismiss the appeal on ground that it was filed too late. The District Court of Appeal, Draper, J., held that fixing of attorneys' fees was not a trial of a material issue of fact and was not a proper subject of motion for new trial, and that therefore Rule on Appeal providing that when valid notice of intention to move for new trial is filed, time for filing notice of appeal is extended until 30 days after denial of motion, was not applicable.

Motion to dismiss appeal granted, and appeal dismissed.

1. New Trial ⇐½

Trial procedure is wholly statutory, and if right to new trial is not found in the statute, it does not exist. West's Ann.Code Civ.Proc., § 656.

2. New Trial ⇐17

Generally, a motion for new trial does not lie to review an issue, which is not raised by the pleadings or determined by trial, but is raised and decided only on motion. West's Ann.Code Civ.Proc., §§ 590, 656.

3. Mandamus ⇐175, 187(5)

Where plaintiffs petitioned for writ of mandate to review order of State Social Welfare Board, Superior Court denied writ, Supreme Court on Appeal reversed judgment, plaintiffs then moved in Superior Court for judgment on remittitur and attorneys' fees to which plaintiffs were entitled under Welfare and Institutions Code, and Superior Court entered judgment in accordance with views expressed by Supreme Court decision and also awarded attorneys' fees to each plaintiff, fixing of attorneys' fees was not a trial of a material

issue of fact and was not a proper subject of motion for new trial, and therefore Rule on Appeal providing that when valid notice of intention to move for new trial is filed, time for filing notice of appeal is extended until 30 days after denial of motion, was not applicable. West's Welfare & Inst.Code, § 104.3; West's Ann.Code Civ.Proc., §§ 590, 656; West's Ann.Rules on Appeal, rules 2, 3.

Howard B. Crittenden, Jr., San Francisco, for petitioners.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for respondent.

DRAPER, Justice.

Respondents move to dismiss this appeal upon the ground that it was filed too late.

This is the second appeal in this action, which began when plaintiffs petitioned for writ of mandate to review an order of the State Social Welfare Board. The Superior Court denied the writ. On appeal, that judgment was reversed, and the issues were settled by the decision on appeal, Bertch v. Social Welfare Department, 45 Cal.2d 524, 289 P.2d 485. Plaintiffs then moved for judgment on the remittitur, and in the same motion sought attorneys' fees, to which plaintiffs were entitled under Section 104.3, Welfare and Institutions Code. Judgment was entered in accordance with the views expressed in the Supreme Court decision, and attorneys' fees were awarded to each plaintiff in the sum of $500. This judgment was entered on August 20, 1956. On August 30, defendant filed its notice of intention to move for new trial. This motion was denied October 19. Defendant's notice of appeal was filed November 14.

It is apparent that the appeal was taken after expiration of the 60-day period provided by Rule 2, Rules on Appeal. Appellant contends, however, that Rule 3 is applicable. This rule provides that "when a valid notice of intention to move for a new trial" is filed, the time for filing the notice of appeal is extended until 30 days after denial of the motion. Respondents argue that the motion for new trial is not "valid", and that, therefore, the appeal is not timely.

[1] New trial procedure is wholly statutory. If the right to new trial is not found in the statute, it does not exist. Mann v. Superior Court, 53 Cal.App.2d 272, 127 P.2d 970; Gray v. Cotton, 174 Cal. 256, 162 P. 1019. Our statute defines a new trial as "a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee", Code of Civil Procedure, § 656. "An issue of fact arises * * * upon a material allegation in the complaint controverted by the answer", Code of Civil Procedure, § 590.

[2] In the case at bar, there was no trial or examination of any issue of fact, so far as concerns the issue of respondents' right to the principal relief they sought. Rather, the judgment was entered upon the remittitur, upon respondents' motion for such relief. The general rule is that a motion for new trial does not lie to review an issue which is not raised by the pleadings nor determined by trial, but is raised and decided only upon motion. City of Pasadena v. Superior Court, 212 Cal. 309, 298 P. 968.

[3] Appellant apparently concedes this point as to the principal issues of the case, but insists that the fixing of attorneys' fees constituted trial of an issue of fact, and that as to this matter, the motion for new trial was properly made. But the allowance of attorneys' fees is mandatory under the statute, Welfare and Institutions Code, § 104.3, and it seems clear that the fixing of their amount, as done here, is but incidental to respondents' right to recover upon their case in chief. In like situations, it has been held that the fixing of attorneys' fees is not the trial of a material issue of fact, Huber v. Shedoudy, 180 Cal. 311, 181 P. 63; and is not a proper subject of motion for new trial. Mann v. Superior Court, supra.

Motion to dismiss granted and appeal dismissed.

KAUFMAN, P. J., and DOOLING, J., concur.

149 Cal.App.2d 379

Hazel TAPSCOTT, Plaintiff, Cross-Defendant and Appellant,

v.

Bennie TAPSCOTT, Defendant, Cross-Complainant and Respondent.

Civ. 5372.

District Court of Appeal, Fourth District, California.

March 22, 1957.

Action by wife for divorce. Husband failed to appear and default was entered and thereafter interlocutory decree was entered by default granting wife divorce, awarding her custody of two minor children and support money and community property. In proceedings on husband's motion entitled "Notice of Motion to Set Aside Default and Award Custody of Children to Defendant", the Superior Court, Fresno County, George M. DeWolf, J., denied divorce to wife, granted husband divorce, divided community property and awarded custody of two children to husband with reasonable visitation rights in wife, and wife appealed. The District Court of Appeal, Griffin, J., held that trial judge had not erroneously considered probate officer's report and recommendation or testimony and opinion of staff psychologist at probation department concerning custody of children and regardless of report and opinion, there was sufficient evidence to justify custody award in favor of husband.

Judgment affirmed.

1. Divorce ⇐161

Where wife had instituted action for divorce, husband had failed to appear and a default was entered and thereafter an interlocutory decree was entered by default, husband's document entitled "Notice of Motion to Set Aside Default and Award Custody of Children to Defendant," was sufficient to set aside default, as distinguished from the default judgment, even though body of document only recited that husband would move to set aside the "default judgment".

2. Divorce ⇐303(1)

Where wife had obtained default judgment in her divorce action against husband, and judgment had been set aside, trial court did not err in awarding custody of two children to father after it had previously awarded custody to mother on theory that there had to be a showing or finding of change of conditions.

3. Divorce ⇐302

Award of custody of minor children in divorce action is not adjudication of fitness of parent who is for the time denied the right to obtain possession of children, and award is nothing more than expression of court's belief, under circumstances then existing, that welfare of children will be best served by placing them with one parent rather than with other. West's Ann.Civ. Code, § 138.

4. Divorce ⇐296

Statute providing for custody of children does not give mother of a child of tender years absolute right to its custody but leaves a large measure of discretion with court. West's Ann.Civ.Code, § 138(2).

5. Divorce ⇐303(3)

It is not necessary that an order modifying a custodial decree contain a finding as to unfitness of parent from whose custody children are taken. West's Ann.Civ.Code, § 138.

6. Divorce ⇐312.6(3)

Every presumption supports reasonableness of decree fixing custody of children. West's Ann.Civ.Code, § 138.

7. Divorce ⇐301

In wife's action for divorce, court's finding in awarding custody of children to father was supported by evidence. West's Ann.Civ.Code, § 138.

8. Divorce ⇐301

In wife's action for divorce, trial judge had not erroneously considered probate officer's report and recommendation or testimony and opinion of staff psychologist of probation office concerning custody of children and regardless of report and opinion there was sufficient competent evi-

dence to justify custody award in favor of husband. West's Ann.Civ.Code, § 138.

Walter L. Gordon, Jr., and James L. Garcia, Los Angeles, for appellant.

George N. Zenovich, Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff filed this action for divorce (cruelty) and served defendant with summons and complaint. He failed to appear and answer. On April 7, 1955, a default was entered. A hearing was then had and an interlocutory decree was entered by default on April 13, granting plaintiff a divorce, awarding her custody of their two minor children (a boy aged 7 and a girl aged 10), support money for them, and the community property.

[1] On May 24, 1955, defendant obtained an attorney, who filed a document entitled "Notice of Motion to Set Aside Default and Award Custody of Children to Defendant". However, in the body of the notice of motion, it only recites that defendant would move to set aside the "default judgment" and permit defendant to file an answer and cross-complaint, and no mention is made of the *default* itself. It recites that the motion would be based on "this notice, the affidavit of the defendant * * * his verified answer and cross-complaint served herewith". The written motion is similarly entitled "Motion to set aside default" and contains the same statement as set forth in the motion. The affidavit of defendant recites that a default was taken against him by reason of excusable neglect, setting forth the facts and the reasons why the default should be set aside. The minute entry of May 27th shows the motion was argued, and "It is ordered * * * that the default entry and the default judgment * * * be vacated and set aside * * * and defendant granted leave to answer and file a cross-complaint." A written order to this effect followed. Apparently plaintiff then filed an amended complaint and defendant answered and filed a cross-complaint seeking a divorce on the ground of cruelty. He also sought the community property and custody of the children. Without further objection a trial was had upon the issues thus presented. A divorce was denied plaintiff and granted to defendant on his cross-complaint. A division of the community property was made and the custody of the two children was awarded to defendant with reasonable visitation rights to plaintiff.

On this appeal from the judgment plaintiff claims that the court erred in vacating and setting aside the *default* where no motion was made to set it aside, as distinguished from the default judgment; that although the title indicated it was a motion to set aside the default, the body of the motion was directed toward the *default judgment;* that the nature and character of a pleading is to be determined from its allegations, regardless of what it may be called by the parties, and is to be determined by its contents rather than a selected designation; that accordingly the court was without jurisdiction to set aside the default, citing Sullivan v. Compton, 61 Cal.App.2d 500, 143 P.2d 357; Tomales Bay Oyster Corp. v. Superior Court, 35 Cal.2d 389, 217 P.2d 968; Harth v. Ten Eyck, 16 Cal.2d 829, 108 P.2d 675; and Sec. 585, Code Civ. Proc.

We see no merit to this argument, under the circumstances here related. A similar point was urged in Weck v. Sucher, 96 Cal.App. 422, 426, 274 P. 579, 581. The court there said:

> "Plaintiff did not question the scope of the motion at the time it was presented and determined * * *, even assuming that he may do so now, we find no merit in the point because the terms of said motion and the contents of the documents attached thereto adequately apprised plaintiff that defendants were seeking to obtain complete relief under section 473 from the effect of their default, and in our opinion the order subsequently made by the court

pursuant to said motion is legally sufficient, in form and substance, to grant such relief."

To the same effect are Airline Transport Carriers, Inc., v. Batchelor, 102 Cal.App.2d 241, 227 P.2d 480; Lencioni v. Dan, 128 Cal.App.2d 105, 275 P.2d 101; and County of Los Angeles v. Lewis, 179 Cal. 398, 177 P. 154.

[2–7] The next claim is that the court erred in awarding the custody of the children to the father after it had been previously awarded to the mother, and where there had been no adequate showing or finding of change of conditions, citing such authority as Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96. The principle there stated is not applicable since the original decree awarding custody was vacated and set aside. The question of their custody and what was for the best interests of the children was a factual question for the determination of the trial judge. The bestowal of the custody of minor children in a divorce action is not an adjudication of the fitness of the parent who is for the time denied the right to obtain possession of the children. It is nothing more than the expression of the court's belief, under the circumstances then existing, that the welfare of the children will be best served by placing them with one parent rather than with the other. Section 138 of the Civil Code does not give the mother of a child of tender years the absolute right to its custody, but leaves a large measure of discretion with the court, and it has a broad discretion in determining whether other things are equal within subdivision (2) of that section. It is not necessary that an order modifying a custodial decree should contain a finding as to unfitness of the parent from whose custody it is taken. Every presumption supports the reasonableness of the decree fixing the custody of the children. Bush v. Bush, 81 Cal.App.2d 695, 185 P.2d 38; Clayton v. Clayton, 117 Cal.App.2d 7, 254 P.2d 669; Exley v. Exley, 101 Cal.App.2d 831, 835, 225 P.2d 662; Runsvold v. Runsvold, 61 Cal.App.2d 731, 143 P.2d 746. The court's finding in awarding custody of the children to the father is supported by the evidence.

[8] The next argument is that the trial judge erroneously considered the probation officer's report and recommendation and the testimony and opinion of the staff psychologist of said probation department and did not act on the competent evidence before him in making this determination. An examination of the record does not so indicate. The trial judge did take considerable evidence on this subject, not only from the parties themselves, but others. He showed more than an ordinary interest in the children's future welfare. He refused to submit the matter without argument and made arrangements to interview the children himself. He ordered, by agreement of the parties, a reference of this subject to the probation officer and his staff to make an investigation of the home, the surroundings, to interview the children and parents, and to report as to the present ability of the parties to care for the children. It was agreed between counsel for the respective parties that such a report would be made and they were to be furnished a copy of it; and that counsel for either side could cross-examine the author of the report as to any statement made therein. This was done and the witness gave a detailed explanation of it. It apparently was stipulated that these reports, after being filed, could be "considered" by the court subject to cross-examination of the author.

This case was subsequently argued and, as far as the record is concerned, no question was raised as to these reports or their contents until after the appeal was perfected. Regardless of the reports, there was sufficient evidence to justify the custody order entered.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

149 Cal.App.2d 525

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert CONLON and William R. Staats, Defendants and Appellants.

Cr. 2693.

District Court of Appeal, Third District, California.

March 28, 1957.

Defendants were convicted on two counts of indictment charging them with unlawfully possessing, transporting, selling, furnishing, or giving away marijuana. The Superior Court, Stanislaus County, H. L. Chamberlain, J., entered judgments of conviction and orders denying the separate motions of defendants for new trial, and they appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence was sufficient to sustain jury's implied finding that entrapment had not been practiced on first defendant by undercover agent.

Judgments and orders affirmed.

1. Poisons ⇐9

Evidence that first defendant directed undercover agent to home of second defendant, directed agent to park his automobile in such a way as not to excite suspicion, went into second defendant's house, inferably told second defendant that agent wanted to buy marijuana, and was present when sale of marijuana was made to agent by second defendant, was sufficient to justify conviction of first defendant under indictment charging defendants with unlawfully possessing, transporting, selling, furnishing, or giving away marijuana. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⇐330

Entrapment is a positive defense imposing on an accused the burden of showing that he was induced to commit the act for which he is on trial.

3. Criminal Law ⇐37

"Entrapment" is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

4. Criminal Law ⇐1159(5)

Where record shows a conflict in the evidence as to entrapment, judgment of conviction will not be reversed on appeal.

5. Criminal Law ⇐568

In prosecution under indictment charging defendants in two counts with unlawfully possessing, transporting, selling, furnishing, or giving away marijuana, evidence sustained jury's implied finding that entrapment had not been practiced by undercover agent on one of the defendants. West's Ann.Health & Safety Code, § 11500.

6. Criminal Law ⇐370, 371(12), 372(1)

In prosecution under indictment charging defendants with unlawfully possessing, transporting, selling, furnishing, or giving away marijuana, evidence that one of the defendants made a trip to Mexico to obtain marijuana a few days after the last offense charged in the indictment was properly admitted to show motive, scheme, plan and system on part of such defendant in transactions involving possession and sale of marijuana, to show that he was familiar with marijuana, and as tending to prove the essential knowledge that the substance he was charged in the indictment as selling was marijuana. West's Ann.Health & Safety Code, § 11500.

7. Poisons ⇐9

The corpus delicti of the crime of possession of marijuana is knowledge by defendant that substance in his possession is a narcotic. West's Ann.Health & Safety Code, § 11500.

Lawrence F. Girolami, Sacramento, for appellants.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Each appellant herein was convicted on two counts of violating Section 11500 of the Health and Safety Code. They appeal from the judgments and from the orders denying their separate motions for new trial.

The first count of the indictment against appellants charged them with unlawfully possessing, transporting, selling, furnishing or giving away marijuana, committed on July 22, 1955. The second count charged a like offense committed on July 25, 1955. As to Count One, the evidence may be summarized as follows: One Nick Alvarez was employed by the sheriff's office of Stanislaus County during the month of July, 1955, in the capacity of an undercover operator in the narcotics detail. While acting in this capacity on July 22, 1955, he observed the appellant Robert Conlon in an alley near 7th Street in Modesto. Conlon called out to Alvarez as Alvarez drove by in his auto. Alvarez stopped and Conlon approached. After some conversation he told Alvarez that he wanted some marijuana. Alvarez said he did not have any, but if Conlon knew where he could pick up some, he would get it. Conlon then got into the car and told Alvarez to drive to a certain point in Modesto. There they found several men sitting in a park. Conlon got out, talked to some of the group and returned to the car, telling Alvarez that one of the men had marijuana at his house and had gone to get it. When that person returned, Conlon asked Alvarez for a dollar and on receiving it, walked toward the other man and handed him two one dollar bills, receiving an object. Conlon returned to Alvarez and told him that if he wanted to get "high" they would leave with another man in his automobile. After driving out toward the country, Conlon lit a cigarette, the object he had received, but there was some talk about its being of unsatisfactory quality, and they all returned to the park. There they observed a Buick car drive up, and Conlon said the driver had some "good stuff" with him. He then walked to the Buick, in which appellant Staats was seated, handed Staats something and then returned to where Alvarez was waiting. He gave Alvarez a brown cigarette. Alvarez asked him how much marijuana Staats would sell for $10. Conlon returned to Staats, talked with him and then told Alvarez that Staats said he would give him half a can for $10, and that they were to return in half an hour. Alvarez and Conlon left and later returned. Staats soon drove up in his car. Conlon went to him, talked with him and returned to Alvarez, asking for the $10. He received it, went back to Staats, reached into the car and took out a package which he brought back and delivered to Alvarez. Before handing the package over, he told Alvarez he would take some marijuana in payment for his troubles in the transaction. He did so, delivering the balance to Alvarez. It was shown that this was marijuana.

The evidence as to the second count may be summarized as follows: On July 25, 1955, Alvarez again contacted Conlon at the State Club in Modesto. He asked Conlon if he knew where marijuana could be obtained, and Conlon told him to drive to the state hospital, where there was a man who had it. They drove to the hospital; Conlon left the car and went into the hospital but returned about 15 minutes later, saying that the man he intended to see was not working that day. He then told Alvarez to drive to appellant Staats' home. As they passed the house, Conlon told Alvarez to make a U turn, not to park directly in front. Conlon went into the house and came out with Staats. The two got into Alvarez' car, where Staats told Alvarez he had 20 "joints" which he would sell for $15. Alvarez said that would be all right, and Staats left the car and returned to his house. Conlon remained in the car. Staats came back, entered the car and handed Alvarez 18 marijuana cigarettes, telling him to drive off as he, Staats, was going to light up the other two and get "high". Alvarez paid Staats $15 for the 18 cigarettes. After driving awhile, Staats lit the cigarettes, Conlon smoked one, and

they passed one to Alvarez, who pretended to smoke it and handed it back to one of the others. Alvarez drove Staats home and drove back to town with Conlon.

With respect to appellant Staats, additional evidence was received that between July 26 and August 1, 1955, Staats, with two other men, made a trip to Mexico and brought a quantity of marijuana to Modesto. This evidence was introduced over the objections of both appellants.

[1] The first contention advanced is that the evidence is insufficient to support the conviction of Conlon for the alleged violation of July 25, 1955. The argument is that not once did Conlon have the marijuana in his possession; that he did not receive any money paid by Alvarez to Staats; that he did not in any way participate in the transaction but was a mere observer. The contention cannot be sustained. The evidence we have heretofore narrated sufficiently shows that he was directly concerned in the commission of the crime and aided and abetted its commission. Penal Code, Sec. 31. He directed Alvarez to the home of Staats, directed him to park in such a way as not to excite suspicion. He went into the Staats house and, inferably, told Staats that Alvarez wanted to buy marijuana. He was present when the sale was made to Alvarez. The jury could conclude that he was so intimately concerned with the whole transaction as to be fairly held to have aided and abetted Staats in the commission of the crime.

[2–5] Appellant Conlon contends that he was the victim of entrapment. The evidence we have narrated, while it does contain proof of suggestions by Alvarez that marijuana be obtained and other acts of Alvarez which might be described as acts in collaboration with Conlon in obtaining marijuana, nevertheless, the most that can be said is that the evidence was sufficient to make the defense of entrapment an issue of fact which the jury, under appropriate instructions, resolved against appellant. Entrapment is a positive defense, imposing upon an accused the burden of showing that he was induced to commit the act for which he is on trial. People v. Schwartz, 109 Cal.App.2d 450, 455, 240 P.2d 1024. Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer. People v. Lindsey, 91 Cal. App.2d 914, 916, 205 P.2d 1114. Where the record shows a conflict in the evidence as to entrapment, the judgment will not be reversed. People v. Braddock, 41 Cal.2d 794, 803, 264 P.2d 521. The evidence is sufficient to uphold the jury's implied finding that entrapment had not been practiced.

[6, 7] The evidence of the trip made by appellant Staats to Mexico a few days after the occurrences on July 25th which formed the basis of the second count, was introduced against Staats alone, and the trial court admonished the jury on several occasions they were not to consider it in connection with the guilt or innocence of Conlon. If admissible against Staats, therefore, Conlon cannot complain. We cannot assume that the jury did not obey the admonitions of the court. The evidence was admissible as to Staats. It tended, logically, naturally and by reasonable inference, to establish facts material to the prosecution. It showed motive, scheme, plan and system on the part of Staats in transactions involving the possession and sale of marijuana. It showed that he was familiar with marijuana and tended to prove the essential of the crimes with which he was charged, that is, knowledge that the substance he had and sold was marijuana. People v. Winston, 46 Cal.2d 151, 293 P.2d 40. It may be added that the court had properly instructed the jury that: "The corpus delicti of the crime of possession of marijuana is: * * * 3) The defendant must have knowledge that such objects in his possession is a narcotic." It was, therefore, properly admitted.

The judgments and the orders appealed from are affirmed.

SCHOTTKY and PEEK, JJ., concur.

149 Cal.App.2d 296

Morris FUTLICK, Plaintiff and Appellant,

v.

F. W. WOOLWORTH CO., a corporation, Robert Kirkwood, California State Board of Equalization, Defendants and Respondents.

Civ. 5361.

District Court of Appeal, Fourth District, California.

March 19, 1957.

Proceeding wherein plaintiff sought to enjoin company from collecting taxes in excess of amount authorized. The Superior Court, George M. DeWolf, J., Fresno County, sustained a demurrer without leave to amend, and plaintiff filed notice of appeal from that order prior to entry of judgment. The District Court of Appeal, Mussell, J., held that the order sustaining demurrer without leave to amend was not an appealable order.

Purported appeal dismissed.

1. Appeal and Error ⇐428(2)

Where appellant's notice of appeal from order sustaining demurrer without leave to amend was filed prior to entry of judgment, and there was no reference in such notice to a judgment from which appeal could have been taken, appeal could not be maintained.

2. Appeal and Error ⇐102

Order sustaining demurrer without leave to amend is not an appealable order.

3. Appeal and Error ⇐422

Notices of appeal must be liberally construed to permit, if possible, a hearing on the merits, and no technicality should prevent such a hearing, but reviewing court has no power to make appealable an order which is not appealable and the problem is one of jurisdiction.

4. Appeal and Error ⇐782

If appellants appeal from nonappealable order reviewing court cannot remedy defect.

Morris Futlick, Fresno, in pro. per.

Adrian A. Kragen and Sho Sato, Berkeley, for respondent F. W. Woolworth Co.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., and Ernest P. Goodman and Harry W. Low, Deputies Atty. Gen., for respondents Robert C. Kirkwood and State Bd. of Equalization.

MUSSELL, Justice.

This is an action in which plaintiff in his first amended complaint for injunctive relief sought to enjoin the F. W. Woolworth Company from collecting City of Fresno and State of California sales taxes in excess of the amount authorized by the Sales and Use Tax Law of California, Revenue & Taxation Code, § 6001 et seq., and by a Fresno city ordinance. Plaintiff also sought to enjoin Robert C. Kirkwood, the controller, and the State Board of Equalization from authorizing or recommending the use of a particular sales tax reimbursement schedule. A general demurrer to the original complaint was filed by defendant F. W. Woolworth Company alleging that the complaint did not state facts sufficient to constitute a cause of action and this demurrer was sustained with leave to amend. Following the filing of plaintiff's first amended complaint, defendants Woolworth Company, the State Board of Equalization and Robert C. Kirkwood, Controller, filed demurrers to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action against them or any of them. This demurrer was sustained without leave to amend by order of the court on March 22, 1956. On March 23, 1956, plaintiff filed a notice of appeal from this order. On April 6, 1956, the trial court entered and filed a judgment that plaintiff take nothing by his action and that judgment be entered for defendants Robert C. Kirkwood and the State Board of Equalization. On April 13, 1956, judgment was entered dismissing the amended complaint and ordering judgment for F. W. Woolworth Com-

pany. No appeal was taken by plaintiff from either of these judgments.

[1] Appellant's notice of appeal was filed prior to the entry of the judgment herein and there is no reference in the notice of appeal to a judgment from which an appeal may be taken. The notice specifically states that the "* * * (p)laintiff in the above-entitled action hereby appeals to the Supreme Court of the State of California from the order sustaining the Demurrer of defendants, without leave to amend and entered in the said above-entitled court, from which appeal is taken on the 22nd day of March, 1956, in favor of defendants and against said plaintiff and from the whole of said order.

[2–4] The order sustaining the demurrer without leave to amend is not an appealable order and this court must therefore dismiss the appeal. Cole v. Rush, 40 Cal.2d 178, 252 P.2d 1; Evans v. Dabney, 37 Cal.2d 758, 759, 235 P.2d 604; Madsen v. Turlock Irrigation Dist., 56 Cal.App.2d 742, 133 P.2d 416. As is said in Schmidt v. Townsend, 103 Cal.App.2d 185, 186–187, 229 P.2d 488, 489:

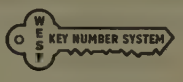
> "While notices of appeal must be liberally construed to permit, if possible, a hearing on the merits, and no technicality should prevent such a hearing, Holden v. California Emp., etc., Comm., 101 Cal.App.2d [427], 225 P.2d 634, this court has no power to make appealable an order which is nonappealable. The problem is one of jurisdiction. If appellants appealed from a nonappealable order we cannot remedy the defect. We cannot consider an appeal where none was taken."

In Wilbur v. Cull, 127 Cal.App.2d 655, 656, 274 P.2d 424, 425, the court said:

> "The document which purported to take an appeal from the order denying a new trial was so specific in its reference to that order and to the date of its entry, that it cannot be given any effect as an appeal from the judgment; and of course since the order denying a mistrial was not an appealable order the document was completely abortive."

The purported appeal is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.



149 Cal.App.2d 352

FORGERON INCORPORATED, a corporation Plaintiff and Respondent,

v.

Clifford L. HANSEN, Howard W. Hansen, individually and as the general partners of L. H. Hansen & Sons, a limited partnership; L. H. Hansen & Sons, a copartnership, Defendants and Appellants.

Civ. 5368.

District Court of Appeal, Fourth District, California.

March 21, 1957.

As Modified on Denial of Rehearing April 18, 1957.

Hearing Denied May 20, 1957.

Action for damages for defendants' failure to award to plaintiff a subcontract. From a judgment of the Superior Court of Kern County and from an order denying a motion for judgment notwithstanding the verdict, Robert B. Lambert, J., the defendants appealed. The District Court of Appeal, Mussell, J., held that in action for damages against general contractor for failure to award to plaintiff a subcontract for plumbing, evidence failed to show that general contractor's estimator agreed that general contractor would enter into subcontract, that subcontractor's bid was low, or that estimator had authority to bind the general contractor even if estimator had so represented to subcontractor.

Judgment reversed and new trial ordered, and order affirmed.

1. Principal and Agent ⇐50

Actual authority is such as a principal intentionally confers upon the agent, or in-

tentionally, or by want of ordinary care, allows agent to believe himself to possess. West's Ann.Civ.Code, § 2316.

2. Contracts ⇐25

An agreement to make in the future such a contract as may be agreed upon at later time amounts to nothing, is not binding, and cannot be made basis of a cause of action.

3. Contracts ⇐32

When it is part of understanding between parties that terms of contract are to be reduced to writing and signed by them, there is no binding agreement until a written contract is signed.

4. Contracts ⇐47

An agreement to be enforceable must be supported by good and valuable consideration, and consideration must be such as was bargained by the parties.

5. Contracts ⇐18

In order that general contractor's estimator's statement to plumbing subcontractor that its bid would be accepted should constitute an offer, it would necessarily have to be something more than a statement that general contractor would award the subcontract to subcontractor and something more than a statement that estimator understood that low bidder was to get the job.

6. Contracts ⇐28(3)

In action for damages against general contractor for failure to award to plaintiff a subcontract for plumbing, evidence failed to show that general contractor's estimator agreed that general contractor would enter into subcontract, that subcontractor's bid was low, or that estimator had authority to bind the general contractor even if estimator had so represented to subcontractor.

Rowell, Lamberson & Thomas, Richard Z. Lamberson, Edwin H. Hiber, Fresno, for appellants.

Baker, Palmer, Wall & Raymond, Bakersfield, for respondent.

MUSSELL, Justice.

This is an action for damages alleged to have been caused by the failure of defendants as general contractors to award plaintiff a subcontract for the plumbing in the construction of a college gymnasium and swimming pool in Bakersfield. A jury trial was had and a verdict was returned for the plaintiff. Defendants appeal from the judgment entered in accordance with the verdict and from an order denying their motion for judgment notwithstanding the verdict.

Prior to July 2, 1954, defendants advertised in various building trade papers requesting bids on portions of the construction of the Bakersfield Junior College gymnasium and swimming pool. On that date defendants were engaged in the preparation of a general contract bid to be submitted by them to the public awarding authority for the construction of the entire job and sent one Christian Jessen, an estimator, to their temporary office in Bakersfield to receive the bids of the various firms who wished to submit subcontract bids to the partnership for such portions of the work which defendants did not contemplate performing themselves in the event that the general construction contract was awarded to them. Various subcontractors had prepared bids for the plumbing, heating and ventilating portion of the work or portions thereof, and on July 2, 1954, submitted them to the bid depository of the Bakersfield Associated Plumbing Contractors, Inc., with which each of such subcontractors was affiliated. The sealed bids, as submitted to the bid depository, were opened at approximately 2:00 p. m. on that day. The bids of plaintiff Forgeron Incorporated were as follows: Plumbing, $149,800; Heating and Ventilating, $137,320; and combined plumbing and heating, $283,000. The combined plumbing and heating bid of plaintiff in the sum of $283,000 was the lowest combined bid submitted to the bid depository. Plaintiff's separate bid of $137,320 for the heating and ventilating was the lowest bid for that work. However, plaintiff's separate bid for the plumbing was

higher than a bid of $148,000 submitted by the Haverty Company.

The rules of the bid depository provided that contractors submitting bids to the depository should submit separate bids for plumbing and separate bids for heating and ventilating; that the combination figure for both items might be reduced not more than five per cent of the total amount; and that all bids, except the combination plumbing and heating and ventilating bid, when conveyed to the general contractor, should contain a condition to the effect that such bid could only be used with another plumbing or heating or ventilating bid which had been submitted in conformity with these rules.

Following the opening of the bids at the depository on July 2, 1954, and at approximately 3:30 p. m., Theodore Forgeron, president of Forgeron Incorporated, by telephone contacted the office of defendants in Bakersfield to convey his bid to them. Mr. Christian Jessen answered the telephone and, according to the testimony of Forgeron, the following conversation took place:

"A. I asked Mr. Jessen if Mr. Hansen was there. He said he wasn't, but he says, 'I'll take the bids.' And I said, 'Well, are you authorized to take bids?' And he said, 'Yes.' I said, 'You understand the rules of the bid box, and that if I am low in the bid box, I'm to get the bid.' And he says, 'Yes.' I said, 'Well, my bid is $283,000, combination plumbing, heating and ventilating.' And he said, 'Well, can you break it down?' And I said, 'Well, there is no reason to break it down, because there is no combination of bids that can beat mine, my combination. In other words, there is no plumbing bid or heating bid in a combination that would beat my combination bid of $283,000.' And I said, 'You understand that you are not to use it, either of those bids without a member of it has gone to the bid box and that I have the low bid, and it's my job.' And he says, 'I understand that thoroughly. We have gone through the bid box before.' And as far as I know, that was the most of our conversation.

"Q. Was it more than once that Mr. Jessen advised you that they would observe that Hansen & Sons would observe that rules of it? * * * A. Yes. He repeated it two or three times. * * *

"Q. What did he say about their accepting the low bids, the low bid, rather? A. He said that he would like the breakdown on the bid, and I said, 'Why do you want a breakdown? There is no combination that can beat my breakdown, that can beat my combination bid.' And he said, 'Well, out of curiosity.' He says, 'I already knew you had the low bid.' And as far as I can remember, I still insisted that there was no, well, I, it's a fact that I still insisted that I couldn't see why he wanted the breakdown of the two bids; and he said, 'Well, just out of curiosity, what is it?' So, I finally, I says, 'Well it's $137,320 for the heating and $149,800 for the plumbing, but on the combination I took off, took off $4,000 that I considered I could save by doing both jobs.' And I says, but I says, 'The combination is the low bid, and there is no combination that can beat it.' And he says, 'I know that.'

"Q. Do you remember anything further of the conversation? A. I can't recall anything pertinent."

Thomas Collins, an estimator for Forgeron, listened to a part of this conversation on an extension telephone and he testified in this connection as follows:

"A. Well, the portion of the conversation that I heard when Mr. Forgeron rapped on the window to get me on the extension, well, the gentleman's name, I think he said was—I don't remember exactly what the name was now, sounded like Jensen or something like that—and Mr. Forgeron asked him if he was authorized to take bids, and he said yes, and would he accept the low

bid in the Associated Plumbing Contractors' depository; and he said yes, that he would. So, he gave him the price of the bid, and I don't remember what the price of the bid was now, two-hundred eighty some thousand dollars, as near as I can recollect; and after he had given him the bid, he asked him if he would break it down, and Mr. Forgeron says, 'Why should I break it down?' Says, 'I have the low combination in the bid depository', and something was said about agreement of the bid depository rules; and I think this Mr. Jessen, * * * said something about wanting a breakdown for, I think it's commuting purpose or something like that. I don't remember just exactly what that phrase that he used at that time; and, let me think a minute. And, then, I believe Mr. Jessen asked him again to break it down, and Mr. Forgeron, I believe, asked him again why he wanted it; and evidently the same answer, and I don't see—wait a minute. So, finally, after he was assured that it wouldn't be used, individually, that he could use it as a combined—. * * *

"Q. Was anything said during the conversation about agreement to accept this bid if it were low? A. Yes. That's what he stated the first thing; the first part of the conversation that he agreed to accept the bid if he was low. That's what he stated.

"Q. Did he ever change that statement during the conversation? A. Not that I know of."

Jessen, called as a witness for plaintiff, testified that he was employed by L. H. Hansen & Sons as an estimator; that as a part of that work he received a bid over the telephone from Forgeron; that he received bids from subcontractors but did not tell them the conditions and circumstances under which Hansen would use their bids; that he never represented to any contractor on behalf of Hansen & Sons that their bid would be used if it was low in the bid depository. In his deposition, which was read into evidence by plaintiff, Jessen stated that in his capacity as estimator he did not make subcontracts with subcontractors; that he was not sure whether he had ever given assurance to a subcontractor that he would have a contract with Hansen & Sons; that he had never agreed with a subcontractor upon receiving his bid that he would be the subcontractor who would do the job in the event L. H. Hansen & Sons were awarded the job; that the telephone conversation with Forgeron was as follows:

"I think it was about three o'clock in the afternoon when Mr. Forgeron called, and he said, 'Well, here's the low bid.' * * * Then he gave me his plumbing and heating figure. I asked him to break the figure down, to give me his separate figures on the plumbing and heating. He refused to do that at first. I again asked him to break his figure down, and then, he said, 'Well here it is.' Then, he gave me the plumbing figure and the heating figure. I said, 'Thank you,' and that was about it."

The general contract for the construction involved was awarded to L. H. Hansen & Sons, who, in turn, entered into a written subcontract with Forgeron Incorporated for the heating and ventilating portion of the work and with Haverty Company for the plumbing work.

It is plaintiff's contention that the telephone conversation between Forgeron and Jessen gave rise to an oral contract between L. H. Hansen & Sons and Forgeron Incorporated by virtue of which the partnership agreed to award to the corporation the subcontract for the plumbing, heating and ventilating work required in constructing the gymnasium and swimming pool in the event said corporation's bid submitted to the partnership was the lowest bid submitted to it. We are not in accord with this contention.

The second amended complaint herein contains two causes of action. In the first it is alleged that L. H. Hansen & Sons orally agreed with plaintiff that said de-

fendants would use the subcontract bid of plaintiff and would name plaintiff as plumbing and heating and ventilating subcontractor upon said project, in the event that plaintiff's was the low bid submitted to said defendants and was the low bid submitted to the Bakersfield Plumbing Contractors' bid depository; and that defendant has failed and refused to award the plumbing subcontract to plaintiff. There is no allegation in this cause of action that Jessen held himself out as agent having authority to bind Hansen & Sons to such an agreement or that he represented himself as such agent. In the second count of the second amended complaint it is alleged in one paragraph that Jessen represented to plaintiff that he was authorized to enter into an agreement with plaintiff and in another paragraph it is alleged, on information and belief, that Jessen was not so authorized. The second cause of action was dismissed on motion of plaintiff's counsel and trial was had on the issues framed in the first cause of action. It is therefore apparent that plaintiff relied upon proof of actual authority of Jessen to enter into an oral agreement obligating Hansen & Sons to award the plumbing subcontract to plaintiff.

Jessen testified in this connection that in his capacity as estimator he did not make subcontracts with subcontractors and had never represented to any contractor on behalf of Hansen & Sons that their bid would be used if it was low in the bid depository; that he was employed as an estimator and his duty was to arrive at a figure by which Hansen & Sons could do a job and obtain a reasonable profit; that in his dealings with subcontractors in his capacity as an estimator he received their bids and discussed their jobs.

Clifford Hansen, one of the defendants, testified that subcontract bids were received by anyone in the office and usually an hour or two before the bid opening they segregated the subcontract proposals into various classifications and after going through them, they decided which of the sub bids they were going to use in compiling their total bid; that in July, 1954, and prior thereto, they received subcontract bids when they were 'phoned into his office but did not accept them; that they did not award a subcontract before they were awarded the general contract by the awarding authority; that on July 2, 1954, and prior thereto, none of the employees of Hansen & Sons were authorized to enter into any subcontract on a public bid job and Mr. Jessen was not so authorized; that Jessen was advised when he started estimating that his job was material take off and the receiving of sub bids, but that in all awarding and decisions as to what bid would be used in any particular trade, the decision was reserved for his brother or himself; that subcontracts were entered into on standard written forms; that about a week after July 2, 1954, he had a conversation with Forgeron in which he explained to him the reason that he did not list Forgeron as a subplumbing contractor; that he told Forgeron that they took his combination bid and added the cost of a bond to that bid, which made the total higher than a separate bid of Forgeron on the heating and the bid of Mr. Haverty on the plumbing and that they felt that they would be willing to award Mr. Forgeron the heating contract and Mr. Haverty the plumbing contract.

[1] Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess. Civ.Code, sec. 2316. In Restatement of the Law on Agency, section 7, comments a and b are as follows:

> "a. * * * Authority exists only in accordance with manifestations of the principal * * *
>
> "b. By manifestation is meant the expression of the principal's will as distinguished from undisclosed purpose or intention. The manifestation to the agent must be prior to or contemporaneous with an act done by the agent in order to confer authority upon the agent. A manifestation of consent by the principal after the agent has acted may result in ratification * * *"

And in Restatement of the Law on Agency, section 26, comment a is as follows:

"* * * The fact that the principal is willing that another shall act on his account and that the other so believes does not create authority; there must be a manifestation by conduct originating from the principal and coming to the knowledge of the agent."

In Waniorek v. United Railroads, 17 Cal. App. 121, 132, 118 P. 947, 952, it is said:

"Manifestly the proper way to show the extent of the agent's authority is to offer evidence of the orders or direction given him or of the rules adopted for his guidance by the principal. If there were no such evidence available, it would be proper to describe the work performed by the agent in the course of his employment, bringing it home to the knowledge and implied acquiescence of the principal, or, in the language of Mecham, 'tracing it to some word or act of the alleged principal.' But without any such showing it is a palpable invasion of the province of the jury to ask a witness whether a certain act is within the scope of the agent's authority; neither can it be justified upon the theory that the witness was an expert upon the subject, as the duty of these employés is not a matter of expert testimony."

In Albert Steinfeld & Co. v. Broxholme, 59 Cal.App. 623, 211 P. 473, it was held that an architect employed in the remodeling of a store, in the absence of express authority, did not have any authority to bind the owner by entering into contracts in the owner's name for and on the owner's behalf.

There is evidence in the record that Jessen entered into written agreements somewhat similar to the one asserted by plaintiff over a year after the original complaint herein was filed and that such was done with the knowledge of his employer. However, this merely showed authority to enter into such written agreements at a time more than one year after this action was filed.

We find no substantial evidence in the record that Hansen & Sons conferred actual authority upon Jessen to enter into an agreement binding them to award the plumbing contract to plaintiff. The text of the notices published by Hansen & Sons advertising for bids is not before us and it does not appear that Hansen & Sons were obligated to accept combination bids rather than the separate bids of the various subcontractors. It is apparent that the defendants could award the plumbing contract to one contractor and the heating and ventilating contract to another, if they so desired.

There is no doubt that Jessen had authority to receive bids; he was sent to Bakersfield for that purpose. It was understood by Forgeron and Hansen & Sons that a written agreement would be entered into between the parties if the contract was later awarded to plaintiff. There is a distinction between receiving bids and awarding contracts and while Forgeron asked Jessen if he was authorized to take bids, he made no inquiry as to whether Jessen was authorized to award subcontracts, and it does not appear that Jessen offered, promised or agreed to enter into a binding contract whereby plaintiff would be employed to do the plumbing job. None of the terms of the proposed subcontract were discussed and there was no conversation or indication as to when the work would be performed, when the payment would be due, or what specific plumbing, heating and ventilating work was to be performed.

[2–4] As stated in 12 Cal.Jur.2d, Contracts, Section 111: "An agreement to make in the future such a contract as may be agreed upon at the later time amounts to nothing, is not binding, and cannot be made the basis of a cause of action." And at page 218, section 26: "When it is part of an understanding between the parties that the terms of the contract are to be reduced to writing and signed by them, there is no binding agreement until a written contract is signed." Dexter v. Ankiewicz, 26 Cal. App.2d 326, 333, 79 P.2d 400. Moreover, an agreement to be enforceable must be

supported by good and valuable consideration, and the consideration must be such as was bargained by the parties. As was said in Simmons v. Cal. Institute of Technology, 34 Cal.2d 264, 272, 209 P.2d 581, 586:

> "But the consideration for a promise must be an act or a return promise, bargained for and given in exchange for the promise. Bard v. Kent, 19 Cal. 2d 449, 122 P.2d 8, 139 A.L.R. 1032; Tiffany & Co. v. Spreckels, 202 Cal. 778, 262 P. 742; Williams v. Hasshagen, 166 Cal. 386, 137 P. 9; Lasar v. Johnson, 125 Cal. 549, 58 P. 161; Rest., Contracts, § 75; see Williston, Contracts, (rev.ed.) §§ 61, 100, 102, 102a. In the words of section 75 of the Restatement of Contracts (comment b): 'Consideration must actually be bargained for as the exchange for the promise * * * The existence or non-existence of a bargain where something has been parted with by the promisee or received by the promisor depends upon the manifested intention of the parties * * * The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange.' Language approved in Bard v. Kent, supra, 19 Cal.2d 449, page 452, 122 P.2d 8, 139 A.L.R. 1032."

In the instant case it appears that even if Jessen promised or notified Forgeron that he would get the job if his combination bid was low, there was no evidence as to what Jessen expected or wanted in exchange for such a promise, or upon what his promise was conditioned. The statement by Jessen that Forgeron would get the bid may well have been Jessen's opinion in the matter. It was not a statement that he, Jessen, had the authority in behalf of Hansen & Sons to award the plumbing contract or that Hansen & Sons would enter into a written contract with plaintiff.

It is stated in respondents' reply brief that since the outset of this litigation respondents have frankly relied upon the contractual theory noted in Re Estate of Lynch, 62 Cal.App. 687, 217 P. 807. In that case the court had under consideration a written notice by the executor of an estate to the effect that he would sell at private sale on or after a given hour, on a specified day, to the highest bidder therefor, upon certain terms and conditions, one of which was that all bids should be in writing. It was contended that the notice constituted an offer to sell and the court said, 62 Cal.App. at pages 689–690, 217 P. at page 808:

> "The notice merely amounts to an indication to sell; and the mere submission of a bid in response thereto cannot be construed as an acceptance of an offer. That the executor did not accept the appellant's bid (offer) is evidenced by his act in calling for higher bids and his acceptance of the Levin offer. The act of the executor in advertising for bids did not, therefore, constitute an offer. It was but a mere preliminary act, amounting to no more that a mere solicitation of bids, leading up to a sale. The bid of appellant was, of course, an offer, but until accepted no rights were created thereby between the parties."

[5] In the instant case, the notices calling for bids are not before us and in what respect Hansen & Sons were bound by them is not apparent. The offer of Hansen & Sons was in the notice calling for bids and the telephone conversation between Jessen and Forgeron did not constitute a binding agreement. It is evident that in order that Jessen's statement would constitute an offer it would necessarily have to be something more than a statement that Hansen & Sons would award the contract to plaintiff and something more than a statement that he understood that the low bidder was to get the job.

[6] It follows from what we have heretofore said that the judgment must be reversed and it is therefore unnecessary to pass upon other points relied upon by the defendants.

The judgment is reversed and a new trial ordered. The order denying the motion for judgment notwithstanding the verdict is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



149 Cal.App.2d 225

R. A. KLASSEN, Plaintiff and Appellant,

v.

The CITY OF SAN CARLOS, a municipal corporation, Harry L. Grant, as Treasurer of said City of San Carlos, and L. C. Smith Co., a corporation, Defendants and Respondents.

No. 16863.

District Court of Appeal, First District, Division 1, California.

March 19, 1957.

Action was brought by taxpayer against city and others to prevent alleged illegal expenditure from the city's general fund and to require restoration to that fund of moneys which had been allegedly spent illegally. The Superior Court, County of San Mateo, Murray Draper, J., entered judgment against taxpayer, and taxpayer appealed. The District Court of Appeal, Fred B. Wood, J., 303 P.2d 33, reversed the judgment and held that the complaint clearly stated a cause of action not vulnerable to general demurrer. On rehearing the District Court of Appeal, Fred B. Wood, J., held that city council had authority under the Streets and Highway Code after commencement of a certain street improvement proceeding to contribute moneys for the improvement out of the city's general fund, despite the fact that resolution of intention made no mention of a contribution from any general fund of the city treasury.

Judgment affirmed.

1. Municipal Corporations ⇐886

City council had authority under the Streets and Highway Code after commencement of a certain street improvement proceeding to contribute moneys for the improvement out of the city's general fund, despite the fact that resolution of intention made no mention of a contribution from any general fund of the city treasury. West's Ann.Streets & High.Code, §§ 2–4, 6, 5360, 5375, 10000–10609, 10201, 10205.

2. Municipal Corporations ⇐266

Fact that when the 1913 Municipal Improvement Act was codified in 1953 the words "as now or hereafter provided" were deleted did not operate to void incorporation which had been effected in 1950, of sections of the 1911 Municipal Improvement Act dealing with contributions by legislative body of city to cost of improvement project. West's Ann.Streets & High. Code, §§ 2–4, 6, 5360, 5375, 10000–10609, 10201, 10205.

3. Municipal Corporations ⇐266

Incorporation into 1913 Municipal Improvement Act of contribution provisions of the 1911 Municipal Improvement Act was not so repugnant to section of the 1913 Act providing that in resolution of intention the legislative body may order that a specified portion or percentage of cost and expenses of improvements shall be paid out of treasury of municipality from such fund as legislative body may designate, as to require inference that the Legislature did not intend an incorporation of provisions of the 1911 Act dealing with contribution by legislative body to cost of project. West's Ann.Streets & High.Code, §§ 2–4, 6, 5360, 5375, 10000–10609, 10201, 10205.

4. Municipal Corporations ⇐883

Section of the Streets and Highway Code dealing with contribution by legislative body of city to cost of improvement project, was not intended to apply after completion of contract by contractor. West's Ann.Streets & High.Code, § 5375.

William O. Ellis, Redwood City, for appellant.

Melvin E. Cohn, City Atty., San Carlos, Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for respondents.

O'Melveny & Myers, Los Angeles, amici curiae.

FRED B. WOOD, Justice.

Shortly after the filing of our former opinion upon this appeal, — Cal.App.2d —, 303 P.2d 33, section 5375 of the Streets and Highways Code (added to the code by Ch. 65 of the Statutes of the 1st Ex.Session of 1950, p. 526) for the first time came to our attention. As that section appeared to have a significant bearing upon the issues herein, we ordered a rehearing, upon our own motion, for the purpose of considering it and to give counsel an opportunity to submit briefs as to the applicability, if any, of its provisions. That has been done and we are persuaded that section 5375 does apply and requires an affirmance of the judgment appealed from.

This action was brought by plaintiff as a citizen and taxpayer of the City of San Carlos pursuant to the provisions of section 526a of the Code of Civil Procedure. He alleges that after the commencement of a certain street improvement proceeding under sanction of the Municipal Improvement Act of 1913, Streets and Highways Code, §§ 10000–10609, the city council contributed moneys for the improvement out of the city's general fund, and did so despite the fact that the resolution of intention "made no mention of a contribution from any general fund of the City Treasury."

This, plaintiff claims, the city had no power to do. We so held in our opinion as first filed herein, predicated upon section 10201 of the 1913 act and the apparent lack of authority therefor expressed in the Improvement Act of 1911.[1] But section 5375 of the 1911 act compels the opposite conclusion.

[1] It says that if in the opinion of the legislative body of the city the public interest will be served, that body "may provide for making a contribution to the cost of any project, or for the payment of any part of the cost thereof or of the expenses incidental thereto, instead of assessing the cost thereof in any assessment heretofore or hereafter levied." This it may do "notwithstanding no provision is made therefor in the resolution of intention or said contribution or payment is in addition to that provided in said resolution." The Legislature could hardly have expressed itself more emphatically. If applicable here, section 5375 demonstrates that San Carlos' city council had complete authority to make the questioned contributions; the complaint does not and can not be made to state a cause of action; the demurrer to the third amended complaint was properly sustained without leave to amend; and the judgment must be affirmed.

[2] Section 5375 is applicable here. At the time of its enactment (1950) section 2a of the Municipal Improvement Act of 1913 read as follows: "The provisions of the Improvement Act of 1911, *as now or hereafter provided,* relating to contributions, is [are] incorporated herein by reference." Stats.1949, ch. 976, § 5 at p. 1764; emphasis added. The fact that when the 1913 act was codified in 1953 (section 2a becoming section 10205 of the Streets and Highways Code; Stats.1953, ch. 192, p. 1176 at p. 1183), the words "as now or hereafter provided" were deleted, did not operate to void the incorporation of section 5375 which had been effected in 1950. Moreover, we do not consider that the deletion of those words in the process of codification reflects an intent to change the meaning of the provisions of section 2a, in view of the long declared policy of the Code Commission to avoid substantive change (see Final Report of the Code Commission, 1953, pp. 11 and 12) and the prac-

1. Section 10205 of the 1913 act declares that "The provisions of the Improvement Act of 1911 relating to contributions is [are] incorporated in this division as if fully set out herein."

tice of the Legislature in that regard, see Sobey v. Molony, 40 Cal.App.2d 381, 104 P.2d 868, especially in the light of the declarations appearing in sections 2, 3 and 4 (particularly section 2) of the Streets and Highways Code.

[3] Was such incorporation into the 1913 act so repugnant to the provisions of section 10201 of that act as to require an inference that the Legislature did not intend an incorporation of the provisions of section 5375? No. Section 10201 simply authorizes the city's legislative body to declare in its resolution of intention that a portion or percentage of the cost and expenses of the improvement shall be paid out of the city treasury. We do not think that the granting of that permission in 1913 (it was a part of the original act, ch. 247 of the Statutes of 1913, p. 421) was so inconsistent with the 1950 legislative grant of permission to contribute city moneys at a later stage of the proceedings, that effect can not be given to both.[2]

[4] Plaintiff argues that because section 5375 appears at the end of a chapter entitled "Making and Confirming Assessment," which he says means "after the contractor has fulfilled his contract" (quoting from section 5360), section 5375 was intended to apply only *after* completion of the contract, hence, inapplicable to the facts here pleaded. We do not find a basis for any such limitation. It can not be spelled out of the text of the sections in the chapter mentioned. Nor do chapter and section headings have a limiting effect. § 6, Sts. & Hy.Code. Section 5375 was not originally an integral part of that chapter. It was added to the code nine years after the other sections in the chapter had become a part of the code. And the Legislature did not, expressly, make it any part of that chapter; it in terms "added" section 5375 "to said code." Stats. 1st Ex.Sess.1950, ch. 65, p. 526. There was a space there (between §§ 5374 and 5390) which presumably seemed as good a place as any for insertion of the subject matter of section 5375.

This concludes the consideration of the sole question urged by plaintiff upon this appeal (plaintiff's opening brief, page 5, and his reply brief, pages 2 and 3), the legal effect of the failure of the city council to include in its resolution of intention a provision for the questioned contributions.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

2. We are not holding that section 10205 incorporates only such provisions of the 1911 act as are consistent with those of the 1913 act. That is a question to be decided if and when it arises. We note that the incorporating clause (§ 2a of the original act) was inserted long after the original enactment and, therefore, is a more recent legislative expression on the subject of "contributions" than is section 10201.



149 Cal.App.2d 257

Otis W. VOWELS and George J. Rossi, Individually, and d/b/a Calor Construction Company, Plaintiffs and Respondents,

v.

Albert J. WITT and Evelyn N. Witt, Defendants and Appellants.

Civ. 17083.

District Court of Appeal, First District, Division 2, California.

March 19, 1957.

Hearing Denied May 15, 1957.

Action by contractors against real property owners to foreclose mechanic's lien. From judgment of Superior Court of San Mateo County, Murray Draper, J., decreeing foreclosure, owners appealed. The District Court of Appeal, Kaufman, J., held that trial judge's determination of amount due under contract, providing credit to owners for minor imperfections in construction, was reasonable value of all work completed, and that contract was sub-

stantially performed was sustained by evidence.

Affirmed.

1. Mechanics' Liens ⇐281(1)

In action by contractors against real property owners to foreclose mechanic's lien, evidence sustained findings that contractors substantially performed contract and that owners had not been induced to sign cost-plus contract by allegedly fraudulent representation that total costs would not exceed $55,700.

2. Contracts ⇐299(1)

Where cost-plus construction contract provided that contractors bill owners for all cost incurred during preceding calendar month, but owners could have checked work progress and determined if they needed more financing and owners acquiesced in rapid completion of project, fact of occasional late billing was not sufficient to hold that contractors did not substantially perform contract.

3. Contracts ⇐229(1)

Although cost-plus construction contract provided that total cost included all costs of any subcontractors engaged, contractors could subcontract work on cost-plus, rather than competitive bid, basis.

4. Contracts ⇐229(1)

Although cost-plus contract precluded charging of overhead as costs, items for supervision, maintenance, payroll taxes, insurance, welfare fund and utilities were allowable in determining costs.

5. Contracts ⇐229(1)

In cost-plus contracts, as general rule, premiums for workmen's compensation insurance, social security and labor taxes, hauling, storage and operating expenses resulting from use of equipment are reimbursable costs and not overhead.

6. Mechanics' Liens ⇐93

Where contractor, in action to foreclose mechanic's lien, presented evidence to establish cost of $89,308 and trial judge found that there were certain imperfections but determined $81,534 was reasonable value of work completed, owners were not left to complete contract and remedy defect regardless of cost.

7. Mechanics' Liens ⇐291(6)

Where rights of only one lien claimant were affected by mechanic's lien, owner of two parcels of real property had no cause for complaint if amounts distributable to each were not segregated by judgment ordering foreclosure and sale of both parcels. West's Ann.Code Civ.Proc., §§ 1194.1, 1195.1.

8. Interest ⇐39(1)

Where judgment of foreclosure of mechanic's lien was entirely for items furnished in accordance with contract, with deduction allowed property owners for minor imperfections in contractor's work, interest was properly allowed from date on which lien was filed rather than from date of judgment.

John J. Fahey, Jr., Daly City, Herbert Chamberlin, San Francisco, of counsel, for appellant.

Arvin O. Robb, San Jose, for respondent.

KAUFMAN, Justice.

Defendants appeal from a judgment of the Superior Court of San Mateo County decreeing foreclosure of a mechanic's lien in favor of plaintiffs and respondents for $38,002.31 against certain real property owned by appellants, together with interest and costs.

The amended complaint alleged that plaintiffs Vowels and Rossi, copartners, doing business as the Calor Construction Company, duly licensed contractors, entered into a written agreement with defendant Albert J. Witt, on or about September 1, 1953, whereby they agreed to furnish the material and erect for defendants a certain group of buildings upon land thereafter described in said complaint; that Albert J. Witt as owner of said property agreed to pay all costs for material furnished and labor rendered for construction of said

building, "including all costs of any subcontractors engaged by plaintiffs, cost of insurance, permits, Federal and State taxes including Federal and State tax on wages paid, plus ten (10%) per cent of the total cost as a contractor's fee"; that costs under said agreement were to become due and owing after billing by the contractor for all costs incurred during any preceding calendar month, and were to be payable immediately.

It was alleged that between September 1, 1953 and March 4, 1954, at the special instance and request of defendants, plaintiffs performed work and furnished material to alter the existing buildings on the property, for which defendants agreed to pay under the same terms as contained in the written contract referred to above; that plaintiffs completed said contract in accordance with its terms, consisting of one duplex rental unit, one fourplex rental unit, and completed the remodeling as requested of an existing duplex unit; that said work was completed by March 4, 1954, and pursuant to billings rendered defendants there was due and owing $89,308.22 of which sum $43,312.10 had been paid, leaving a balance of $45,996.12; that this balance is distributable as follows; $1,066.20 due for remodeling of one unit of the existing duplex, $6,788.36 due for remodeling of the other unit of said duplex, $3,227.43 due on construction of the new duplex, and $32,-227.43 due on construction of new fourplex. A later paragraph alleged the amounts of the balances believed to be due at the time notice of lien was filed, and prior to an audit of plaintiffs' records, which figures differed on each of the above units, some being more following the audit, and others, less.

Defendants and appellants denied generally most of the charging allegations of the complaint, affirmatively alleged that the work provided for in said contract was not completed in a workmanlike manner, was defective in many particulars and not up to the standard or in accordance with the terms of the agreement. They alleged that prior to the execution of the written agreement concerning the duplex and fourplex, and prior to the oral agreement respecting the remodeling job, plaintiffs fraudulently misrepresented to defendants that the total cost, including the contractor's 10% profit, would be $55,700; that they fraudulently misrepresented that they were qualified contractors and estimators, and that Rossi was a qualified architect, that relying upon said representations they entered into the written and oral agreements. It was alleged that when said work was fully completed in a workmanlike manner, there would be owing from defendants to plaintiffs the sum of $12,387.90; that the cost of completing the work and correcting unworkmanlike features would be the sum of $3,500. Defendants therefor prayed that judgment be entered against them for the sum of $8,887.90 and no more.

Appellants, Mr. and Mrs. Albert J. Witt, owned real property on University Drive and Alice Street, Menlo Park. They occupied one apartment in a duplex at 625 University Drive. They entered into negotiations with plaintiff and respondent Rossi concerning the construction of another duplex and a fourplex on the above parcels of property for income and investment purposes. A written agreement was eventually entered into on or about September 1, 1953. This contract was a cost plus type of contract, the contractor's fee being ten per cent of the total costs of construction. Remodeling of the duplex on the University Drive property was also undertaken by respondents under an oral contract similar in terms to the written contract covering construction of the new buildings.

In order to finance the construction, appellants borrowed certain sums of money, and subdivided the property into two parcels, parcel one consisting of the land improved by the old duplex and the land on which the new duplex was to be built. A construction loan of $13,500 was obtained on this parcel, and on the security of parcel two which was to be improved by the fourplex, appellants borrowed $25,000 from the San Francisco Bank on a FHA

construction loan. The new duplex was completed before the end of 1953. The fourplex was under construction in November, 1953. Specifications for this building were submitted to and approved by the FHA. Notice of completion of the fourplex was filed by appellant Albert Witt on or about March 11, 1954.

According to respondents' evidence, the cost of the new duplex was $23,255.11 of which $20,027.68 had been paid, leaving a balance owing of $3,227.43. Appellants' expert witnesses testified that the fair and reasonable cost of reproducing the duplex was between $15,249 and $17,459.39. Respondents' evidence showed the cost of the fourplex to have been $49,361.63 of which $14,447.50 had been paid, with a balance of $34,914.13 still due and owing. The testimony of appellants' experts placed the fair and reasonable cost of reproducing the fourplex between $35,140 and $35,997.87.

The remodeling project on the old duplex was undertaken at the same time that the fourplex was under construction. Respondents' evidence showed that the cost of remodeling apartment No. 1 had been $9903.12 of which $7836.92 had been paid; the cost of apartment No. 2, $6788.36, all of which had been paid. Appellants' experts estimated the fair and reasonable cost of reproducing No. 1 between $7,031.66 and $8,170 and No. 2 between $4,373.66 and $4,762.

Appellants had been billed for $35,536.57 up to January 20, 1954. After that time bills for $52,144.82 were submitted by respondents. On February 16, 1954, upon receipt of a payment of $14,000 from appellants, respondents wrote appellants that they had credited the payment in such a manner that no balance was owing on the new duplex or the remodeling job. This allocation respondents later found to be incorrect.

Certain sub-contracts for electrical, plumbing and roofing work were made between respondents and the sub-contractors on a cost plus basis. Appellant Witt testified that respondent Rossi had told him that respondents' customary practice was to let such contracts after obtaining several bids from competing contractors.

[1] Appellants seek a reversal of the judgment on the ground that the evidence does not sustain the finding that respondents substantially performed their construction contracts with appellants. They appear to argue first that good faith of the respondents is a prerequisite to their recovery in a court of equity, citing De Garmo v. Goldman, 19 Cal.2d 755, 123 P.2d 1, Nelson v. Abraham, 29 Cal.2d 745, 750, 177 P.2d 931, and Smith v. Empire Sanitary Dist., 127 Cal.App.2d 63, 72, 273 P.2d 37. Appellants in their answer affirmatively pleaded fraudulent misrepresentations of respondents in inducing them to enter into a contract in which the total costs would not exceed $55,700. On conflicting evidence, the trial court decided this issue against appellants. Insofar as the element of good faith is in issue where fraud is alleged as a defense it may be said that such issue was determined in favor of respondents. The trial court found that whatever errors were made in the accounts were not wilfully made, that some were in favor of respondents and some in favor of appellants, that such errors were not made with intent to deceive or defraud. Appellants do not attack this finding as unsupported, nor could they do so in view of the record.

Findings V and VI are attacked as unsupported by the evidence. Those findings read as follows:

"V

"In the construction of the new buildings and in the remodeling of the existing duplex, some work was not completed and some was not done in a workmanlike manner. As a whole, however, all these items were minor in relation to the entire work done, and as a whole plaintiffs have substantially performed their contract with the defendants. That as substantially completed, each unit in the buildings constructed has been occupied and income producing.

As to the work not completed and the work not done in a workmanlike manner, the defendants are entitled to credit for these minor imperfections. However, in view of the voluminous record in this case and the great difficulty in itemizing the numerous amounts involved and to give credit to defendants for the minor items of work not completed, the minor imperfections of construction, and to determine the reasonable cost of each item of labor rendered in the construction of the various housing units and the reasonable cost of each item of material furnished, the Court finds that although the actual cost to plaintiffs of all such items, including the actual cost paid to subcontractors, plus the contractors fee of 10%, is in excess of $81,534.41, the Court further finds that the reasonable cost for all labor rendered and the reasonable cost of all items of materials furnished plus a contractors fee of 10% thereof, for all work done and completed in accordance with the contract is the sum of $81,534.41 and that the reasonable value of all work done and completed in accordance with the contract is the sum of $81,534.41 and the Court further finds that the work done and as completed constitutes a substantial compliance with the contract as entered in between plaintiffs and defendants.

"VI

"The defendants have paid to plaintiffs the sum of $43,512.10 and that plaintiffs are entitled to recover from defendants, the sum of $38,022.31 with interest from March 18, 1954 at the legal rate."

[2] The written contract herein contained a provision that the contractor "shall bill the owner for all costs incurred during the preceding calendar month, and all amounts so billed shall be immediately due and payable." Appellants based their defense upon the charge that respondents fraudulently induced them to enter into their contract on the representation that the costs would be a certain sum, but did not plead any defense in relation to delayed billings. There was some evidence that bills were not always promptly presented in the month just following the date when costs were incurred. Appellants were present during the progress of the work and respondents' records were open to them for their inspection. The final billings necessarily included numerous very expensive items such as refrigerators, washing machines, electrical installations and window shades. Appellants say that because of delays in billings they were faced with a bill almost double that which they anticipated. Although appellants assert that the total cost should have been $55,700 and therefore admit owing but $8,887.50, their own experts gave a total estimate for the three projects ranging between $61,794.32 and $66,389.26. The fact that the bills were not always furnished promptly, should not be sufficient reason for holding that the contractor did not substantially perform the contract under the circumstances here present, where the owner could check constantly on the progress of the work and could readily determine whether or not he needed further financing than he had first arranged, and where he acquiesced in the rapid completion of the project, filing notice of completion of the fourplex so that it would be immediately available for rental.

[3] Appellants argue that under the contract respondent should be allowed to recover only the costs of labor and material furnished by subcontractors, but not the profit made by such subcontractors. They state that such profit cannot be recovered because respondents led them to believe that they would follow their customary practice of asking for competitive bids from subcontractors, whereas in certain instances they subcontracted work on a cost plus basis. And further, the terms of the written contract allows respondents 10% of the cost of labor and materials. In Grafton Hotel Co. v. Walsh, 4 Cir., 228 F. 5, 10, it was held that the cost of labor and materials plus 10 per cent did not include the subcontractor's profit. One paragraph of the contract herein quoted by appellants on page 11 of the brief reads as follows: "The costs for construction

payable to contractor shall be the total cost of all materials used in and labor rendered for the construction of said residential structures, including all costs *and profits* of any subcontractors engaged by the contractor." (Emphasis ours.) There is nothing in the written contract that requires subcontractors contracts to be made after competitive bidding, and the record does not indicate that in the instances where the cost plus plan was used the work was more expensive than it would have been if bids were received.

[4, 5] The contract, appellants say, precluded the charging of overhead as costs, but nevertheless the court allowed such items for supervision, maintenance, payroll taxes, insurance, welfare fund and utilities. The contract, as quoted by appellants' brief, states: "The costs shall include the cost of insurance, permits, federal and state taxes of wages paid, supervision plus no per cent for overhead costs. * *" Clearly, most of the above items of which appellants complain, were included as part of the costs and were specifically excluded from the classification of overhead costs by the contract. In cost plus contracts, as a general rule, premiums for workmen's compensation insurance, social security and labor taxes, hauling, storage and operating expenses resulting from the use of equipment are reimbursable costs and not overhead. See, House v. Fessill, 188 Md. 160, 51 A.2d 669; Citizen's State Bank v. Gentry, 20 Cal.App.2d 415, 67 P.2d 364.

[6] There is no merit in appellants' argument that appellants who had not breached their contract were left to complete the contract and remedy the defects no matter what the cost might be. Respondents presented evidence to establish that the costs of construction plus 10% amounted to $89,308.22. The trial judge found that there were certain minor imperfections in the work, that while the costs plus 10 per cent to the contractor was in excess of $81,534.41, that sum was the reasonable value of all work completed under the contract, and that the contract was substantially performed. The court specifically found that it had arrived at this figure, after an examination of the voluminous record, which provided for credit to appellants for the minor imperfections in construction.

[7] It is contended the respondents were not entitled to a mechanic's lien upon either or both of the parcels of real property, and that it was error for the court to decree judgment of foreclosure and sale of both parcels of property to satisfy payment of amounts, some relating to one parcel, and some to the other. Appellants cite in support of this statement, section 1195.1 of the Civil Code. That code contains no such section number. Section 1195.1 of the Code of Civil Procedure is concerned with separate residential units. Apparently, section 1194.1, Code of Civil Procedure is the applicable section. That section requires that the claimant must designate the amount due on each building where the claim covers multiple improvements. That was done in the present case. Furthermore, only the one lien claimant is here involved, and it was held in Kritzer v. Tracy Engineering Co., 16 Cal.App. 287, 116 P. 700, that where there are no other lien claimants whose rights could be affected, the owner has no cause for complaint if the amounts distributable to each parcel are not segregated.

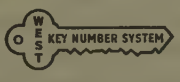
[8] The final contention is that interest should not have been allowed from the date that the claim of lien was filed, but only from the date of judgment declaring the fair and reasonable value of the work and materials, citing Broderick v. Torresan, 88 Cal.App.2d 18, 22, 198 P.2d 75, Associated and Wholesale Elec. Co. v. S. H. Kress & Co., 11 Cal.App.2d 592, 54 P.2d 38. In Broderick v. Torreson, supra, the dispute was concerned with interest on extras furnished by the contractor, and the defendants there admitted that as to materials and labor furnished pursuant to the contract, interest was allowable from the date the money became due. Associated Wholesale Elec. Co. v. S. H. Kress & Co.,

supra, was a suit by a creditor of a subcontractor against the owner of a building where the lien was filed against the owner for the reasonable value of the labor and materials, and not for a sum due under a contract with the owner. In Combs v. Eberhard, 120 Cal.App. 25, 30, 7 P.2d 338, it was held that interest on items furnished pursuant to the contract between the prime contractor and the owner was properly allowed from the date of completion of the work, but that as to extras, the reasonable amount must be determined by the court, and that interest on such items, as well as on amounts claimed by other parties for materials furnished to the contractor, must bear interest from the date of judgment. The judgment herein was entirely for items furnished in accordance with the contract, with a deduction allowed appellants for minor imperfections, hence interest was properly allowed from the date on which the lien was filed.

No prejudicial error appearing in the record before us, the judgment must be affirmed.

Judgment affirmed.

DOOLING, Acting P. J., and STONE, J. pro tem., concur.



149 Cal.App.2d 188

Eva CROW, Plaintiff and Appellant,

v.

YOSEMITE CREEK COMPANY, etc., et al., Defendants,

Norma Zemira Smith, as Executrix of the Estate of Ralph B. Smith, Deceased, Respondent.

Civ. 17189.

District Court of Appeal, First District, Division 1, California.

March 18, 1957.

Action commenced by pledgor's assignee to recover from pledgee balance remaining after proceeds of sale of pledged goods had been applied to payment of note secured thereby. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., rendered judgment giving priority to garnishment lien, and plaintiff appealed. The Court of Appeal, Agee, J. pro tem., held that garnishment levy upon pledgee of non-negotiable warehouse receipts for canned figs created valid lien, and where pledgee accelerated payment of its note on date of levy and exercised its right to liquidate collateral, garnishment lien was entitled to priority, over subsequent assignee of pledgor, in balance remaining in pledgee's hands after proceeds of sale of collateral had been applied to payment of its note.

Affirmed.

1. Garnishment ⇐95

In California, the only method to levy garnishment upon pledged goods is by levy upon pledgee and not upon pledged property.

2. Garnishment ⇐109

Garnishment levy prior in time to assignment would be prior in right if garnishment levy created valid lien. West's Ann. Civ.Code, § 2897.

3. Garnishment ⇐108

Garnishment levy upon pledgee of non-negotiable warehouse receipt for canned figs created valid lien, and where pledgee accelerated payment of its note on date of levy and exercised its right to liquidate collateral, garnishment lien was entitled to priority, over subsequent assignee of pledgor, in balance remaining in pledgee's hands after proceeds of sale of collateral had been applied to payment of its note. West's Ann.Civ.Code, §§ 1858.01 et seq., 2897, 3440.

Charles M. Stark, Paul W. McComish, San Francisco, for appellant.

S. B. Gill, Bakersfield, for respondent.

AGEE, Justice pro tem.

This is an appeal from a judgment giving priority to a garnishment of an unliquidated credit over a subsequent assignment of such credit.

On December 22, 1952, Ralph B. Smith filed suit against Yosemite Creek Company for $150,000 and garnisheed the Crocker First National Bank for such amount. The bank answered, "No Funds." On said date, Yosemite owed the bank a balance of $21,912.50 on a promissory note executed on November 7, 1952. The bank held a nonnegotiable warehouse receipt, issued in its name, for 11,100 cases of canned figs stored by Yosemite, which receipt was so held under a general pledge agreement executed by Yosemite on the same date as the note. When the garnishment was levied upon the bank, it accelerated payment of Yosemite's note as provided in the pledge agreement and declared the entire balance immediately due and payable. The bank then caused the figs to be sold and the proceeds applied to payment of the note. After the note was paid in full, the bank had left in its hands the sum of $12,716.33, in which it disclaimed any interest.

On March 6, 1953, Yosemite assigned to its attorneys all of its interest in the figs and any proceeds therefrom. Notice of such assignment was given to the bank on the same day. On April 14, 1954, Smith obtained judgment against Yosemite for $55,183.73. On June 9, 1954, this action was commenced by the assignee of Yosemite's assignees to recover the said $12,716.33 being held by the bank. The bank deposited the money in court and, Smith having died, his executrix was substituted for the bank as defendant. The lower court held that the unliquidated credit of Yosemite was subject to the garnishment of December 22, 1952, and that such garnishment was prior in right to the assignment of March 6, 1953. This appeal by plaintiff followed from the resulting judgment awarding the $12,716.33 to Smith's executrix.

[1–3] The only method in California to levy a garnishment upon pledged goods is by a levy upon the pledgee (bank) and not upon the pledged property. Treadwell v. Davis, 34 Cal. 601; Dubois v. Spinks, 114 Cal. 289, 46 P. 95. The levy on December 22, 1952, being prior in time to the assignment of March 6, 1953 is prior in right *if* such levy created a valid lien. Civil Code, § 2897. The question is, of course, whether there was anything in the hands of the bank on December 22, 1952, which was capable of being attached by Smith.

Appellant's contention is that goods which have been warehoused, pursuant to the Warehouse Receipts Act, Deering's General Laws, 1937, Act 9059, Civil Code, § 1858.01 et seq., are not subject to attachment by a creditor of the transferor (Yosemite) after the warehouseman has had notice of the transfer.

Appellant relies upon Heffron v. Bank of America Nat. Trust & Savings Ass'n, 9 Cir., 113 F.2d 239, 133 A.L.R. 203. There the dispute was between the holder of a nonnegotiable warehouse receipt (a bank) and the trustee of a bankrupt's estate. The bankrupt had placed his entire stock of goods, consisting of unfabricated steel, under the warehousing agreement and had arranged to have his own premises used as the warehouse. The trustee claimed that the transfer by the bankrupt to the bank was void under the provisions of section 3440 of the Civil Code (bulk sales law) because there was no change of possession as required by that section. The court posed the question as to "whether the bulk sales provision of the statute [Civil Code, § 3440] has any application, in view of the terms of the Warehouse Receipts Act, later enacted." 113 F.2d at pages 241–242. It then stated that if this question "be answered in the negative, there will be no occasion to consider other points discussed on the appeal." 113 F.2d at page 242. The court then decided the question in the negative. It stated, 113 F.2d at page 243: "We conclude that the Warehouse Receipts Act repealed § 3440 so far as the latter might otherwise apply to warehoused goods." The judgment of the lower court allowing the bank's claim as a secured

claim against the bankrupt's estate was thereupon affirmed.

However, there is dicta in the opinion which appears to lend support to appellant's contention. The court said, 113 F.2d at page 242: "The inescapable implication of this provision [then section 42 of the Warehouse Receipts Act, now section 1858.70 of the Civil Code] is that the goods are not subject to attachment or execution by creditors of the transferor—in this case the bankrupt—after the warehouseman has had notice of the transfer." It is clear, however, that the court was only considering the claim of the holder of the warehouse receipt (the bank) and not the excess, if any, remaining after its loan had been paid in full. We do not consider that the dicta, quoted above, is applicable to the instant case. If, in the Heffron case, there had been any excess after the bank loan had been paid in full, we are certain that such excess would have gone to the trustee in bankruptcy.

The same court (9 Cir.) later decided Mount Tivy Winery v. Lewis, 134 F.2d 120. There a winery stored wine in a warehouse and obtained warehouse receipts therefor, which it negotiated to a bank as security for credit financing. The bank required the same kind of pledge agreement as Yosemite executed in the instant case. The winery procured the buyers and handled all sale transactions, just as Yosemite did for Crocker. The federal government levied a floor tax on the wine under a statute providing for a tax on all wines "held by the producer thereof." 134 F.2d at page 122. The winery contended that the wine was not being "held" by it and that all it had was "an inchoate right to receive the wine back at some future date, provided it paid its obligation to the Bank." 134 F.2d at page 123. The court held that the winery had legal title to the wine and pointed out that section 58 (now Civil Code, sec. 1858.-04) provides that "owner" does not include "mortgagee" or "pledgee." It pointed out that the transaction was intended as a credit arrangement and not as a sale. The court quoted from section 42 (now Civil Code, sec. 1858.70), putting emphasis on the latter portion, as follows: "'A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title to the goods, *subject to the terms of any agreement with the transferor.*'", 134 F.2d at page 123. The court held that the agreement between the parties constituted a pledge and that the pledgor (winery) retained title and was the owner. It concluded that such title and ownership, although without possession, resulted in the wine being "held" by the winery within the meaning of the tax statute.

Applying the rule of the Mount Tivy case, supra, to the instant case, it would seem clear that on December 22, 1952, Yosemite, as pledgor, held title and ownership to the figs subject to Crocker's right of possession and right to be paid its loan. After such loan was paid the bank should certainly not be allowed to retain any excess. Indeed, Crocker has made no such claim.

The most impelling authority against the contention of appellant is to be found in the Act itself. Section 25 of the Act (now Civil Code, sec. 1858.34) provides as follows: "If goods are delivered to a warehouseman by the owner * * * and a *negotiable* receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, *unless* the receipt be first surrendered to the warehouseman, or its negotiation enjoined." (Emphasis ours.) This section can only be read as meaning that goods held under a negotiable warehouse receipt can be attached or levied upon *if* the conditions therein stated are met. In view of the fact that the Act does not impose any conditions at all upon the attaching of goods held under a nonnegotiable receipt, it would indeed be strange if they could not also be attached.

Other jurisdictions have held that goods held under a nonnegotiable warehouse receipt are subject to attachment. Stone Leather Co. v. Henry Boston & Sons, 234

Mass. 477, 126 N.E. 46; Edward L. Eyre & Co. v. Hirsch, 36 Wash.2d 439, 218 P.2d 888. In the Eyre case, supra, the plaintiff filed an action against one Hirsch and caused a writ of garnishment to be issued against a bank. The bank answered that it had warehouse receipts covering grain as security for Hirsch's indebtness to it. The bank thereafter assigned the receipts to the warehouse company in return for the latter's payment of $8,012.98, which was the balance due on notes issued by Hirsch and held by the bank. The bank was held liable to the garnishor for the difference between this sum and the value of the grain covered by the receipts.

Appellant also contends that the relation of debtor-creditor would have had to exist *on December 22, 1952,* between Crocker, as debtor, and Yosemite, as creditor, in order for the garnishment to have created a lien. Appellant argues that the garnishor (Smith) had no greater right than his debtor (Yosemite) had against the garnishee (Crocker) at the time of the levy and that all that Yosemite had at that time was "the completely inchoate hope that there would be something left over when the bank had been paid."

Appellant cites a note in American Law Reports which states: "As a general proposition, money presently and unconditionally owing, but not payable until a future date, is subject to garnishment. See 12 R.C.L. title, Garnishment, p. 779. But where a further performance of a contract is necessary before money payable thereon becomes due, the payment is conditioned on the performance, and is not subject to garnishment until the condition has been fulfilled." 2 A.L.R. 506. Appellant argues that the further performance in question was the sale of the figs at a price greater than Crocker's loan and that, until this was done, Crocker did not owe anything to Yosemite or to an attaching creditor.

It should be noted that there was nothing left for Yosemite to do or perform in order to create an obligation by the bank to it. The bank accelerated the payment of its note on the date of the levy. Under the terms of the pledge agreement, it had the power of sale of the collateral. Although it may have been more convenient for the bank to have Yosemite negotiate the sales, it had the legal right and power to liquidate the collateral on its own initiative at any time after acceleration of the note.

In Brainard v. Rogers, 74 Cal.App. 247, 239 P. 1095, the court allowed garnishment of the proceeds of a fire insurance policy by creditors of the insured before the insured had executed and delivered a formal proof of loss or the insurance company had made an adjustment or appraisal of the loss. Thus, there was something to be done by the debtor (i. e., proof of loss) before the insurance company owed him anything and also something to be done by the insurance company (i. e., adjustment or appraisal) before the amount to be paid could be ascertained. As before stated, in the instant case there was nothing left for Yosemite to do or perform and the only thing remaining for Crocker to do was to sell the figs. The court in the Brainard case rejected the contention that "the right [of the debtor] to sue at the date of the attachment is the true test." 74 Cal.App. at page 253, 239 P. at page 1097. It held: "[O]ur own search of the authorities satisfies us that the general rule is that the term 'debts,' as used in attachment statutes, applies to either a matured or unmatured debt and that the present right to sue is not essential." 74 Cal.App. at page 253, 239 P. at page 1097.

Appellant also seems to contend that where the collateral is difficult to evaluate there is nothing in the hands of the garnishor that can be attached. Respondent, in reply, cites three cases in which the collateral consisted of notes of third persons held by the garnishee, which notes were in face amounts larger than the debt thereby secured. Robinson v. Tevis, 38 Cal. 611; Deering & Co. v. Richardson-Kimball Co.,

109 Cal. 73, 41 P. 801; Carter v. Los Angeles Nat. Bk., 116 Cal. 370, 48 P. 332. In each of the cited cases, the garnishor was held to be entitled to participate in the proceeds realized by the garnishee in excess of the debtor's obligation to the garnishee. Appellant distinguishes these cases on the ground that notes constitute a credit in a stated amount and that the excess remaining after the amount due the garnishee can be determined with accuracy. This entirely overlooks the obvious, that the value of such notes may or may not be their face amount.

In Brainard v. Rogers, supra, the court quoted, 74 Cal.App. at page 251, 239 P. at page 1097, from a Pennsylvania case, Girard Fire & Marine Ins. Co. v. Field, Merritt & Co., 45 Pa. 129, as follows: "'It is true, the value of the property may have to be ascertained, but this is not a serious difficulty, for there exists a standard for property in every community, viz., its market value. It is quite as easy to prove what 100 bushels of wheat are worth which have been lost by fire, as what they would have been worth if sold, and the price claimed on a *quantum valebant.*'" Likewise, the market value of canned figs should not be difficult to ascertain.

We conclude that the levy upon Crocker was effective as to the interest which Yosemite then had in the figs or the proceeds therefrom. Any other result would allow a debtor to defeat all except one of his creditors by placing all of his assets under such a warehousing arrangement in favor of such one creditor. This would place beyond the reach of the other creditors all of such assets even when the holder of the warehouse receipt had a claim for far less than the value of said assets.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

149 Cal.App.2d 476

John A. CAMPBELL, Jr., Pauline Campbell and John A. Campbell, Plaintiffs and Appellants,

v.

REPUBLIC INDEMNITY COMPANY OF AMERICA, a corporation, Defendant and Respondent.

Civ. 21930.

District Court of Appeal, Second District, Division 3, California.

March 27, 1957.

Action by insureds under an automobile liability policy for a declaration that coverage under said policy extended to insured's eighteen year old son, wherein insurer cross-complained for reformation of the policy. The Superior Court, Los Angeles County, Philip H. Richards, J., entered judgment for insurer reforming policy and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained finding that understanding of the parties was to limit coverage of the policy to operation of insured vehicle by insured and her husband and that due to mutual mistake the policy as issued by insurer did not express such understanding.

Judgment affirmed.

1. Reformation of Instruments ⇐1

"Reformation" is a remedy which assumes the existence of a valid contract which failed to express actual intention of the parties and contemplates continuance of the contractual relation upon the basis which they truly intended. West's Ann.Civ.Code, §§ 3399, 3401.

See publication Words and Phrases, for other judicial constructions and definitions of "Reformation".

2. Reformation of Instruments ⇐46, 49

Although party seeking revision of a contract must present clear and convincing proof, intention of the parties is a factual

matter to be determined by trial court, and District Court of Appeal's review of the judgment is limited to question of whether such judgment is supported by substantial evidence.

3. Reformation of Instruments ⇐45(14)

In action by insureds under an automobile liability policy for a declaration that coverage under said policy extended to insureds' eighteen year old son, wherein insurer cross-complained for reformation of the policy, evidence sustained finding that understanding of the parties was to limit coverage of the policy to operation of insured vehicle to insured and her husband and that due to mutual mistake the policy as issued by insurer did not express such understanding. West's Ann.Civ.Code, §§ 3399, 3401.

Raymond R. Roberts, Van Nuys, for appellants.

Wyman & Finell, Beverly Hills, for respondent.

SHINN, Presiding Justice.

Republic Indemnity Company of America issued its policy of automobile liability insurance to Mr. and Mrs. John A. Campbell, Jr., for the year commencing March 15, 1954. Attached to the policy was the following endorsement: "Additional Declaration * * * (b) There is no operator of the automobile under 25 years of age resident in the Named Insured's household or employed as a chauffeur of the automobile." On October 17, 1954, the insured automobile became involved in two collisions while being driven by John Alexander Campbell, the son of Mr. and Mrs. Campbell, who was then 18 years of age.

The present action is by the Campbells for a declaration that Republic Indemnity Company is obligated to defend actions for personal injuries and property damage arising out of said collisions and to pay all damages within the policy limits. Defendant denied coverage and filed a cross-complaint for reformation of the policy.

The material allegations of the cross-complaint are as follows: That Ruth T. Ronk is a licensed insurance agent and authorized to do business on defendant's behalf. That prior to March 15, 1954, plaintiffs and defendant (acting through Mrs. Ronk) entered into an agreement whereby defendant was to issue a policy of insurance covering the operation of a 1949 Chevrolet automobile against bodily injury, property damage liability, medical payments and collision damage; it was the mutual understanding of plaintiffs and defendant (acting through Mrs. Ronk) that the policy to be issued would provide no insurance coverage at any time when the Chevrolet was operated by John Alexander Campbell; in view of this specific understanding, defendant issued its policy to the Campbells at a preferential premium rate; affixed to the policy was the endorsement which we have already quoted; pursuant to the understanding of the parties, said endorsement should have read as follows: "It is agreed that no insurance is afforded by any provision of this policy or of any endorsement attached hereto or issued to form a part hereof while any insured vehicle is being operated, maintained or used by or under the control of a person under 25 years of age;" the policy failed to embody the real agreement of the parties as the result of a mutual mistake. The prayer of the cross-complaint was that the policy be reformed so as to express their true understanding.

The court made findings and entered judgment reforming the policy. Plaintiffs' motion for a new trial was denied and they appeal from the judgment.

There was evidence of the following facts. Mrs. Campbell bought a used Chevrolet automobile in the spring of 1952 and purchased liability insurance with the Harbor Insurance Company through Mrs. Ronk, who was an authorized agent of that company as well as of defendant. Plaintiffs' son was then living at home. He was driving the Chevrolet and was protected by the Harbor policy, which his mother renewed in March 1953 on the same terms.

In June 1953, Mrs. Campbell told Mrs. Ronk that her son's driver's license had been suspended and requested that he be taken off the policy. Harbor accordingly attached an exclusionary rider and Mrs. Campbell was given a prorate refund of the premium.

The policy with Harbor expired in March 1954, at which time Mrs. Campbell's son was in the armed forces and no longer residing with his parents. Mrs. Ronk transferred the insurance on the Chevrolet to defendant company. Mrs. Campbell testified that she had a conversation with Mrs. Ronk about the new policy and told her that she wanted "the same kind of policy" with Republic that she had carried with Harbor. She testified that her son's name was not mentioned in the conversation. Mrs. Ronk testified that she called Mrs. Campbell and asked her whether there was any one under 25 in the family to be covered. Upon being assured that there was no one to be covered, she prepared and forwarded an application for insurance to defendant which stated that no member of the Campbell household under the age of 25 was driving the Chevrolet. She knew that Mrs. Campbell's son was in the service and testified further that her "only thought was there was no one to be covered under 25 years of age" and that "my only interest was for rating for a policy which covered no one under 25 years."

After her son returned home on furlough in early October 1954, Mrs. Campbell permitted him to drive the Chevrolet. Two weeks later the accidents occurred. Mrs. Campbell admitted that she allowed him to drive the car even though she knew or thought that he was not insured. She stated that she telephoned Mrs. Ronk after the collisions and "asked regarding no insurance to cover the fact that John was driving it." Mrs. Ronk testified as to the same conversation. She stated that Mrs. Campbell said: "We have no coverage for the children" and that she replied: "No. What has happened?"

The court found that the parties intended the policy to afford no protection while the car was being driven by the Campbell boy; in view of this intention, the policy was written at a lower premium rate; pursuant to the understanding of the parties, the policy should have contained an exclusionary endorsement identical to that contained in the policy plaintiffs had carried with Harbor Insurance Company; and that the policy issued by defendant failed to embody the real agreement of the parties as the result of a mutual mistake. The court accordingly reformed the policy by substituting the Harbor exclusionary endorsement for the endorsement defendant had attached, and concluded that Republic was under no obligation to provide a defense for the actions or pay the damages arising out of the two collisions.

The sole assignment of error to be considered is the insufficiency of the evidence to support the findings. In this connection, plaintiffs argue that there was no evidence that they intended to exclude their son from coverage or that they intended to embody the language of the Harbor exclusionary endorsement in the policy, and that the mistake, if any, was the wholly unilateral mistake of the insurance company. The argument is without merit.

[1, 2] Reformation is a remedy accorded to an aggrieved party to a written contract when, through fraud or mutual mistake of the parties, or a mistake of one party known or suspected by the other, the contract does not truly express their intention. Civ.Code, § 3399. It assumes the existence of a valid contract which failed to express the actual intention of the parties and it contemplates the continuance of the contractual relation upon the basis which they truly intended. Douglass v. Dahm, 101 Cal.App.2d 125, 224 P.2d 914. The court is not limited to inquiring what the language of the contract was intended to be, but may inquire what the contract was intended to mean. Civ.Code, § 3401. Although the party seeking revision of the contract must present clear and convincing proof, the intention of the parties is a factual matter to be determined by the trial court, and our review of the judg-

ment is limited to the question whether it is supported by substantial evidence. (27 Cal.Jur.2d 785.)

[3] There was no conflict in the evidence as to the material facts and we are of the opinion that it amply supports the findings. The court was warranted in determining that the understanding of the parties was to limit coverage to operation of the vehicle by Mrs. Campbell and her husband, and that due to a mutual mistake the policy as issued by the company did not express this understanding. Reformation of the policy to express the true understanding was not only proper but could not reasonably have been refused.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



149 Cal.App.2d 428

R. H. SHAFFORD, Plaintiff and Respondent,

v.

OTTO SALES COMPANY, Inc., et al., Defendants,

Walter E. Otto, Sr., Defendant and Appellant.

Civ. 17159.

District Court of Appeal, First District, Division 1, California.

March 26, 1957.

Rehearing Denied April 25, 1957.

Hearing Denied May 22, 1957.

Salesman's action to recover commissions on sales of products for corporation. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered judgment against corporate as well as individual defendant the latter appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence was sufficient to justify determination that corporation was merely alter ego of individual defendant against whom judgment would be entered.

Affirmed.

1. Corporations ⇦1

In salesman's action against insolvent corporation and individual defendant for commissions on sales of products for corporation which was grossly under-capitalized and for which there had never been a legal issue of stock, evidence supported action of trial court in disregarding corporate entity and imposing liability upon individual defendant.

2. Corporations ⇦1

The two requirements for disregarding corporate entity are, that there should be such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and that if the acts are treated as those of the corporation alone an inequitable result will follow.

3. Corporations ⇦1

Failure to issue stock or to apply at any time for a permit to do so, although not conclusive evidence, is an indication that the persons purportedly acting through a corporation were in fact doing business as individuals.

4. Corporations ⇦1

A factor to be considered in determining whether individuals dealing through a corporation should be held personally responsible for corporate obligations is whether there was an attempt to provide an adequate capitalization for the corporation.

5. Appeal and Error ⇦1010(1)

Conclusion of trier of fact that corporate entity, under circumstances, should be disregarded and personal liability imposed upon individual for corporate obligations, will not be disturbed if it is supported by substantial evidence.

6. Trial ⇦367

Record failed to show that defendant had unfair trial on any theory that judge trying case without jury was overbearing toward counsel and witnesses.

Fabian D. Brown, San Francisco, for appellant.

Bledsoe, Smith, Cathcart, Johnson & Phelps, R. S. Cathcart, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff Shafford brought this action to recover his commissions on sales of cocoanut from Otto Sales Co., Inc., a corporation, to the B & O Nut Company. In addition to the Otto Sales corporation he joined Walter E. Otto, Sr., as a defendant, upon the theory that Otto used the corporation as a shield to cover up his activities as an individual. Shafford recovered judgment against each, which was affirmed as against the corporation but reversed as against Otto. Shafford v. Otto Sales Co., Inc., 119 Cal.App.2d 849, 260 P.2d 269.

In reversing as to Otto, Sr. (hereinafter called "Otto"), we indicated that much of the significant evidence in the case came in through the deposition of one Grantier but applied only to the defendant corporation, not to Otto, because the deposition was taken before process had been served upon Otto. Especially, did we note that there was no evidence that the corporation was used as a shield by Otto to cover up his activities as an individual; no evidence that plaintiff believed he was dealing with Otto personally; no evidence that plaintiff placed any reliance upon such a belief; no evidence that the corporation was undercapitalized or not financially responsible; and no evidence that any inequitable result would follow a refusal to disregard the corporate entity. See pages 860 and 861 of 119 Cal.App.2d, pages 275 and 276 of 260 P.2d.

Upon the retrial, the record of that portion of the former evidence which applied to Otto was put in evidence. Grantier's deposition was again taken and the testimony of Otto and other witnesses was also taken, addressed to the issues indicated in our former opinion. There resulted a judgment against Otto based upon findings the more significant features of which may be summarized as follows:

(1) For a period of 15 years prior to December 16, 1946, Otto had been doing an export and import business in San Francisco under the name of "Otto Sales Company"; (2) on December 16, 1946, Otto caused to be filed with the Secretary of State articles of incorporation relating to "Otto Sales Company, Inc." and later caused to be filed with the State Corporation Commissioner an application on behalf of said corporation for the issuance of stock therein; (3) a permit was issued authorizing the issuance of certificates of stock but the corporation never issued any valid certificates pursuant to the permit or otherwise; (4) Otto invested $50 in the purported corporation and caused its books to be set up with an outstanding capital of $50; the purported corporation never had in excess of $50 in its stated capital account; (5) the purported corporation was grossly under-capitalized and has been at all times subsequent to December 31, 1947, and now is insolvent; (6) the purported corporation has wholly failed and is financially unable to pay the judgment recovered against it in favor of plaintiff on the prior trial of this action; (7) Otto formed the purported corporation merely as an instrumentality through which he, for his personal convenience, transacted business; (8) at all times referred to in the complaint the purported corporation was dominated and controlled by Otto and at all of said times was the *alter ego* of Otto and merely the conduit through which Otto performed the acts and made the promises and representations hereinafter referred to; (9) it is and would be inequitable to recognize any corporate entity separate and apart from Otto; (10) on January 9, 1948, Otto controlled and owned all the output of a certain desiccated cocoanut factory in the Philippine Islands; (11) on January 9, 1948, Otto entered into an oral contract with plaintiff under the terms of which he employed plaintiff to sell for the account of Otto said factory's entire output of desiccated cocoanut for a term of one year and promised to pay plaintiff a commission of 5% on gross receipts derived from such sales to any purchaser procured by plaintiff; (12) pursuant to said contract plaintiff promised to and did use his best efforts

to procure a purchaser or purchasers and did procure and introduce to Otto on January 9, 1948, a purchaser, the B & O Nut Company, ready, willing and able to purchase the total annual output of said factory for one year at the prevailing market price; (13) between April 28 and September 27, 1948, Otto sold and delivered to B & O Nut Company and the latter paid Otto for the desiccated cocoanut produced at said factory a total purchase price of $250,788.46; (14) pursuant to Otto's contract with plaintiff there became payable from Otto to plaintiff his commission of 5% of said purchase price or the sum of $12,539.42; (15) said sum has been payable from Otto to plaintiff ever since November 1, 1948, with interest at 7% per annum from said date, amounting to $5,850.89 calculated through June 30, 1955. Accordingly, judgment was rendered in favor of plaintiff in the sum of $18,390.31 with interest thereon at 7% from July 19, 1955, until paid.

[1] These findings are adequately supported by the evidence, except possibly as to the date (December 31, 1947; see clause (5), above) from and after which the corporation has been insolvent. The corporation's balance sheet for December 31, 1947, indicated a surplus of assets over liabilities amounting to $27,000. Plaintiff claims that the trial court was entitled to and presumably did impliedly find that a number of items listed as assets were of little or no value. That may well be. The corporation had no real property and its assets consisted largely of accounts receivable. From the beginning the bank which handled the corporation's credit held all the assets in pledge. But insolvency on that particular date is not an indispensable basis for the trial court disregarding the corporate entity. The evidence quite clearly shows that the corporation's liabilities exceeded its assets, beginning at least as early as December 31, 1948. The gross under-capitalization, the failure to effect a legal issue of shares of stock, the promptness with which corporate insolvency did ensue, and other pertinent factors, support the action of the trial court in disregarding the corporate entity.

It is not necessary to summarize the evidence. It is well, however, to mention a few bits of evidence that are reflected but not specifically mentioned in the findings: Immediately after formation of the corporation, Otto advanced it $25,000, the amount required to open its bank account with the bank that undertook to extend it credit. That loan has never been repaid. The minute book of the corporation is very meager. It has very few entries of action, if any, taken by the board of directors or by the stockholders. During the period of his negotiations with Otto (1947–48) plaintiff did not know that Otto Sales Company was a corporation, nor did he understand that he was dealing with a corporation. He wrote to the company many times and received replies written on the letterhead which apparently had been used by Otto prior to the incorporation, while he was doing business under the name of "Otto Sales Company." The only form of contract furnished plaintiff for use in soliciting business was the old one formerly used by Otto personally. It was headed by the caption "W. E. Otto" and in the space at the bottom (for seller's signature) it read "W. E. Otto, By ————————, Sellers." Grantier (a former employee of Otto or of the corporation), testified that Otto was the head of the firm, the sales manager, the man in charge. Grantier was not told there were any other officers. He confirmed plaintiff's testimony as to the terms of plaintiff's contract and the circumstances under which it was negotiated. He also said that after plaintiff had introduced to Otto representatives of the B & O Nut Company as prospective buyers, plaintiff inquired of Grantier whether the Nut Company had signed a contract. Otto said they had signed but instructed Grantier to tell plaintiff "the deal is pending and we will let him know as soon as we can ship the cocoanut." Later, in response to a further inquiry from plaintiff, Otto told Grantier to tell plaintiff "the deal has fallen through."

[2] The most recent exposition of the basis for disregarding the corporate entity appears in Automotriz Del Golfo De California S. A. De C. V. v. Resnick, 47 Cal.2d 792, 306 P.2d 1, 3, Chief Justice Gibson speaking for the court: "It is the general rule that the conditions under which a corporate entity may be disregarded vary according to the circumstances in each case. See H. A. S. Loan Service, Inc., v. McColgan, 21 Cal.2d 518, 523, 133 P.2d 391, 145 A.L.R. 349; Stark v. Coker, 20 Cal.2d 839, 846, 129 P.2d 390. It has been stated that the two requirements for application of this doctrine are (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow. Stark v. Coker, 20 Cal.2d 839, 846, 129 P.2d 390; Watson v. Commonwealth Ins. Co., 8 Cal.2d 61, 68, 63 P.2d 295.

[3] "The failure to issue stock or to apply at any time for a permit although not conclusive evidence, is an indication that defendants were doing business as individuals. Geisenhoff v. Mabrey, 58 Cal.App.2d 481, 137 P.2d 36; see Marr v. Postal Union Life Ins. Co., 40 Cal.App.2d 673, 105 P.2d 649. In the Marr case the court stated: 'While the fact standing alone that a corporation remains inchoate without stockholders or stock is not of itself determinative of an *alter ego* relationship upon its part, nevertheless it does indicate that such corporation may exist merely to serve the interests of another—a corporation or an individual.' 40 Cal.App.2d at page 682, 105 P.2d at page 654.

[4] "Another factor to be considered in determining whether individuals dealing through a corporation should be held personally responsible for the corporate obligations is whether there was an attempt to provide adequate capitalization for the corporation. In Ballantine on Corporations (rev. ed., 1946), at pages 302–303, it is stated: 'If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unincumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege.'

"The rule that inadequate capitalization may be considered as a factor in determining whether the corporate entity should be disregarded was followed in Shea v. Leonis, 14 Cal.2d 666, 96 P.2d 332, 334, where a lessee attempted to escape liability for rent due under a lease by assigning his interest in the lease to a corporation which was without other assets. The court held that the owners of the corporate stock were liable for the rental payments, pointing out that it is proper to disregard corporate existence 'where, as in the instant case, the device adopted is * * * an attempt to avoid liability for benefits enjoyed by means of taking the obligation in the name of a specially organized corporation which has no other assets.' In Carlesimo v. Schwebel, 87 Cal.App.2d 482, 197 P.2d 167, 174, it was recognized that 'the proper rule is that inadequate financing, where such appears, is a factor, and an important factor, in determining whether to remove the insulation to stockholders normally created by the corporate method of operation.' See also Mosher v. Salt River Valley Water Users' Ass'n, 39 Ariz. 567, 8 P.2d 1077; Ballantine, Corporations: 'Disregarding the Corporate Entity' as a Regulatory Process (1943), 31 Cal.L.Rev. 426, 427; Fuller, The Incorporated Individual: A Study of the One-Man Company (1938), 51 Harv.L.

Rev. 1373, 1381–1383; cf. Dixie Coal Min. & Mfg. Co. v. Williams, 221 Ala. 331, 128 So. 799."

[5] The respective functions of the trial court and of a reviewing court, in any such inquiry, we find well expressed in H. A. S. Loan Service, Inc., v. McColgan, 21 Cal.2d 518, 133 P.2d 391, 145 A.L.R. 349: "Plaintiff argues that in order to authorize the disregard of a corporate entity the evidence must be convincing and satisfactory and that a presumption of separate entity is present. However that may be, such rules are for the guidance of the trier of fact, and the rule on appeal is the same as in other cases; the conclusion of the trier of fact will not be disturbed if it is supported by substantial evidence. The same principle is pertinent in analogous instances involving the proof of fraud. See 12 Cal.Jur. 834." 21 Cal.2d at page 524, 133 P.2d at page 394.

Likewise, in our case, we believe there was sufficient evidence before the trial court to justify it in determining that a sound basis existed for disregarding the corporate entity and in holding Otto personally liable.

Otto sought by the witness Evangelyn Bozeny, who was secretary of the corporation in 1948, to show that Otto made certain proposals which were overruled by the board of directors. The judge ruled that a record of such incidents should have been in the corporate minutes; hence, it was incumbent upon Otto to produce the minutes. This, probably, is sustainable under the best evidence rule. Moreover, Otto got such evidence in later when in support of his effort to do so his counsel directed particular attention to the testimony of Grantier that Otto dominated the corporation and stressed Otto's desire to rebut that testimony. If counsel had made that explanation to begin with, the court doubtless would have let the evidence in when first offered.

[6] Finally, Otto asserts that he did not have a fair trial, claiming that the judge was overbearing toward counsel and the witnesses, though admitting that this is not disclosed by the typewritten record. Of this, plaintiff says in his brief "the trial judge may not have 'conducted himself with the imperturbability of a Rhadamanthus.' (U[nited]. S[tates]. v. Dennis, 2 Cir., 1950, 183 F.2d 201, 226, * * * [speaking of Judge Medina]) but the appellant's pretense that he had made no record of transactions involving substantial sums of money was not such as to gain the confidence of the trier of fact." Moreover, there was no jury. Accordingly, appellant's claim that he had an unfair trial fails of support.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



149 Cal.App.2d 243

Ann KIRCHHUBEL, George Kirchhubel and Daniel Pallas, Petitioners and Appellants,

v.

Russell S. MUNRO, Director of the Department of Alcoholic Beverage Control of the State of California, Respondent.

Civ. 17193.

District Court of Appeal, First District, Division 1, California.

March 19, 1957.

As Corrected March 26 and April 18, 1957.

Hearing Denied May 15, 1957.

Mandate proceeding to review revocation of liquor license, by Director of Department of Alcoholic Beverage Control, for allegedly knowingly permitting sales of narcotics on licensed premises. The Superior Court, County of San Mateo, Edmund Scott, J., rendered judgment denying petition and licensees appealed. The District Court of Appeal, Bray, J., held that evidence supported findings of sales by permission of licensees.

Judgment affirmed.

1. Intoxicating Liquors ⇐108(5)

In proceeding for revocation of on-sale liquor license for knowingly permitting narcotic sales, there was sufficient evidence of successive sales of narcotics to permit Director of Department of Alcoholic Beverage Control to invoke statutory presumption of permission from successive sales, though there was no evidence that licensees had been present on licensed premises when any sales had been made. West's Ann.Bus. & Prof. Code, § 24200.5.

2. Intoxicating Liquors ⇐108(10)

In proceeding for revocation of on-sale license for allegedly knowingly permitting sales of narcotics on premises, conflicts in testimony were for Director of Department of Alcoholic Beverage Control to resolve and its decision was required to be sustained if evidence, though conflicting, was substantially sufficient to support its findings, and all substantial conflicts were to be resolved in favor of Board. West's Ann.Bus. & Prof.Code, § 24200.5.

3. Intoxicating Liquors ⇐15

The statutory presumption that successive sales of narcotics over continuous period of time shall be deemed evidence of permission for sales by licensees, in statute providing mandatory revocation of licenses for knowingly permitting sales of narcotics on premises was not unconstitutional in application to licensees who had not been present when sales were made, even if sales were made by customers and not by employees. West's Ann.Bus. & Prof.Code, § 24200.5.

4. Intoxicating Liquors ⇐108(5)

In proceeding for revocation of on-sale liquor license for allegedly knowingly permitting sales of narcotics on premises, testimony of two officers employed two nights of week on premises supported statutory presumption that sales over continuous period were with permission. West's Ann. Bus. & Prof.Code, § 24200.5.

5. Intoxicating Liquors ⇐108(5)

In statute providing mandatory revocation of liquor licenses for knowingly permitting sale of narcotics on premises, the presumption that successive sales are made with permission of licensees is not conclusive but is merely evidence which may be overcome by a contrary showing, and is constitutional as having rational relation between facts proved and presumed. West's Ann.Bus. & Prof.Code, § 24200.5.

6. Constitutional Law ⇐55

Legislature has power to provide presumption if there is natural and rational evidentiary relation between facts proved and presumed.

John J. Fahey, Jr., Daly City, Herbert Chamberlin, San Francisco, of counsel, for appellants.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Appellants, owners of an on-sale liquor license at "Hilltop Lodge," Daly City, were accused by the Department of Alcoholic Beverage Control of violating sections 25601 (keeping a disorderly house) and 24200.5 (knowingly permitting illegal sale of narcotics), Business and Professions Code. At the hearing of the charges, the hearing officer found appellants guilty of both charges. The Alcoholic Beverage Control Appeals Board held the evidence insufficient to support the finding under section 25601, but sufficient under section 24200.5 and as mandatorily required by that section revoked the license. On a review by the superior court, under petition for writ of mandate of the proceedings before the director filed by appellants, the court found that the decision of the director was supported by substantial evidence and by the weight of the evidence and denied the petition. Appellants appeal therefrom.

Questions Presented.

1. Sufficiency of evidence to support finding that appellants knowingly permitted sale of narcotics.

2. Constitutionality of presumption of knowledge in section 24200.5, subdivision (a), Business and Professions Code.

1. Knowingly Permitting Narcotic Sales.

There was no evidence that the proprietors were present upon the licensed premises at the time of any of the narcotic sales. Their knowledge is based upon the presumption in section 24200.5, subdivision (a): "Successive sales over any continuous period of time shall be deemed evidence of such permission."

[1] The first question we have to determine is whether the evidence shows "successive sales" of narcotics "over any continuous period." We think it does. One Graham testified that about March or April, 1954, he began going to the Hilltop. On each of the 15 or 16 times he went there he either purchased or sold marijuana. He could not give exactly the particular dates, except that on August 5, 1954, he sold four or five marijuana cigarettes to one Acevez.[1] In the period March to August, Graham saw marijuana used frequently in the premises—in the bathroom, in the corner by the juke box, at the tables and at the bar. In July the sales of narcotics became rather bold. A patron called "Wido" would sell benzedrine, red devils, pink ladies, codein. On one occasion Wido had six cans of marijuana in his possession. Graham admitted that since his teens he had been in and out of correctional institutions and had pleaded guilty to a charge of possession of narcotics.

On August 4, one Magee, an investigator for the district attorney, went to the lodge at about 10 p. m. and met Acevez. In the early hours of August 5 he purchased two marijuana cigarettes from Acevez. August 6 at approximately 10:30 p. m. he purchased four marijuana cigarettes from Wido which Wido had received from Graham. Magee returned to the lodge on August 7 but made no purchases. August 18 he purchased three such cigarettes from an unidentified man in a booth near the men's room. He also saw other sales of marijuana made that night. During his visits to the lodge in August in addition to the above, he observed men smoking marijuana cigarettes in the corner by the juke box. In the men's room he saw three members of the lodge's band smoking such cigarettes. Court records were introduced showing that Wido had pleaded guilty to possessing and selling marijuana on August 6, and that Acevez had pleaded guilty to selling marijuana. Magee testified that those sales were made at the Hilltop Lodge. He also testified that 60 to 70 per cent of the patrons were marijuana types.

[2] Because of the number of youths frequenting the lodge, the licensees hired an off-duty policeman to work on Friday and Saturday nights (about six hours per week), to check I.D. cards and maintain order. One of the proprietors, George Kirchhubel, testified that the day the policeman came to work, the latter said that some of the customers did not look right, "shady, or something like that * * * and might have been smoking something like that * * *." Kirchhubel told him he had a free hand to do what he wanted. Officer Van Otten of the Daly City Police Department testified that he visited Hilltop Lodge on an average of six times per week, checking juveniles as a part of his duty, and that the owners welcomed his doing so. Coleman, Kirchhubel, his colessees Mrs. Kirchhubel and Pallas, a part time bartender at the lodge, and the leader of the band, all testified that they had never seen marijuana cigarettes or narcotics on the premises or anyone smoking marijuana. The colessees, however, testified that they did not know what marijuana cigarettes looked like. This testimony merely created a conflict which was resolved by the director. The decision of the director must be sustained if the evidence, although conflicting, is substantially sufficient to support its findings. Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545. All substantial conflicts must be resolved in

1. The accusation charges sales on August 5, 6, 7, 8, and 18.

favor of the findings of the director. Molina v. Munro, 145 Cal.App.2d 601, 302 P.2d 818. "Neither the superior court nor this court has power to reweigh the evidence presented to the * * * board [now director] or to exercise independent judgment thereon." Dethlefsen v. State Board of Equalization, 145 Cal.App.2d 561, 303 P.2d 7, 9. Magee's testimony as to sales of narcotics on the 5th, 6th and 18th days of August, his evidence as to what he saw on those and other occasions, the type of people who patronized the lodge, and the testimony of Graham, plus the guilty pleas of Acevez and Wido and the other circumstances, constitute substantial evidence, which, if believed by the director (and it was), fully supported the findings that successive sales of narcotics over a continuous period occurred at the Hilltop Lodge, and that the licensees are presumed to know thereof. Even without the presumption, the evidence almost forces an inference that the things testified to by Magee and Graham could not have gone on in the lodge without some of the proprietors as well as the employees knowing thereof.

2. Is The Presumption Provided In Section 24200.5, Subdivision (a), Unconstitutional As Applied To Appellants?

[3] In Endo v. State Board of Equalization, 143 Cal.App.2d 395, 300 P.2d 366, the contention was made that this statutory presumption was unconstitutional as to the licensee who claimed to have no personal knowledge of the illegal sales of narcotics in the licensed premises. We there held that it was constitutional. The only factual difference between the Endo case and ours is that there the sales were made by the bartender employed by the licensee, while here they were made by patrons. Such factual difference, under the circumstances here, in nowise affects the principle involved. As said in People v. Jemnez, 49 Cal.App.2d Supp. 739, 741, 121 P.2d 543, 544: "It has long been uniformly held that there is no inherent right in a citizen to engage in the business of selling alcoholic beverages [citations], and that 'The regulation of that business is governed by legal principles different from those which apply to what may be termed inherently lawful avocations.' [Citation.] The governing authority may, therefore, in the exercise of the police power for the protection of the public morals, health and safety, grant the privilege of selling alcoholic beverages upon such terms and conditions as it may determine. [Citations.] In recognition of these principles our Supreme Court has held in Ex Parte Hayes, 1893, 98 Cal. 555, 33 P. 337, 338, 20 L.R.A. 701, that the above quoted constitutional provision (§ 18 of Art. XX) 'does not * * * operate as a limitation upon the power of the state * * * to prescribe the conditions upon which the business of retailing intoxicating liquors shall be permitted to be carried on, or in regulating the manner in which such business shall be conducted.' " See also State Board of Equalization of California v. Superior Ct., 5 Cal.App.2d 374, 377, 42 P.2d 1076; Cooper v. State Board of Equalization, 137 Cal.App.2d 672, 679, 290 P.2d 914.

[4] One of the conditions prescribed is that the holder of a liquor license must be vigilant to see that sales of narcotics do not take place upon his premises and that if they do take place successively and continuously he will be presumed to have known of them and to have permitted them. Appellants seem to think that the employment of a policeman two nights a week (the specific sales charged occurred on nights when the policeman was not on duty), stationing him near the door, as the evidence shows he was most of the time, makes the presumption inapplicable as to them. Such action does not do so.

Petitioners contend that the presumption created by section 24200.5, subdivision (a), is dispelled as a matter of law by the testimony of the witnesses, the fact that petitioners employed Officer Coleman and encouraged inspection of juveniles by Officer Van Otten. It is interesting to note that Officer Van Otten did not testify as to the conditions he found at the lodge. Officer Coleman's duties with reference to checking I.D. cards, etc., were such that

he had little time to observe the entire premises. The evidence shows that the place was patronized by a number of marijuana users (Magee testified that 65 to 70 per cent of the patrons were marijuana types), and that in spite of Coleman's statement when he first worked there that some of the customers did not look right "and might have been smoking," he made no particular effort to investigate that situation. He was there only on Friday and Saturday nights. His station was at the entrance door some 45 to 60 feet from the juke box and the entrance to the men's room at which places the marijuana smoking occurred. However, on the nights he was there, the conduct of the place was less "loose" than on nights when he was not there. Graham testified that during the month of July the narcotic sales were "pretty bold" although they slowed down when I.D. checking tightened up. The case is not one in which the presumption stands alone against the testimony of petitioners' witnesses (although were it so, the evidence contrary to it does not as a matter of law dispel it). The testimony of both Magee and Graham supports the presumption. Petitioners' evidence created a conflict with the presumption and the testimony of Magee and Graham. The resolving of that conflict was a matter for the Department of Alcoholic Beverage Control, whose action thereon cannot be upset by this court if there is substantial evidence to support it. Covert v. State Board of Equalization, supra, 29 Cal.2d 125, 131, 173 P.2d 545.

[5, 6] The presumption is not made conclusive but merely evidence of permission which may be overcome by a contrary showing. The Legislature has power to provide for such a presumption if there is a natural and rational evidentiary relation between the facts proved and those presumed. Having in mind that the power to regulate the liquor business is a very broad one, there is a natural and rational evidentiary relation between a showing that there have been successive sales of narcotics over a continuous period on licensed premises and the very natural conclusion that the sales could not have continued without the implied or express consent of the licensee. Moreover, a licensee holds his liquor license with the knowledge that he must effectively police his premises against successive sales of narcotics thereon, not only by his employees but by his patrons as well. This does not mean, as claimed by petitioners it would mean, that an occasional sale by a patron, which sale was unknown to the licensee or his employee, would jeopardize the license, but sales which, as the section requires, are successive and over a continuous period of time. Such a situation cannot occur if the licensee is vigilant in protecting his license and is at least as interested in protecting the public welfare and morals as he is in making money.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



149 Cal.App.2d 228

Francis J. SPERISEN, Plaintiff and Respondent,

v.

John HEYNEMANN, Defendant and Appellant.

Civ. 17098.

District Court of Appeal, First District, Division 1, California.

March 19, 1957.

Action by bailor of matched jade lamps against the bailee to recover damages to a lamp occurring during the bailment. Judgment for plaintiff for $3,500 in the Superior Court, City and County of San Francisco, Thomas M. Foley, J., and the defendant appealed. The District Court of Appeal,

Peters, P. J., held that the evidence established a deviation from the terms of the bailment rendering the bailee liable for damages but that the amount awarded was not supported by the evidence.

Judgment reversed on the issue of damages alone, with instructions.

1. Bailment ⇐35

A bailor need not be the owner of the bailed property but may maintain an action against third persons who had damaged the bailed property based on a possessory interest if that interest is good as against all but the true owner.

2. Bailment ⇐35

Where valuable lamps were entrusted to plaintiff as bailor for sale and sale was not consummated and on return of the lamps they had been damaged, plaintiff as bailor could maintain an action against the defendant for damages though plaintiff was not the owner.

3. Bailment ⇐11

Any deviation from terms of bailment rendered the bailee absolutely liable for any damages suffered to the goods while in his possession. West's Ann.Civ.Code, §§ 1836, 1930.

4. Bailment ⇐14(1)

Where valuable lamps were submitted to plaintiff for sale and he entrusted them to the defendant as bailee who claimed he had a purchaser in Texas and the defendant deviated from the bailment and sought to sell the lamps at a public sale in Los Angeles and they were damaged, defendant had deviated from the terms of the bailment and was liable for damages sustained. West's Ann.Civ.Code, §§ 1836, 1930.

5. Bailment ⇐31(3)

In action by bailor for damages to valuable lamps entrusted to bailor for sale to private buyer in Texas where lamps were turned over to bailee for that purpose, evidence established that defendant's use of the lamps was in violation of the terms of the bailment.

6. Damages ⇐142, 222

Recovery cannot be had when item of special damages was neither pleaded nor found by the trial court.

7. Damages ⇐222

If special damages are to be awarded, a special finding on that issue is essential.

8. Bailment ⇐32

In action by bailor for damages to valuable jade lamps on the ground that they were damaged while in the bailee's possession, evidence failed to justify an award of $3,500 damages to the lamps.

9. Appeal and Error ⇐1071(1)
Trial ⇐387(2)

The statute providing that the court's decision must be filed with the clerk within 30 days after the cause is submitted is directory only and before a reversal is justified, because of its violation, prejudice must be shown. West's Ann.Code Civ.Proc., § 632.

10. Appeal and Error ⇐1071(1)

Record did not establish that defendant was prejudicially damaged because the trial court took the case under submission for about nine months. West's Ann.Code Civ. Proc., § 632.

11. Appeal and Error ⇐934(1)

Where trial court originally entered judgment for an amount in excess of the complaint, Appellate Court must assume in support of judgment subsequently correctly entered that the error was purely clerical and not caused by delay of nine months in keeping the case under submission. West's Ann.Code Civ.Proc., § 632.

12. Costs ⇐237

Where the case was reversed on the issue of damages alone, each party would bear its own costs on appeal.

Rhein, Dienstag & Levin, Edward Levin, Jay Jackson, Jr., San Francisco, for appellant.

Peart, Baraty & Hassard, Robert D. Huber, San Francisco, for respondent.

PETERS, Presiding Justice.

This action was brought by the bailor of two matched jade bridal lamps against the bailee to recover the damage to one of the lamps that occurred during the bailment. The complaint is in two counts. One alleges that the bailee deviated from the terms of the bailment, and the other alleges that the bailee was negligent. The prayer is for $3,500, the alleged cost of repairing the damaged lamp. The trial court entered its judgment against defendant for the full $3,500. The findings are based entirely on the cause of action alleging deviation from the terms of the bailment. There was neither evidence nor a finding on the negligence cause of action. Defendant appeals.

[1, 2] The general facts are as follows: A Mr. Koo admittedly owned, and still owns, the two matched jade lamps, valued at $6,500. Defendant informed the plaintiff that he had a potential customer for the lamps in Dallas, Texas. Plaintiff told Koo of this possibility and he, being agreeable to a sale, delivered the lamps to the plaintiff. Plaintiff then, in turn, delivered the lamps to defendant on August 5, 1952. Before delivery, a microscopic examination of the lamps was made, and all agree that the lamps were then in perfect condition. The lamps were not sold and were delivered back to plaintiff on February 13, 1953. At that time even a visual examination disclosed that a part of one of the lamps, called a "fence", had been broken. Plaintiff, as bailor, considered himself responsible to Koo, the owner. He thereupon brought this action against defendant. This he had a legal right to do. A bailor need not be the owner of the bailed property. He may maintain an action against third persons based on a possessory interest if that interest is good as against all but the true owner. See generally 6 Am.Jur. p. 232, § 77. Defendant does not challenge plaintiff's right to maintain the action.

The "deviation" cause of action alleges that the lamps were delivered to defendant "for the sole purpose and on the express oral agreement of defendant that the lamps were to be exhibited by him to a client of the defendant's in Dallas, Texas, as a possible purchaser." In violation of this agreement, it is alleged, defendant took the lamps to Los Angeles for exhibition and sale at retail, and, while the lamps were in the possession of defendant, one of the lamps was damaged.

The findings are in general accord with this portion of the pleadings. The court found in accordance with the uncontradicted evidence that the lamps were valued at in excess of $6,500, and then found the terms of the bailment as pleaded by plaintiff. The court then found that "defendant instead of exhibiting said lamps to his client in Dallas, Texas, took the said lamps to Los Angeles, California, for exhibition and to be sold at retail contrary to the agreement between plaintiff and defendant * * *." The court then found that while in the possession and control of defendant "one lamp was broken and damaged and that the reasonable cost of repairing said lamp is the sum of $3,500.00."

[3] There is no question raised as to the law applicable to these facts. Defendant does not challenge the authorities cited by plaintiff for the proposition that any deviation from the terms of the bailment renders the bailee absolutely liable for any damage suffered to the goods while in his possession. In support of this rule plaintiff cites Civil Code sections 1836 and 1930; Constantian v. Mercedes-Benz Co., 5 Cal.2d 631, 55 P.2d 841; Hollywood M. P. Equipment Co. v. Furer, 16 Cal.2d 184, 105 P.2d 299. These authorities generally support the rule for which they are cited, at least by way of dicta. The rule is well settled. Supported by many authorities it is stated as follows in 6 Am.Jur. p. 330, § 225: "In conformity with this rule, the authorities, generally speaking, support the proposition that in every bailment, whether

lucrative or not, the bailor is entitled, and the bailee is bound, to a carrying out of the purpose of the bailment within the terms expressly or impliedly agreed upon by the parties, and a bailee who departs from such terms is liable to the bailor for any loss or damage in respect of the thing bailed which occurs as a result thereof, irrespective of any want of due care on his part, in the absence, of course, of any ratification on the part of the bailor; or, as otherwise stated, if a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risk of so doing, except where the risk is independent of his acts and inherent in the property itself."

As already stated, defendant does not challenge this rule of law.

[4] Defendant's first contention is that the finding that he deviated from the terms of the bailment is not supported. Although the evidence as to the terms of the bailment is in conflict, there is ample evidence to support the finding of the court on this issue. At the time the lamps were delivered to defendant on August 5, 1952, there were five people present—defendant, Mr. Koo, plaintiff, and his wife and son.

The son testified that plaintiff told defendant that "These lamps should be shown to your client in Dallas, Texas," and that "These lamps are to be restricted to a private showing to your client in Dallas, Texas," and defendant replied "Yes, I understand this." Plaintiff's wife testified that plaintiff told defendant "that the lamps were to be shown to his customer in Dallas, Texas," and defendant replied "that is what he would do, and that alone." This testimony alone supports the finding as to the terms of the bailment.

Mr. Koo was positive that he had stated that he did not want the lamps shown in public, and he was quite clear that plaintiff had told him that defendant wanted the lamps to show to a private purchaser in Texas. Plaintiff testified that, because of Mr. Koo's restrictions, the lamps were "to be shown privately and they were not to be placed on display"; that they were to be shown only to a private collector "and not to the trade." He stated that by private collector he meant a private individual, and not firms like Gump's, V. C. Morris & Company, Nathan Benz or other retail dealers. He first testified that defendant was not to be limited as to the persons to whom the lamps could be displayed, but after thinking about the matter overnight he said that by "exhibited privately" he meant exhibited to the Texas customer that defendant had mentioned.

Defendant's testimony was not clear. He admitted that the only prospective customer he discussed with plaintiff was the man in Texas, and he also admitted that he did not disclose to plaintiff that in fact he did not know personally the man in Texas but expected to make such a contact through a Los Angeles dealer. He first testified that plaintiff told him that he could display the lamps "only for your client in Dallas, Texas," but shortly thereafter testified that plaintiff said "I should show the lamps only in privacy, not in public. I understand he means not go and peddle them around to the retail stores with the lamps and putting them on display for the open public." A little later he testified: "I couldn't recall correctly the conversation. Maybe I misunderstood him or maybe—I was only talking to Mr. Sperisen about one customer," that is, about his Dallas buyer.

From this summary it is quite apparent that the finding that the express terms of the bailment were that the lamps were delivered to defendant for the sole purpose of displaying them to a prospective client in Dallas, Texas, is amply supported.

The next question is whether there was any deviation from the terms of this bailment, as found by the trial court. This, of course, depends upon what defendant did with the lamps.

Defendant neither took the lamps to Dallas, nor did he display them to any customer from there. He testified that when

the lamps were delivered to him on August 5, 1952, he took them to his home where they remained for about 14 days; that then he took them to Los Angeles and placed them in the jade vault at Elizabeth McPherson's, where they remained for between 10 to 14 days; that he then brought them back to his home in San Francisco; that some time thereafter he put them in his automobile and started to drive to New York, but turned back because of illness after he got to Nevada; that the lamps were never unpacked following this trip and did not leave his house until they were returned to plaintiff.

This testimony was impeached in several important respects. According to Elizabeth McPherson the lamps were in her place of business for nearly a month, that is, from August 28, 1952, to September 22, 1952. There was also introduced a telegram dated November 4, 1952, sent by defendant to Elizabeth McPherson which reads: "Received jade bridal lamps back from New York today." Defendant's explanation of this telegram was that some time before it was sent, the partner of Elizabeth McPherson had telephoned him from Los Angeles, urging him to bring the lamps back to Los Angeles because he, the partner, had "another" customer for them, and, because defendant did not want to make another trip to Los Angeles right then, he told the partner that the lamps were in New York and that he would telegraph him when the lamps were returned. Actually, he testified, the lamps were at his home.

It also appears in the record that Elizabeth McPherson is an interior decorator, operating a two-story establishment in Los Angeles. On the second floor is located the display case where the lamps were kept while in her establishment. Defendant described this depositary as a special vault containing glass cases and that an iron gate bars entry into the vault. This vault or room is not open to the general public, but is opened for the "very fine buyers" of the establishment. There are many valuable and rare articles on display in this vault.

Defendant also testified that he had personally unpacked the lamps and placed them in a case in the vault, and then personally repacked them when he brought them back to San Francisco. As far as he knew, the lamps were not shown to anyone while they were in the vault. Elizabeth McPherson agreed that no one but defendant handled the lamps while they were in her store, but she said nothing in her statement about whether or not they were displayed to the public. She described the purpose of the deposit of the lamps in her store as follows: "[Defendant] brought in 2 jade wedding lamps whom he mentioned as belonging to a friend and asked me if I would be willing to buy them or display them in my store. * * * Mr. Heynemann stated he wanted $14,000.00 for the lamps." This is contrary to defendant's statement that he placed the lamps with Elizabeth McPherson for the sole purpose of trying to sell them to a Texas customer who was a client of the interior decorator and not a client of defendant. Defendant also admitted that he never told Koo or the plaintiff that he intended to transport the lamps to New York, and he also admitted trying to sell them to various buyers, but claims that he did so only by letter or photograph.

[5] Thus, while the evidence does not show that the lamps were placed on general public display, they were certainly used in violation of the terms of the bailment. They were never displayed to the customer from Texas, which was the sole purpose of the bailment. The taking of them on the automobile trip that started for New York was a clear deviation from the terms of the bailment. In other respects, as shown by the evidence, the terms of the bailment were violated. Thus, the findings as to the terms of the bailment and deviation from the terms of the bailment find ample support in the record.

We now come to the question of damages. This presents a more difficult question. The trial court found that "while said lamps were in the possession of and under the control of said defendant one lamp was

broken and damaged and that the reasonable cost of repairing said lamp is the sum of $3,500.00." This is in exact accord with the allegations of the complaint. There is no evidence to support the finding of $3,500 damage. Plaintiff testified that, in his opinion, it would cost "about" $3,250 to repair the lamp; that he estimated it would take 1,000 hours of labor at $3 an hour, and that there would be a $250 material cost. Mr. Koo's estimates ranged from $800, if the repairs could be made in Communist China, to from $1,700 to $2,160, plus a materials cost of $250. Defendant's expert estimated the cost of repair at about $400.

[6–8] Plaintiff, in an effort to support the finding, refers to some evidence to the effect that it would be most difficult to find a piece of jade that would exactly match the jade of the other lamp; that part of the value of the lamps was that they were a perfect match; that if matching jade could not be found it would be necessary to carve two new fences. Clearly, this was an item of special damage that was neither pleaded nor found by the trial court. This is fatal to the claim. Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L.R.A. 498. Even if the trial court could have considered this item, the fact is that it did not, because its finding is that the damage to one of the lamps amounted to $3,500. If special damages were to be awarded, a special finding on that issue was essential. Klein v. Milne, 198 Cal. 71, 243 P. 420; Aspe v. Pirrelli, 204 Cal. 9, 266 P. 276; James v. Haley, 212 Cal. 142, 297 P. 920. Thus, the finding as to the amount of damages is totally unsupported.

The last contention of defendant is that he was prejudicially damaged because the trial court kept the case under submission for about nine months. The trial occurred in June, 1954. The findings were not filed until March 23, 1955.

[9] Section 632 of the Code of Civil Procedure provides that the trial court's decision must be "filed with the clerk within thirty days after the cause is submitted for decision." This section is directory only, and before a reversal is justified because of its violation prejudice must be shown. Farmers' & Merchants Nat. Bank of Los Angeles v. Peterson, 5 Cal.2d 601, 55 P.2d 867; McQuillan v. Donahue, 49 Cal. 157; Van Der Most v. Workman, 107 Cal.App. 2d 274, 236 P.2d 842; City of Los Angeles v. Hannon, 79 Cal.App. 669, 251 P. 247; Hutchinson Co. v. Marshall, 49 Cal.App. 307, 193 P. 164. In all of these cases the delay was held to be non-prejudicial. No case has been found where the delay has been held to be prejudicial.

[10, 11] To establish his claimed prejudice defendant calls attention to the fact that the record, as augmented, shows that on March 7, 1955, the trial court entered its judgment in favor of plaintiff for $5,000. This sum exceeded the prayer of the complaint. When apprised of this fact the trial court then entered its judgment for $3,500, the precise amount prayed for in the complaint. Defendant argues that this demonstrates that, because of the long delay, the judge did not have the evidence in mind when he rendered his decision, and that therefore the long delay was necessarily prejudicial. While it is a possible inference that the error in the amount of the judgment was caused by the delay, it is also reasonable to infer that the error was purely clerical. In support of the judgment we must indulge in the latter inference.

[12] There is no need for a retrial of the issue of liability. The findings in that respect are amply supported. The judgment is reversed on the issue of damages alone, with instructions to the trial court to retry that issue and to enter its judgment accordingly. Each side will bear its own costs on this appeal.

BRAY and FRED B. WOOD, JJ., concur.

149 Cal.App.2d 342

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

L. V. ROBINSON, Defendant and Appellant.

Cr. 1221.

District Court of Appeal, Fourth District, California.

March 20, 1957.

Hearing Denied May 15, 1957.

Defendant was found guilty of burglary with explosives, possession of tetratol and wilfully and maliciously placing tetratol in a building. The Superior Court, Fresno County, Philip Conley, J., entered judgment of conviction and from judgment and an order denying motion for new trial, defendant appealed. The District Court of Appeal, Mussell, J., held that although informant had testified at preliminary hearing, informant's testimony at trial was not essential to prosecution's case and it was not reasonably probable that a result more favorable to defendant would have been obtained if testimony of informant had not been read into evidence.

Judgment and order denying new trial affirmed.

1. Criminal Law ⇐543(2)

Question of what constitutes due diligence to secure presence of a witness which will authorize the reading to jury of witness' testimony taken at preliminary hearing of case is largely within discretion of trial court and depends upon facts of each particular case.

2. Criminal Law ⇐543(2)

In prosecution resulting in a conviction for burglary with explosives, possession of tetratol, and willfully and maliciously placing an explosive in a building, evidence supported conclusion that police officers had exercised due diligence in attempting to serve subpoena to appear at trial on informant who had testified at preliminary hearing and trial court did not abuse its discretion in permitting prosecution to read into evidence testimony of informant taken at preliminary examination. West's Ann. Pen.Code, § 464; West's Ann.Health and Safety Code, §§ 12353, 12354.

3. Burglary ⇐41(1)
Explosives ⇐5

In prosecution resulting in a conviction for burglary, possession of tetratol, and willfully and maliciously placing an explosive in a building, testimony of police officers as to their findings at scene of crime and as to conduct of defendant were ample to sustain verdicts of guilty. West's Ann. Pen.Code, § 464; West's Ann.Health and Safety Code, §§ 12353, 12354.

4. Criminal Law ⇐1169(1)

In prosecution resulting in conviction for burglary with explosives, possession of tetratol, and willfully and maliciously placing tetratol in a building, although informant had testified at preliminary hearing, informant's testimony at trial was not essential to prosecution's case and it was not reasonably probable that a result more favorable to defendant would have been obtained if the testimony of informant had not been read into evidence, and therefore no miscarriage of justice resulted. West's Ann.Pen.Code, § 464; West's Ann.Health and Safety Code, §§ 12353, 12354.

Howard Renge, Fowler, for appellant.

Edmund G. Brown, Atty. Gen., and Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was found guilty by a jury of a violation of Section 464 of the Penal Code (Burglary with Explosives), as charged in count one of the Information filed against him by the District Attorney of Fresno county. He was also found guilty of violation of Section 12353 of the Health and Safety Code (Possession of an Explosive, to wit, Tetratol) and violation of Section 12354 of the Health and Safety Code (Wilfully and Maliciously Placing an Explosive, to wit, Tetratol, in a building of the Pacific Tent and Awning

Company), which offenses are charged in counts four and five of said information. He was found not guilty of two other offenses charged in counts two and three of the Information, to wit, wilfully and unlawfully entering a blasting powder storage bunker with intent to commit theft therein, and wilfully and unlawfully entering a storage bunker for explosive detonation caps with intent to commit theft therein. Three prior convictions charged were admitted by the defendant. His motion for a new trial was denied, he was sentenced to State's prison and appeals from the judgment of conviction and the order denying his motion for new trial.

At about 5:20 a. m., on May 17, 1956, police officers, who had information concerning a planned burglary, went to the building occupied by the Pacific Tent and Awning Company in Fresno. When they entered the building, they observed the defendant running through it. He was making a turn in the vicinity of a bench and dropped a piece of black cord on it. He was commanded to halt, which he did, and was taken into custody. He was asked "if he had anything set to go there" and replied, "No." His eyes were bloodshot but he did not appear to be under the influence of intoxicating liquor and was steady on his feet. The officers found a heavy duty electric cord with a male plug on the end of it lying on the bench near which the defendant had been observed and there was an electric light socket about three feet from the end of the cord. This cord led to wires which were connected to an electric blasting cap, which was taped onto a block of Tetratol, which was in turn taped onto a safe. The rear of the safe appeared to have been beaten and pounded with a heavy object. A large sledge hammer was lying on the floor at the back of the safe and a chisel was lying on a desk near the safe. An attempt had been made to use a chisel on the safe and the odor of tear gas was very strong close to it.

Gordon Gouldy, who informed the police officers of the planned burglary by defendant, testified for the prosecution at the preliminary examination but could not be found at the time of trial. His testimony at the preliminary examination was read into the record at the trial, over objection by the defendant, and he bases his appeal herein on the grounds that the prosecution failed to show that due diligence had been exercised in attempting to locate Gouldy; that his evidence was material to the issues and without which a conviction would have been doubtful; and that the trial court erred in admitting his testimony in evidence.

Gouldy's testimony was that on the night of May 16, 1956, one Cody introduced him to the defendant at Ted's Club, in Fresno. Defendant desired to be taken to Mira Monte and Gouldy agreed to drive him there. Defendant told Gouldy he had tried to break into a safe and had gotten tear gas in his eyes and wanted to be taken to Mira Monte to get some gear to get into the safe. Gouldy left Ted's Club and informed the sheriff's office of this conversation with the defendant and was instructed by them to go along with the defendant's plans. Gouldy then returned to Ted's Club and took the defendant with him to Mira Monte, where the defendant obtained a canvas bag and a carton, which he placed in the car. Upon their return to Fresno, Gouldy again contacted the sheriff's office, without the knowledge of the defendant, and informed them that he, Gouldy and the defendant were going to the Pacific Tent and Awning Company in Fresno. When Gouldy and the defendant arrived there, the defendant removed explosives from the canvas bag and entered the building, while Gouldy remained in his car until the police arrived.

[1, 2] The rule applicable to the determination of whether the court abused its discretion in permitting the prosecution to read into evidence the testimony of Gouldy taken at the preliminary examination is stated in People v. Cavazos, 25 Cal.2d 198, 200–201, 153 P.2d 177, 178, as follows:

"The question of what constitutes due diligence to secure the presence

of a witness which will authorize the reading to the jury of testimony taken at the preliminary hearing of the case is largely within the discretion of the trial court, and depends upon the facts of each particular case. The decision of a trial judge on the question of diligence and of the propriety of receiving or rejecting the evidence will not be disturbed on appeal unless it appears that there was an abuse of discretion. (People v. Lewandowski, 143 Cal. 574, 77 P. 467; People v. Harris, 16 Cal.App.2d 701, 61 P.2d 348; People v. Noone, 132 Cal.App. 89, 22 P.2d 284; People v. Fay, 82 Cal.App. 62, 255 P. 239. The problem is primarily for the trial court, and its solution will not be disturbed if there is evidence of substantial character to support its conclusion. People v. Noone, supra; People v. Hewitt, 78 Cal.App. 426, 248 P. 1021; People v. Lederer, 17 Cal.App. 369, 119 P. 949." See also People v. Franquelin, 109 Cal.App.2d 777, 781, 241 P.2d 651.

In the instant case the record shows that on June 11, 1956, the trial was set for July 17, 1956. A subpoena was issued for Gouldy and delivered to a deputy sheriff for service on July 6th. Gouldy had lived in Fresno "off and on" for thirty-nine years. He had been known to one of the officers for at least five years. He had worked with the police on previous occasions and had been found to be reliable. He had maintained a home at 333 Diana Street in Fresno and in May, 1956, had accepted a subpoena there to appear and testify at the preliminary hearing. The deputy sheriff who attempted to serve the subpoena on Gouldy for the trial first went to Gouldy's listed address and discovered that he had moved. He then went to the taverns Gouldy was known to frequent and discovered that he had left town. He was told various vague and conflicting stories as to Gouldy's destination, such as, "that he was going up around Grass Valley"; that he was "going up north"; and that he was "going up to the Fort Gragg area". The process server "had conversations with several police officers". He checked the post office, the gas company, the power company, the voters' register, and the tax rolls. He was unable, however, to discover a forwarding address or a mailing address where the witness might be reached, even though he continued his efforts up to and during the trial. The record shows substantial evidence to support the conclusion of the trial court that the officer exercised due diligence in attempting to serve the subpoena on Gouldy and no abuse of discretion appears.

[3, 4] Defendant contends that the testimony of Gouldy was essential to the prosecution's case. This contention is without merit. The testimony of the police officers as to their findings at the scene of the crime and as to the conduct of defendant were ample to sustain the verdicts of the jury. Moreover, the jury apparently did not believe the testimony of Gouldy as it found the defendant not guilty of entering a blasting powder storage bunker with intent to commit theft and unlawfully entering a storage bunker of explosive detonation caps with intent to commit theft. The record also shows that Gouldy was extensively cross-examined at the preliminary hearing by defense counsel and it was shown that he had been previously convicted of a felony. After an examination of the entire case, including the evidence, we are of the opinion that it is not reasonably probable that a result more favorable to the defendant would have been obtained if the testimony of Gouldy had not been read into the evidence. Therefore, no miscarriage of justice resulted. People v. Watson, 46 Cal.2d 818, 299 P.2d 243.

The judgment and order denying a new trial are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

149 Cal.App.2d 346

Marjory-Ann MILLER, Plaintiff and Appellant,

v.

Fred W. SCHELL, Dorothy M. Schell, Independent Elevator Company, Inc., et al., Defendants and Respondents.

Civ. 17063.

District Court of Appeal, First District, Division 2, California.

March 21, 1957.

Hearing Denied May 15, 1957.

Action for personal injuries sustained when plaintiff stepped out of automatic elevator which had stopped six to eight inches above floor level against defendants, owner of building and elevator company which had contracted to service elevator. The Superior Court, City and County of San Francisco, George W. Schonfeld, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Stone, J., held that plaintiff could recover even though defect of elevator in stopping at various levels from floor level dependent upon weight load, was as well known to plaintiff as it was to defendants.

Judgment reversed.

1. Carriers ⇐333(1)
Negligence ⇐66(1)

Recovery could be had for personal injuries sustained when plaintiff stepped out of elevator which had stopped between six and eight inches above floor level although defect of elevator in stopping at various levels from floor level dependent upon weight load was as well known to plaintiff as it was to defendants, owner of building and elevator company which had contracted to service elevator.

2. Carriers ⇐333(1)

Plaintiff's knowledge of perceptible condition of elevator in stopping at various levels from floor level dependent upon weight load was not tantamount to knowledge of the dangers inherent therein.

3. Carriers ⇐280(4), 323

An owner of a building has a duty to use utmost care and diligence to maintain an elevator and he cannot escape this duty and liability simply because a passenger in the elevator is as familiar with apparent condition of elevator as owner was.

4. Negligence ⇐136(27)

Where there is a conflict in evidence surrounding circumstances of accident which enable or prevent party to accident from either looking or seeing, question then becomes one to be submitted to jury for determination.

5. Carriers ⇐347(9)
Negligence ⇐136(27)

In action for personal injuries sustained when plaintiff had stepped out of an elevator which had stopped between six and eight inches above floor level against defendants, owner of building and elevator company which had contracted to service elevator, question whether plaintiff was negligent in not looking, or in not looking carefully enough, was for jury.

6. Appeal and Error ⇐1064(1)
Trial ⇐296(1)

If an essential principle of law is stated to jury materially incorrect, this prejudicial error will not ordinarily be cured by correct declaration of same principle in another instruction and giving of instructions which are contradictory in essential elements may warrant a reversal of judgment.

7. Appeal and Error ⇐1064(1)
Trial ⇐296(3)

In action for personal injuries sustained when plaintiff had stepped from elevator which had stopped between six and eight inches above floor level against owner of building and elevator company, which had contracted to service elevator, prejudicial instructions warranted reversal of judgment in favor of defendants and were not cured by giving of other correct instructions.

Jack L. Burnam, Joseph L. Bortin, San Francisco, for appellant.

Alexander, Bacon & Mundhenk, San Francisco, Herbert Chamberlin, San Fran-

cisco, for respondent Independent Elevator Co.

Barfield & Barfield, San Francisco, for respondents Schell.

STONE, Justice.

Plaintiff Marjory-Ann Miller brought this action to recover for personal injuries sustained when she stepped out of an automatic elevator in a building owned by defendants Schell. Defendant Independent Elevator Company had contracted to service the elevator. Plaintiff appeals from an adverse judgment entered pursuant to the verdict of the jury.

Respondents Schell acquired the Lippert Building in San Francisco in 1950. It had an elevator which was thirty to forty years old. In 1951 Independent Elevator Company converted the elevator to the automatic push-button control, self-operating type. There was no automatic self-leveling device to stop the car so that its floor level was the same as that of the building. The brakes were electrically opened and mechanically closed. Under varying loads and weather conditions the brakes did not operate uniformly. There was a variance from one to four inches a great deal of the time and there could be as much as a nine-inch variance above and below floor level. Independent Elevator Company (hereinafter referred to as the elevator company) contracted with respondents Schell to oil, grease, clean and adjust the elevator weekly for the sum of $15 per month. The elevator company was instructed by respondent F. W. Schell to make any necessary repairs for an additional charge.

Appellant was employed by an architect who had offices on the third floor of the building. She had been employed by him for approximately ten months on the date of the accident, December 7, 1953. She testified that the elevator had stopped above or below the floors a number of times when she had used it. Appellant had been on vacation since Thanksgiving and had returned to work the day of the accident. Around 1 p. m. she boarded the elevator on the third floor and pushed the first floor button. When she arrived at the first floor, the inner door (on the cage) opened. She opened the heavy outer door, which had to be pushed back against a tension spring, and looked out to see if anyone was on the other side of the door. She did not look down. She stepped out with her right foot, turning to hold the doors back. She stepped down. She did not fall, but "floundered" forward, trying to catch her balance, which she recovered when she reached the opposite wall. She put her hands on the wall.

Appellant testified that the light was not good in front of the elevator. After the accident she opened the outer door and inspected the elevator. Its floor was approximately six to eight inches above the building floor.

[1–3] Appellant bases her appeal upon two instructions given by the trial court which are alleged to be erroneous. The trial court instructed the jury as follows:

> "I instruct you that the defendants Fred W. Schell and Dorothy M. Schell were not insurers of the plaintiff, nor of the premises or the elevator. Nor is there any presumption of negligence on the part of said defendants, merely because the plaintiff was injured. *There is no liability when the condition of the premises or elevator is obvious, or is as well known to the plaintiff as it is to the said defendants.*" (Emphasis added.)

Respondents point out that an instruction similar to the foregoing has been given and approved in certain cases, particularly that portion which provides, "There is no liability when the condition of the premises or elevator is obvious." In cases where a similar instruction has been given or approved, the accident resulted from or was caused by a condition which was permanent or fixed in its

nature. In such cases, of course, the nature of the condition and whether it is dangerous or not can be determined by an ordinarily prudent person relying upon the common experiences of everyday life. The condition of a raised place in the sidewalk, a step down from one floor level to another, or a stairway without a railing, if dangerous, can normally be as readily observed by on person as another, whether he be a landlord, tenant, or invitee. The condition involved in this action was not ascertainable by observation. The testimony of the plaintiff was that all of the times she had used the elevator it had never stopped more than 3½ to 4 inches from the floor level, yet under the instruction plaintiff was charged by this obvious condition with knowledge that the elevator was likely to stop 6 to 8 inches above the floor level. An officer of defendant Independent Elevator Company, Inc., and an employee of the company testified that the elevator car stopped at varying distances above or below floor level, depending upon the load weight and weather conditions. It could stop and the doors would open at any position "from level up to nine inches above or below the floor." That would be a possible stopping range of a foot and a half. Knowing the perceptible condition in this case would not be tantamount to knowledge of the dangers inherent therein. Ridge v. Boulder Creek, etc., School Dist., 60 Cal. App.2d 453, 460, 140 P.2d 990; Andre v. Allynn, 84 Cal.App.2d 347, 352, 190 P.2d 949.

The last sentence of the instruction reads in part as follows: "There is no liability when the condition of the premises or the elevator is * * * as well known to the plaintiff as it is to the said defendants." This instruction advises the jury that if the defendant landlord has no greater knowledge of the condition than does the plaintiff, he is not liable. The law, however, imposes upon the landlord a duty to use the utmost care and diligence to maintain an elevator and he cannot escape this duty and liability simply because the plaintiff is as familiar with the apparent condition of the elevator as he is. As the court stated in Brown v. George Pepperdine Foundation, 23 Cal.2d 256, at page 261, 143 P.2d 929, at page 931:

> "An owner is bound to use the utmost care and diligence in the maintenance of elevators. Treadwell v. Whittier, 80 Cal. 574, 591, 22 P. 266, 5 L.R.A. 498; Gregg v. Manufacturers' Bldg. Corp., 134 Cal.App. 147, 152, 25 P.2d 1014; 18 Am.Jur. 531, sec. 13. In the fulfillment of this obligation something more than regular and frequent inspections is required. Perfunctory inspections, although regularly and frequently made, would not meet the obligation appellant owed to respondents. In order to fulfill the duty imposed upon it by law appellant was required to use due care in servicing, inspecting and maintaining the elevator and all the appliances appurtenant thereto. The instruction erroneously failed to include this requirement."

The defendant landlord cannot equate the plaintiff's knowledge with his in determining his liability for the condition of the elevator.

[4, 5] Appellant also charges the court erred in giving the following instruction:

> "I instruct you that a duty rested upon plaintiff to look where she was going and to see that which was in plain sight in front of her; that it was negligence on her part not to so use her faculties."

Respondent points out that this instruction has been given a number of times and held not to be reversible error. In those instances where the instruction has been approved, however, there was no conflict in the evidence concerning whether or not the person involved in the accident looked or had an opportunity to look or was in any way prevented from looking or seeing. Huetter v. Andrews, 91 Cal.App.2d 142, 204 P.2d 655. Where there is a conflict in the evidence surrounding the circumstances of

the accident which enable or prevent a party to an accident from either looking or seeing, the question then becomes one to be submitted to the jury for its determination. Leader v. Atkinson, 49 Cal.App.2d 265, 121 P.2d 759; Ribble v. Cook, 111 Cal. App.2d 903–907, 245 P.2d 593.

There was evidence in this case that the elevator was equipped with a door automatically maintaining a closed position at all times, except when intentionally opened. The door was equipped with coiled springs which were at the extended or uncoiled position when the door was closed. To open the door it was necessary to pull or push backward on the door against the springs compressing them. The passenger, the plaintiff in this case, had to open the door because there was no elevator operator. There was evidence that the springs were quite resistant and that it required considerable effort to open the door. Furthermore, when opened the door did not catch or remain open of its own accord until pulled to a closed position, but rather the force of the springs was exerted on the door constantly. It is plaintiff's contention that she was so occupied with the task of opening the door and keeping it open until she could step out that she did not have an opportunity to properly or thoroughly observe the relative position of the elevator and the floor level of the building. While pushing sideways she stepped out as had been her custom over a period of several months and she expected the elevator to be within 3½ to 4 inches of the floor level. Appellant also testified that because there was no glass window or opening in the elevator door her attention to the floor was also diverted by looking about to be certain no one was entering the elevator from the lobby with whom she might collide.

Under the circumstances whether plaintiff was negligent in not looking or if she looked but did not look carefully enough was a question of fact to be determined by the jury. The instruction charged the jury as a matter of law "that it was negligence on her part not to so use her faculties." It gave the jury no opportunity to determine whether or not the plaintiff was justified in light of the evidence in looking in the manner in which she testified she did or in not seeing the position of the bottom of the elevator with reference to the floor level.

[6, 7] Respondents urge that the errors, if any, occurring in both instructions were cured by the giving of other correct instructions. The rule applicable when conflicting instructions are given as in this case is set forth in Spear v. Leuenberger, 44 Cal.App.2d 236, at page 251, 112 P.2d 43, at page 52, wherein the court said:

> "'"If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby. If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction. The giving of instructions which are contradictory in essential elements may warrant a reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury."' Soda v. Marriott, 118 Cal.App. 635, 5 P.2d 675; see, also, Akers v. Cowan, 26 Cal.App.2d 694, 80 P.2d 143."

See also Rackson v. Benioff, 111 Cal.App. 2d 124, 129, 244 P.2d 9.

Judgment is reversed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.

149 Cal.App.2d 265

The BOARD OF EDUCATION OF the RICHMOND SCHOOL DISTRICT, and M. R. Marcos, Jr., its President, Warren Brown, Jr., Joseph Perrelli, Meredith Morgan, and Marion M. Snodgrass, members of said Board of Education, Plaintiffs and Respondents,

v.

Leonice E. MATHEWS, Defendant and Appellant.

Civ. 17158.

District Court of Appeal, First District, Division 2, California.

March 19, 1957.

Proceedings by Board of Education of a school district and members of board to discharge school teacher on ground she had persistently violated and refused to obey reasonable regulations of school district. The Superior Court, County of Contra Costa, Harold Jacoby, J., entered judgment that Board of Education could dismiss teacher, and teacher appealed. The District Court of Appeal, Kaufman, J., held that findings that teacher had persistently violated and refused to obey reasonable regulations of school district in that she had absented herself from school during school hours without permission contrary to rules and regulations of school district and that she had engaged in unprofessional conduct in that she had breached her contract by failure or refusal to report for school term after being directed to do so, were supported by evidence.

Judgment affirmed.

1. Schools and School Districts ⇐136

School district's rules and regulations which are in effect at date of making or renewal of teacher's contract are a part of employment contract of every teacher.

2. Schools and School Districts ⇐141(4)

Regulation of school district that under no circumstances shall teachers be away from assigned school during school hours unless permission has previously been obtained was not unreasonably applied for purposes of dismissal to teacher who had secured a substitute teacher for one day only and then was absent for 10 school days.

3. Schools and School Districts ⇐137, 141(4)

Permanent teacher's failure to report for duty after having been directed to do so by superintendent constituted a breach of her contract of employment and was unprofessional conduct within statute permitting dismissal of teachers for unprofessional conduct. West's Ann.Education Code, § 13521(a, g).

4. Schools and School Districts ⇐141(5)

In proceedings by Board of Education to discharge permanent teacher, findings that teacher had persistently violated and refused to obey reasonable regulations of school district in that she absented herself from school during school hours without permission contrary to the rules and regulations of the school district and that she had engaged in unprofessional conduct in that she had breached her contract by failure or refusal to report for school term after being directed to do so were supported by evidence. West's Ann.Education Code, § 13521(a, g).

Wagener, Brailsford & Knox, Oakland, for appellant.

Francis W. Collins, Dist. Atty. of Contra Costa County, John B. Clausen, Charles L. Hemmings, Deputy Dist. Attys., Martinez, for respondents.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court of Contra Costa County decreeing that respondents may discharge appellant, a teacher employed by the Board of Education of the Richmond School District.

The proceedings herein were instituted under section 13521 of the Education Code which provides that no permanent employee may be dismissed except for one or more

of the causes contained in that section. The subsections here involved are "(a) Immoral or unprofessional conduct; * * * (g) Persistent violation of or refusal to obey the school laws of the State or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him."

Appellant, Miss Leonice E. Mathews, was charged in Cause I with persistent violation of or refusal to obey reasonable regulations of the Richmond School District in that she absented herself from her school during school hours for the week of October 12, 1953, and for the week of October 19, 1953, in violation of the rules and regulations of the district as contained in Rule 3.44(e), Administrative Manual of the Richmond Schools, 1951, and absented herself or refused to report for duty on September 7, 1954, and continued to absent herself to date after having been ordered to report on September 7, 1954 by the District Superintendent. Cause II charged her with refusal to obey reasonable regulations in failing to report for duty on September 7, 1954 after having been directed in writing by the District Superintendent, and Cause III charged unprofessional conduct in that she breached her contract by failure or refusal to report on September 7, 1954, after being directed to do so.

Section 3.44(e) of the Administrative Manual of the Richmond Schools provides: "(e) Under no circumstances shall teachers be away from their assigned school during school hours unless permission has previously been obtained from the principal."

Section 3.45(a) provides that certificated personnel shall be allowed 10 days absence from duty on account of personal illness each school year without loss of salary, and section 3.46(b) reads in part as follows: "Leaves of absence for permanent employees shall be limited to sabbatical, further study, travel, maternity, or health leaves. Except for maternity or health leaves, the time limit for leaves of absence shall be one year."

Appellant contends that she had been given prior permission by school authorities, for on October 8 she requested a substitute teacher for Friday, October 9. The unexcused absences with which she is charged are, however for ten school days in the weeks beginning October 12 and October 19, 1953. The evidence shows that Miss Burkett, the principal, granted appellant permission to be absent on Friday, October 9, 1953, when she complained of a sore throat. There had been no conversation concerning leave for any time during the following two weeks. Leave or permission for that time had not been requested or granted. Dr. Miner, District Superintendent of the Richmond School District, testified that when he called appellant to his office to explain the absence, she told him that it was too cold and nasty and foggy up here and that she had gone south to get warm. Appellant testified that she had left Richmond on Friday morning, October 9, and drove to her home in Los Angeles. She decided to return, she said, when Miss Burkett telephoned. Appellant said, "I was so glad to hear her voice, all my interests in Richmond came rushing into my brain and I did feel ashamed I had been gone so long and it dawned then, I had been gone longer than I should have been. I was so glad to hear her voice wanting to know when I would be back and I said I would be back Monday."

As to the absence beginning with appellant's failure to report for duty at the beginning of the school year, September 7, 1954, the record shows that on or about September 1, 1954, appellant sent Dr. Miner a letter telling him she was not going to return at the beginning of the school year. He replied, directing her to report for duty at a certain school. He then received a telegram from her on September 6, 1953 conveying the information that she had been injured some time in July. This was the first time she informed him of the accident to her leg. She did not consult a doctor from the time of the alleged injury on July 20, 1953 until September 9, 1953.

In her correspondence with Dr. Miner in regard to a leave, appellant at no time asked for leave for reasons of health. Her letters were requests for leave to take care of urgent business in Los Angeles. The urgent business was a dispute concerning a boundary encroachment on her home property. She requested Dr. Miner's permission to teach in another district during this time, or to allow her to do substitute teaching, which requests were not granted.

Dr. Groshell, the blind osteopathic physician and surgeon whom she consulted in Los Angeles, testified in his deposition that he was first consulted by Miss Mathews on September 9, 1954. She visited his office eight times in September and October, and only once a month between October 18 and January 11, 1955. The doctor stated that appellant had not been restricted in her movements, that a rubber knee bandage would have probably been of sufficient help to permit her to carry on her duties as teacher, that he supposed she could have used crutches or a cane.

[1] Appellant contends that the evidence does not establish persistent violation of or refusal to obey reasonable regulations of the Richmond School District. The rules and regulations of the district which are in effect at the date of making or renewal of a teacher's contract are, of course, a part of the employment contract of every teacher. Rible v. Hughes, 24 Cal. 2d 437, 150 P.2d 455, 154 A.L.R. 137; Kacsur v. Board of Trustees, 18 Cal.2d 586, 116 P.2d 593; Fry v. Board of Education, 17 Cal.2d 753, 112 P.2d 229. In Rible v. Hughes [24 Cal.2d 437, 150 P.2d 458], it is said that the contract of employment of a permanent teacher "Is automatically renewed from year to year upon the same terms unless, prior to renewal, the school board acts to change such terms."

[2] Appellant argues that section 3.44 (e) is unreasonable in that it does not provide for unforeseen emergencies. It provides that "under no circumstances" shall teachers be away from their schools unless prior permission has been obtained from the principal. Appellant has not shown that the rule has been unreasonably applied in her case, however. She secured a substitute for one day only, then drove to Los Angeles where she remained two weeks. Each day of that absence without notifying the school authorities as to the necessity therefor, was a violation of the rule. A teacher who was sufficiently able-bodied to drive her car to Los Angeles can certainly not be heard to say that she was physically unable to ask permission for absence due to illness. When finally contacted in Los Angeles by the principal, she admitted that she felt ashamed, that she had absented herself for so long, and said nothing about illness.

Appellant also maintains that section 3.44(e) has no application to illness because section 3.45 covers absence from duty for that reason. It states that certificated personnel shall be allowed absence from duty because of personal illness for ten days of each school year without loss of salary. This rule would appear to make the granting of permission or excuse of absence under rule 3.44(e) mandatory by the principal for illness of a teacher. The very fact that the rule states that the teacher shall be "allowed" absence from duty implies that some authority is to be consulted by the teacher in the matter. The administration of a school would indeed be difficult if teachers could without notice depart for two weeks at a time, even though in the interests of their health, without advising the school of the necessity for securing substitutes or the length of time for which they would be needed.

Appellant cites Fresno City High School Dist. v. De Caristo, 33 Cal.App.2d 666, 92 P.2d 668 in which it is said that two absences without leave may not be said to be a persistent course of conduct. The absences there related to absences on October 6 and October 21 in the same year. In the instant case we have absences on each day of the school week in two consecutive weeks or ten absences as opposed to two in the cited case. Appellant also cites the language in that case to the effect that the notice of dismissal therein did not state, the

amended complaint did not allege, and the findings of fact did not find that the absences from duty were not caused by appellant's sickness. However, in the cited case, the rule of the Board of Education there under consideration prohibited the teacher from absenting herself without permission "except in case of sickness." Hence, to show a violation of that rule, there would have to have been an allegation that the absence was not caused by illness.

It is urged by appellant that section 3.46 (b) of the Manual of the Richmond School District was improperly applied to appellant, hence her conduct was not unprofessional under the circumstances. Section 3.46(b) at the time this action arose required all leaves of absence for permanent employees to be of one year's duration, except maternity or health leaves. Dr. Miner testified that the health leaves had been also changed to one year since the Richmond schools had gone on an annual promotion basis during the past three years. He admitted that there was nothing in the written regulations forbidding a health leave of less than a year, that the rules were under revision, but the change had not yet been adopted in writing. Under these circumstances, it would seem that appellant might be entitled to a health leave of a semester instead of a year, as insisted upon by the superintendent, for under Rible v. Hughes, 24 Cal. 2d 437, 443, 150 P.2d 455, 154 A.L.R. 137, it appears that it is the rules and regulations which have been *adopted* which become a part of the teacher's contract.

In the present case, however, the evidence is subject to the inference that appellant was endeavoring to secure a leave for business reasons rather than for reasons of health. The nature of the business was such that it would most probably have to have been taken care of by a lawyer, and she did in fact place it in a lawyer's hands. It did not reasonably require her constant presence in Los Angeles from September to February. The trial court found that appellant failed and refused to report for duty on September 7, 1954 and continued to absent herself without just cause or legal excuse until February 1, 1955, and without obtaining a leave of absence. If the trial court had believed that appellant's health was such that she could not teach, it could not have found that she was absent without just cause. Nor could it have done so if it believed that the nature of her business was of such gravity as to require her constant attention. The trial court's findings in these respects are supported by the record. It appears to be immaterial therefore, whether or not the Superintendent was in error in insisting that a health leave must be of one year's duration, for in view of this finding, appellant was not entitled to leave.

[3] Appellant's failure to report for duty after having been directed to do so by the Superintendent, her absences being without just cause, constitutes a breach of her contract of employment, and is unquestionably unprofessional conduct. In Board of Education of City of Los Angeles v. Swan, 41 Cal.2d 546, 551, 261 P.2d 261, 264, it was said that in discussing a teacher's refusal to report for a teaching assignment that "a particular act or omission of a teacher may constitute unprofessional conduct, evident unfitness for service, and a persistent violation of or refusal to obey prescribed rules and regulations." The court further stated that "The refusal of a teacher to accept an assignment which the school authorities have the power to make constitutes a violation of school laws as ground for dismissal" citing numerous authorities. In Evard v. Board of Education of City of Bakersfield, 64 Cal.App.2d 745, 149 P.2d 413, it was held that a teacher with permanent tenure who left her position before the expiration of the time specified in her contract without the consent of the trustees of her district, was guilty of unprofessional conduct, and subject to the statutory penalties prescribed.

It is clear that Cause I and Cause III of the charges against appellant are supported, and if either were supported it would sufficiently support the judgment herein. Respondent asks in regard to Cause II relating to the charge that appellant refused to obey reasonable regulations in failing or

refusing to report for duty on September 7, 1954 after being directed to do so, that this court construe subsection (g) of section 13521 of the Education Code to require only a single refusal to obey a regulation as cause for dismissal in contrast to the requirement of "persistent" violation of a regulation to warrant such action. The section requires "Persistent violation of or refusal to obey the school laws * * * or reasonable regulations * * *." It is true as respondent argues, that we must presume that the legislature did not enact useless words and that "violation" and "refusal" are not synonymous. There may be a violation of a rule without knowledge that the rule exists, whereas refusal to obey a rule implies knowledge of its existence. The word "persistent", however, would appear to modify both the words "violation" and "refusal". It would seem that if the same regulation is violated by two teachers, one of whom does it innocently and the other knowingly, the results are quite likely to be the same as far as school administration is concerned. It is the persistent disregard of the rules that this subsection appears to make sufficient basis for dismissal.

In view of the language in Board of Education of City of Los Angeles v. Swan, supra, and the evidence herein of appellant's repeated insistence on a leave for business reasons of one semester's duration, which she was not entitled to under the regulations, and her failure throughout this time to return to her assignment, the court might well have found a "persistent refusal" to obey the regulations of the school district. The trial court, however, merely found a "refusal" to obey such regulations in regard to Cause II.

[4] In view of the fact that the charges and findings of the lower court in connection with Cause I and Cause III are clearly supported by the evidence, the judgment must be affirmed.

Judgment affirmed.

DOOLING, Acting P. J., and STONE, J. pro tem., concur.

Kyle Z. GRAINGER, Jr., as Trustee of the Estate of Marback Motor Company, a copartnership, Bankrupt, Plaintiff and Appellant,

v.

Albert ANTOYAN, Defendant and Respondent.

Max H. GEWIRTZ, Dora Mesnick, Nathan Gerwin and Sidney Gerwin, as executors (substituted in place of William Gewirtz, deceased), Plaintiffs and Appellants,

v.

Sidney MARBACK et al., Defendants, A. L. Antoyan, Respondent.*

Civ. 21785, 22232.

District Court of Appeal, Second District, Division 2, California.

March 13, 1957.

As Amended on Denial of Rehearings April 8, 1957.

Hearing Granted May 8, 1957.

Actions by trustee of bankrupt limited partnership and creditor's executors seeking to hold limited partner liable as general partner. From adverse judgment entered in Superior Court, Los Angeles County, Maurice C. Sparling, J., trustee and creditor's executors appealed. The District Court of Appeal, Philip H. Richards, Justice pro tem., held that where limited partner, who held chattel mortgage on partnership assets and owned building where business was located, instituted proceedings to foreclose chattel mortgage and cancel partnership lease, bought substantial part of partnership's assets and took over operation of a similar business on the same premises under a different name, limited partner's exercise of control was over and beyond his rights and powers as a limited partner and limited partner became liable as a general partner to the creditors of the limited partnership regardless of the adequacy of the price paid for the partnership assets.

Judgment against creditor reversed and judgment against trustee affirmed.

1. Partnership ⇐357

A limited partnership is formed if there is a substantial compliance in good faith in the execution, acknowledgment and rec-

* Opinion vacated 313 P.2d 848.

ordation of a Certificate of Limited Partnership. West's Ann.Corp.Code, § 15502.

2. Partnership ⇐349

Where individual became limited partner and chattel mortgagee of automobile sales agency simultaneously, the fact that limited partner's share in profits was first to be applied toward payment of the chattel mortgage did not negate individual's status as limited partner. West's Ann.Corp.Code, §§ 15501–15531.

3. Partnership ⇐349

The absence of control, present or ultimate, is the essence of the relationship of the limited partner to a limited partnership.

4. Partnership ⇐355

Although limited partner was liable to partnership for $1,000 contribution specified in the certificate of limited partnership which was not paid, failure to pay the contribution did not transform limited partner into a general partner. West's Ann.Corp. Code, § 15517.

5. Partnership ⇐355

Where individual became limited partner and chattel mortgagee simultaneously with mortgage providing that $50,000 advanced to automobile sales agency was a loan with fixed assets as security and payments made on mortgage were charged to mortgage payable account, $50,000 was not limited partner's capital investment even though cash contribution which was to have been paid by the limited partner had never been paid. West's Ann.Corp.Code, § 15502.

6. Partnership ⇐371

Where individual, who was sales manager of automobile agency, became limited partner and continued in his job with authority only to countersign checks but limited partner could not withdraw bank funds or prevent withdrawal by other partners, limited partner did not exercise such management or control as to make him liable as a general partner. West's Ann.Corp. Code, §§ 15501, 15507.

7. Partnership ⇐371

Where limited partner, who held chattel mortgage on fixed assets of automobile agency and owned building leased by agency, initiated proceedings to foreclose chattel mortgage and cancel agency's lease, and purchased substantial part of agency's assets and took over operation of entire business on the same premises under a different name, limited partner exercised control over and beyond his rights and powers as limited partner and became liable as general partner to creditors of the limited partnership even though the price paid for the agency's assets may have been adequate. West's Ann.Corp.Code, § 15507.

8. Bankruptcy ⇐151

The so-called "strong-arm clause" in the Bankruptcy Act does not add additional assets to bankruptcy estate but only gives trustee additional powers with respect to the estate which vests assets in the trustee. Bankr.Act, § 70, sub. c, 11 U.S.C.A. § 110, sub. c.

9. Bankruptcy ⇐149

Liability of limited partner as general partner arising out of limited partner's control of business is not an asset of bankrupt limited partnership which passes to bankruptcy trustee by operation of law. Bankr. Act, § 70, subs. a(5), c, 11 U.S.C.A. § 110, subs. a(5), c.

10. Bankruptcy ⇐149

Creditor's right to an in personam judgment against limited partner whose exercise of control subjected him to liability as general creditor is not property of the limited partnership nor is it a right which can be enforced by bankruptcy trustee. Bankr.Act, § 70, subs. a(5), c, 11 U.S.C.A. § 110, subs. a(5), c.

11. Parties ⇐76(7)

A special demurrer for want of capacity to sue raises only the question of whether any general legal disability exists, such as infancy or insanity, or want of title in the plaintiff to the character in which he sues.

12. Parties ⇐76(5)

Where trustee for bankrupt limited partnership brought suit seeking to hold limited partner liable to creditors as general

partner, objection that cause of action belonged to creditors and could not be enforced by trustee was not waived by failure of limited partner to demur specially on ground of lack of capacity to sue. West's Ann.Code Civ.Proc., § 434.

13. Parties ⇐76(1, 5)

Where complaint states a cause of action in some one, but not in the plaintiff, a general demurrer for failure to state a cause of action will be sustained and this objection is not waived by failure to raise it by demurrer or answer and it may be raised at any point in the proceedings.

Joseph W. Fairfield, Ethelyn F. Black, J. Martin Smith and Max H. Gewirtz, Los Angeles, for appellants.

Stratton & Taylor, Chas. C. Stratton and Joseph Ball, Long Beach, for respondent.

PHILIP H. RICHARDS, Justice pro tem.

These are appeals by plaintiffs from judgments in favor of the defendant in two actions seeking to hold the defendant liable as a general partner on the claims of creditors of a bankrupt limited partnership.

Appellant Kyle Z. Grainger, Jr., as Trustee of the Estate of Marback Motor Company, a co-partnership, Bankrupt, is plaintiff in one action brought for the benefit of the creditor claimants in the bankruptcy estate, and appellants Max H. Gewirtz, et al., as Executors of the Estate of William Gewirtz, deceased, a creditor and assignee of creditors of Marback Motor Company, are the substituted plaintiffs in the other. Each action involved a single and common defendant, Albert Antoyan, and each involved common questions of law and fact and were consolidated for trial.

Prior to April 9, 1951, Marback Motor Company was a limited partnership consisting of Sidney S. Marback as the sole general partner and his son, Philip Marback, as the limited partner. The firm was in the business of selling new and used automobiles in Los Angeles and the business premises occupied by it were owned by the defendant Albert Antoyan and his mother and were under lease to the partnership. The defendant was employed by the firm in 1948 as a saleman and in 1950 became the sales manager. In April 1951 the defendant and Sidney Marback negotiated and consummated a transaction evidenced by four written documents as a result of which the defendant paid $50,000 to the partnership. It is the legal effect of these documents which gave rise to the controversies of the parties. Without regard to the order of their execution, the first executed document dated April 9, 1951 is entitled "Chattel Mortgage" and is in the common form of a mortgage of chattels. This document recites that the Marbacks, individually and as partners, as mortgagors, hypothecate all the fixed assets in the motor company to the defendant, as mortgagee, to secure the payment to the defendant of $50,000, without interest, payable in monthly installments of $750 or 10 per cent of the net profits of the firm, whichever is greater. While no note was given to the defendant, the instrument itself contains a promise to pay the monthly installments until the $50,000 is paid to the defendant.

The second executed document dated April 9, 1951, is entitled "Articles of Limited Partnership" and is in the common form of a limited partnership agreement. It recites that Sidney S. Marback, as "general partner"; Philip Marback, as "first limited partner"; and defendant Albert Antoyan, as "second limited partner" agree to become partners in the business of selling new and used cars upon the terms and conditions set forth; that the partnership shall commence on April 9, 1951 and shall continue until dissolved. It further provides for the payment of 10 per cent of the net profits to the defendant except that he shall be entitled to a guaranteed payment of $750 per month or 10 per cent of the profits, whichever is greater; that this provision shall be read in conjunction with the chattel mortgage

and that the provisions for payment of the $50,000 contained in the chattel mortgage are concurrent and not separate from the provisions for payment in the articles except that the payment of $750 per month or 10 per cent shall continue after the $50,000 is paid.

A Certificate of Limited Partnership having been filed and published in 1949 upon the formation of the original limited partnership between Sidney Marback and his son, the third executed document dated April 9, 1951, is an "Amendment of Certificate of Limited Partnership" and is in the required form of such certificate, Corp. Code, sec. 15502, and recites a cash contribution by the defendant of $1,000 and his right to receive 10 per cent of the profits or $750 per month, whichever is greater. The formal requirements of the California law in respect to the filing and recordation of the chattel mortgage and the certificate of limited partnership are conceded to have been fulfilled. On April 16, 1951, there was executed a document entitled "Agreement Supplementing and Modifying Limited Partnership" by the terms of which the payments to defendant are limited to 10 per cent of the profits after he had been repaid $50,000. The books of the firm reflect that the cash contribution of $1,000 provided for in the Amended Certificate of Limited Partnership was not paid and further reflect that none of the $50,000 advanced by the defendant was ever credited as a contribution to capital and that the monthly payments to defendant were charged to a mortgage-payable account.

After April 9, 1951, the defendant became a co-signer on checks of Marback Motor Company but otherwise took no part in the control or management of the business beyond his prior duties as an employee and salesman and in April 1952, the defendant terminated his employment. By September 1, 1953, $21,000 had been repaid to the defendant. Notwithstanding an apparently profitable operation, the partnership was financially straitened. Rents due to the defendant and his mother on the premises were in arrears and in August 1953, defendant served notice of cancellation of the lease and shortly thereafter commenced an action to recover past-due rent and to cancel the lease. Default was declared on the $750 monthly payments due to the defendant and he commenced proceedings for the foreclosure of the chattel mortgage by making demand for payment and serving a notice of default.

Without a prior dissolution of the limited partnership, the defendant, on September 22, 1953, agreed to buy from the Marbacks the good will and tangible equipment used by the firm in the operation of its business and certain intangible assets. Not included in the sale were the repossession reserves, bank accounts, customers' notes and certain prepaid expenses. The Marbacks agreed to terminate their dealer's franchise and the sale was contingent upon the defendant's obtaining a dealer's franchise for the same line of cars. Upon execution of the agreement, Marback Motor Company went out of active business and defendant took over the operation of a similar business upon the same premises under a different name.

The sale was later consummated, the cash purchase price of $50,000 was paid to certain creditors at the direction of Sidney Marback, and the defendant Antoyan assumed and agreed to pay the balance due on the chattel mortgage which had been assigned by him to his mother.

In June 1954, Marback Motor Company, a Limited Partnership, was adjudicated a bankrupt. The bankruptcy schedules listed liabilities of approximately $126,000 but at the time of the trial the claims filed with the trustee aggregated $38,158.28 not including the claims of $8,673.69 held by the plaintiff Gewirtz.

The principal questions for consideration on this appeal are whether the defendant Albert Antoyan became a limited partner of Marback Motors on April 9, 1951, or merely a creditor, and, if he became a limited partner, did he thereafter take part in the control of the business so as to become liable

as a general partner to the partnership creditors.

[1–3] A limited partnership is formed if there is a substantial compliance in good faith in the execution, acknowledgment and recordation of a Certificate of Limited Partnership, Corp.Code, sec. 15502(2). This we construe to mean, so far as the rights of third parties are concerned, that a limited partnership is created *in praesenti*, by the execution, acknowledgment and recordation in good faith of a certificate of limited partnership in substantially proper form. It is not contended that the certificate failed in any particular to comply with the requirements of the law and it is conceded that the certificate was filed and recorded as required by law. Moreover, the Articles of Limited Partnership expressly provided that the partnership would commence on April 9, 1951 and would continue until dissolved. The defendant, however, contends that the effect of the transaction in 1951 was only to secure and provide for the repayment of a $50,000 loan and to provide for the formation of a limited partnership *in futuro* when the loan was paid, and, not having been paid before the firm went out of business, the defendant Albert Antoyan never became a limited partner. The Limited Partnership Act, Corp.Code, secs. 15501–15531, clearly contemplates that a person may be both a limited partner in a firm and a creditor of the firm and there is nothing in the act which prevents the simultaneous creation of this dual relationship. The relationships of creditor and limited partner are not mutually exclusive and may co-exist. In re Mission Farms Dairy, 9 Cir., 56 F.2d 346, upon which great reliance is placed by defendant, is clearly distinguishable on the facts. The fact that the limited partner's share in the profits is first to be applied toward the payment of a loan made by him to the partnership does not negate his status as a limited partner. The further contention, predicated on the law of general partnership, that the absence of the defendant's right of ultimate control precludes the existence of any partnership, is not persuasive, for the absence of control, present or ultimate, is the essence of the relationship of a limited partner as under the Limited Partnership Act he is in no sense a partner, Henningsen v. Howard, 117 Cal.App.2d 352, 360, 255 P.2d 837. In re Marcuse & Co., 7 Cir., 281 F. 928, and Henningsen v. Howard, supra, relied upon by the defendant, serve mainly to teach that a limited partner's lack of participation or control in the management of the business is the principal criterion which distinguishes him from a general partner. We conclude, contrary to the court's finding, that, pursuant to express provisions of the written memorials of the 1951 transaction, the defendant became a limited partner of Marback Motor Company on April 9, 1951.

[4, 5] Contrary to the appellants' contention, the $50,000 advanced by the defendant was not his capital investment in the limited partnership. The fact that the $1,000 contribution specified in the Certificate of Limited Partnership was not paid does not necessitate a holding that the defendant's loan of $50,000 to Marback Motors was his capital investment or contribution. A limited partner is liable to the partnership for any unpaid portion of the contribution specified in the Certificate, Corp.Code, sec. 15517, but a failure to pay the specified contribution does not transform a limited partner into a general partner. See Henningsen v. Howard, supra. By clear and unambiguous language the $50,000 advanced by the defendant was documented as a loan with provisions for security and rate of repayment. An immediate and regular installment repayment of a limited partner's contribution is inconsistent with the concept of a capital investment. Moreover it is not claimed that any Amended Certificate of Limited Partnership was ever filed as required by law setting forth any reduction of the defendant's contribution, Corp.Code, sec. 15516. No violence is done to San Joaquin Light & Power Corp. v. Costaloupes, 96 Cal.App. 322, 274 P. 84, in so holding, for in that case there was no provision for the repay-

ment of an advance claimed to be a loan and the distribution of profits did not decrease any loan obligation of the firm. Here the chattel mortgage set forth the terms of repayment and each payment to the defendant reduced the unpaid balance of the firm's obligation to him.

[6] We turn now to the question of the exercise of control of the partnership by the defendant. A limited partner as such is not bound by the obligations of the partnership, Corp.Code, sec. 15501 [1], nor is he liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business, Corp.Code, sec. 15507.[2] In the Uniform Limited Partnership Act the Commissioners' Note reads in part as follows: "The business reason for the adoption of acts making provisions for limited or special partners is that men in business often desire to secure capital from others. There are at least three classes of contracts which can be made with those from whom the capital is secured: One, the ordinary loan on interest; another, the loan where the lender, in lieu of interest, takes a share in the profits of the business; third, those cases in which the person advancing the capital secures, besides a share in the profits, some measure of control over the business." Uniform Laws Anno., vol. 8. "In Black's Law Dictionary, 'control' is defined as follows: 'Power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee.' In Rose v. Union Gas & Oil Co., 6 Cir., 297 F. 16, 18, it is defined as follows: 'The word "control" does not import an absolute or even qualified ownership. On the contrary it is synonymous with superintendence, management, or authority to direct, restrict, regulate.'" Speirs & Co. v. Underwriters at Lloyd's, 84 Cal.App.2d 603, 604, 191 P.2d 124, 125. Defendant's only participation in the management of the firm prior to September 1953, to which appellants point as constituting an exercise of control, is the authority given to and exercised by the defendant in countersigning checks on the firm's bank account. This authority gave him no control over the bank account for he could neither withdraw funds himself nor prevent their withdrawal by the other co-signators, which is far short of the control exercised by the limited partners in Holzman v. De Escamilla, 86 Cal.App.2d 858, 195 P.2d 833, where the firm consisted of one general partner and two limited partners who were authorized to sign checks on an account which required that checks be signed by two of the three thus giving the limited partners control over the withdrawal of funds. In addition, the limited partners frequently consulted the general partner on the operation of the firm business and they required the general partner to resign as general manager and selected his successor and the court properly held these activities to be such control by the limited partners as to make them liable as general partners. Defendant's limited participation in the management prior to September 1953 did not constitute such management or control as to make him liable as a general partner.

[7] However in September 1953, as has been previously pointed out, the defendant initiated a foreclosure of his chattel mortgage, commenced proceedings to cancel the firm's lease on the business premises, purchased a substantial part of the firm's physical assets used in the operation of the business and in effect took over the entire operation of the firm's business and the question is whether these acts constituted such an exercise of such con-

1. "A limited partnership is a partnership formed by two or more persons under the provisions of Section 15502, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership." Corp.Code, sec. 15501.

2. "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." Corp. Code, sec. 15507.

trol of the business as to then make the defendant liable as a general partner to the partnership creditors. The price of a limited partner's freedom from liability as a general partner is his abstention from substantial intervention in the ultimate destiny of the partnership. Turning again to the Commissioners' notes appended to the Uniform Limited Partnership Act we find a statement that the act was drafted upon various assumptions, one of them being "That persons in business should be able, while remaining themselves liable without limit for the obligations contracted in its conduct, to associate with themselves others who contribute to the capital and acquire rights of ownership, provided that such contributors do not compete with creditors for the assets of the partnership." Uniform Laws Anno., vol. 8, p. 4. If, to protect himself as a creditor, a limited partner induces the general partner to sell the firm assets to a third person and go out of business, there could be little question but that the limited partner had exercised such control over the business of the partnership as to make him liable as a general partner and we can see no difference when the limited partner himself becomes the purchaser. Here the defendant did not merely pursue his rights as a creditor or a landlord but with the pending proceedings of foreclosure and dispossession facing the firm, virtually bought it out and put it out of business. We are convinced that the defendant's course of conduct culminating in the transfer of the operation of the firm's business to himself and regardless of the adequacy of the price he paid for the firm assets, constituted an exercise of control of the business over and beyond an exercise of his rights and powers as a limited partner and that he thereby became liable as a general partner to the creditors. The only authority found on this point is First National Bank of Canandaigua v. Whitney, 4 Lans., N.Y., 34, affirmed 53 N.Y. 627, decided in 1871, and arising under the New York statute respecting limited partnerships which, after setting forth the extent to which a limited partner could participate in the operation of the firm's business, provided that interference contrary thereto made him liable as a general partner. Whitney, a limited partner, purchased the entire business from the general partner without a dissolution of the partnership. In holding him liable as a general partner for the partnership debts, 4 Lans., N.Y., at page 39, the court said: "Here it is manifest, beyond dispute or contradiction, that the special partner did interfere, 'contrary to these provisions' of section seventeen. He put an end to the business of the partnership, and took title to the entire property and effects thereof, real and personal, to himself and took its business and carried it on in his own name and for his exclusive benefit. If this is not an interference with the concerns and business of a partnership, by a special partner, it is difficult to conceive what would be interference. It was an act which not only terminated the existence of the partnership, but divested the general partners of all title to the partnership property and effects, and transferred it to another, to wit, himself."

We recognize that the defendant Antoyan did not acquire the entire assets of the partnership yet the cumulative effect of his actions resulted in the full payment of his claim and the termination of the limited partnership as a going concern, and this we hold an exercise of control sufficient to cast upon the defendant the liability of a general partner to the then partnership creditors.

[8–10] The trial court properly held that a trustee in bankruptcy has no cause of action on behalf of the bankrupt partnership creditors against a limited partner for his liability as a general partner arising out of his control of the business. The trustee in bankruptcy is vested by operation of law with title to the assets of the estate in bankruptcy, Bankruptcy Act, § 70, sub. a, 11 U.S.C.A. § 110, sub. a, but the only property, including rights of action, which passes to the trustee is that which is transferable by the bankrupt or subject to levy and sale in his hands, Bank-

ruptcy Act, § 70, sub. a(5), 11 U.S.C.A. § 110, sub. a(5). The so-called "strong-arm clause", Bankruptcy Act, § 70, sub. c, 11 U.S.C.A. § 110, sub. c, does not add additional assets to the bankruptcy estate but only gives the trustee additional powers with respect to the estate which vests assets in him. The question presented is whether liability of a general partner to the partnership creditors is an asset of the bankrupt partnership estate which passes to the bankruptcy trustee and which he may enforce against the partners for the benefit of the partnership creditors. This question is definitively answered by First National Bank of Herkimer v. Poland Union, 2 Cir., 109 F.2d 54, 56, certiorari denied 309 U.S. 682, 60 S.Ct. 723, 84 L.Ed. 1026, in which the court was passing upon a reorganization plan of a partnership. In answer to a contention that in case the existence of individual partnership liability is disputed, the bankruptcy trustee may accept and administer part of the individual partner's property, leave the individual partner in possession of the rest, and enjoin all partnership creditors from suing the individual partner, the court said: "We believe that this argument ignores the fundamental distinctions between suits against the individual and levies on his property, as well as between the trustee's power to claim and administer the property of the individual partner and the trustee's power to control the claims of creditors against the partner individually. The latter power the trustee does not possess. The property of the partner is in many ways the property of the partnership, or at least the property of the trustee. * * * But the creditor's right to an in personam judgment against the partner is not the property of the partnership, nor is it a right which can be enforced by the partnership trustee. The trustee is given some of the rights of an attaching creditor, but only those rights which are rights against property, in or out of the custody of the court. Bankruptcy Act, § 70, sub. c, 11 U.S.C.A. § 110, sub. c." The liability of a limited partner exercising control of the partnership is the liability of a general partner and the rights of the creditors with respect to such limited partner come within the holding of the foregoing case. Dean v. Shingle, 198 Cal. 652, 246 P. 1049, 46 A.L.R. 1156, upon which appellants rely, was an action by the trustee of a bankrupt corporation to recover from one director under a constitutional liability provision, sums misappropriated by another director and which the court held to be a loss to the corporation and construed the action as one brought by the trustee to recover assets of the corporation, which distinguishes it from the case at bar.

[11–13] Appellants claim that the defendant failed to raise the point of lack of capacity to sue by a special demurrer and it was therefore waived, Code Civ.Proc. sec. 434. A special demurrer for want of capacity to sue raises only the question of whether any general legal disability exists, such as infancy or insanity, or want of title in the plaintiff to the character in which he sues, Klopstock v. Superior Court, 17 Cal.2d 13, 17, 108 P.2d 906, 135 A.L.R. 318. The right to relief, on the other hand, goes to the existence of a cause of action, and where the complaint states a cause of action in someone, but not in the plaintiff, a general demurrer for failure to state a cause of action will be sustained and this objection is not waived by failure to raise it by demurrer or answer and may be raised at any point in the proceedings. Parker v. Bowron, 40 Cal.2d 344, 351, 254 P.2d 6.

In view of the conclusions we have reached with respect to the liability of defendant in exercising control over the limited partnership it becomes unnecessary to determine his liability under Corp.Code, sec. 15513, under the record before us. Summarizing: the defendant Albert Antoyan became a limited partner and creditor of Marback Motor Company on April 9, 1951; in purchasing the operating assets and good will of the partnership he took such part in the control of the business that he became liable to the then creditors of the partnership; the trustee in

bankruptcy did not succeed to the rights of the partnership creditors to maintain an action based on the creditors' right to an in personam judgment against the defendant; and the right to assert that the bankruptcy trustee had no such course of action was not waived by his failure to demur specially to the complaint upon the ground of lack of capacity to sue.

For the reasons stated, the judgment in favor of defendant in appeal number 22232, Max H. Gewirtz, et al., appellants, is reversed and the judgment in appeal number 21785, Kyle Z. Grainger, Jr., as Trustee of the Estate of Marback Motor Company, a co-partnership, Bankrupt, is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



149 Cal.App.2d 282

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Virgil De Wit ROBINSON, Defendant and Appellant.

Cr. 5789.

District Court of Appeal, Second District, Division 2, California.

March 19, 1957.

Defendant was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of possession of heroin, and he appealed. The District Court of Appeals, Ashburn, J., faced with a question not theretofore passed upon by the state Supreme Court, held that fact that defendant was under arrest and in handcuffs at time he gave his consent to search of his home did not require finding as a matter of law that he had not voluntarily consented to search.

Affirmed.

1. Criminal Law ⇐1144(13)

On appeal, reviewing court would have to accept evidence and inferences favorable to party prevailing below.

2. Criminal Law ⇐736(1)

Unless evidence is wholly free from conflict and diverse influences, question of free consent to search is one of fact, to be decided by judge, who then must determine, and declare as a matter of law, whether evidence procured through search is admissible.

3. Courts ⇐97(6)

In prosecution for violation of state statute, federal precedents were not controlling on question of evidence.

4. Criminal Law ⇐736(1)

Fact that defendant was under arrest and in handcuffs at time he gave his consent to search of his home did not require finding as a matter of law that he had not voluntarily consented to search. West's Ann. Health & Safety Code, § 11500.

Gladys Towles Root, Eugene V. McPherson and Joseph A. Armstrong, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Joan D. Gross, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Convicted, after a nonjury trial, of possession of heroin, § 11500, Health & Safety Code, appellant urges on appeal that there was an unlawful search of his apartment and seizure of the subject matter of the crime, a bindle of heroin which was hidden in the lower part of the back of his television set. No claim of unlawful arrest is made, only that of unlawful search and seizure. Both sides agree that the case turns upon the question of whether defendant freely consented to the search. The evidence was conflicting and the court believed that of the police officers, thereby rejecting defendant's version of the facts.

[1] Accepting as we must on appeal the evidence and inferences favorable to the

respondent, People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, the factual situation is as follows. The search was made without a warrant. Police officer Fitzgerald, on the morning of April 2, 1956, saw two men on the northwest corner of 41st Street and Broadway in Los Angeles; he drove past them, looked back and saw one of them reach underneath some bush or shrubbery; he turned around to investigate; one of the men disappeared and the other hurriedly walked west on 41st Street. The latter was a colored man wearing a gray hat and gray coat. The officer searched the shrubbery and found nothing. He gave this description of the one suspect to officer Waggoner, told what he had seen and said he thought it a narcotic transaction. As they were talking together on 41st Street defendant, who answered the description given by Fitzgerald, arrived in an automobile which he parked on 41st Street near an apartment building which later proved to be his place of residence. Fitzgerald, on his three-wheel motorcycle, drove past defendant's car on his way to show Waggoner and two other officers the place where the shrubbery was. As Fitzgerald passed defendant Waggoner saw him watching Fitzgerald and starting his car. Waggoner and officer Phillips then crowded defendant to the curb before he had gone more than 100 feet or so and immediately arrested him "for narcotics." By radio communication with headquarters they learned that defendant had a narcotic record plus eight traffic warrants standing against him. He denied both aspects of that information. Asked where he lived he told the officers and Waggoner said he thought defendant had narcotics in his room and requested leave to search the apartment. Defendant made no reply. On inquiry he said he had a telephone and the officers said they could check the traffic warrants while there. Again defendant remained silent. Then Waggoner said that if defendant so wished they could go downtown and obtain a search warrant. He replied that that was not necessary. "Well, let's forget about it; let's go up there." He produced the door key from his pocket, led the officers to the door, unlocked it and ushered them in. He was not handcuffed and sat near the wall before and during the search. Officer Phillips said: "Now the search begins," and defendant replied, "Go right ahead." The bindle of heroin was found inside the television set. Defendant first denied that he knew what it was. Finally he said he saw three Mexicans throw this package out of the window of a car, that he had picked it up and placed it in the television and that he thought it was heroin. Defendant's version of these events was contrary in most respects to the testimony of the police officers, but the trial judge rejected defendant's testimony as above indicated.

[2] Counsel for appellant argue that the fact of consent given while under arrest per se spells submission to authority rather than voluntary waiver of the right to decline to submit to the search. In People v. Lujan, 141 Cal.App.2d 143, 147, 296 P.2d 93, 96, this court said: "But the consent must be a voluntary one and whether it was such presents a question of fact. People v. Michael, supra, 45 Cal.2d at page 751 [at page 753], 290 P.2d 852; People v. Gorg, supra, 45 Cal.2d 776 [at page 782], 291 P.2d 469. That question in this instance was decided by the trial judge contrary to appellant's contention, and upon evidence which suggests no other conclusion, cf. People v. Michael, supra, 45 Cal.2d at page 751 [at page 753], 290 P.2d 852, and People v. Gorg, supra, 45 Cal.2d 776 [at page 782], 291 P.2d 469, unless it be dictated by the fact that defendant was under arrest and in handcuffs at the time he gave his consent to a search of his home. Our state Supreme Court has not passed upon this specific point. It did, however, reject in Rogers v. Superior Court, 46 Cal.2d 3, 10–11, 291 P.2d 929, the federal rule that a confession made during a period of illegal detention is inadmissible. In so doing it distinguished the Cahan case, supra [People v. Cahan, 44 Cal.2d 434, 282 P.2d 905], upon grounds not pertinent here. The opinion does hold that the fact that a confession is made during an unlawful detention is 'only one of the factors to be considered in determining whether the statement

was voluntarily made.' No good reason appears for holding otherwise as to consent to a search given while under arrest and in handcuffs. * * * It would be but natural for one who has been arrested with narcotics on his person and who believes there is none in his home to acquiesce with alacrity to a search of that home; believing that nothing would be found, he would reason that his ready cooperation with the police would have a tendency to smooth somewhat the rocky road lying ahead of him, perhaps forestall a charge of selling, one which may carry a heavier penalty (see Health & Saf.Code, §§ 11712–11713) and much less likelihood of leniency in case of conviction." While the reasons for a voluntary consent which suggest themselves at bar are different from those just quoted, it does seem logical to infer that a culprit who has no narcotic on his person would readily agree to a search of his home if he believed that the drug was cleverly enough concealed to escape detection, thus convincing the officers of his innocence of the impending charge, or at the minimum incurring their goodwill through a show of cooperation. These considerations well may enter into a solution of the question of voluntary consent which essentially is one of fact (People v. Gorg, 45 Cal.2d 776, 782, 291 P. 2d 469), ordinarily not one of law. People v. Michael, 45 Cal.2d 751, 753, 290 P.2d 852, 854, says: "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances. Since the cases that have determined this question under varying factual circumstances are difficult if not impossible to reconcile (compare e. g., Davis v. United States, supra, 328 U.S. 582, 593–594, 66 S.Ct. 1256 [90 L.Ed. 1453]; with Johnson v. United States, 333 U.S. 10, 12–13, 68 S.Ct. 367, 92 L.Ed. 436; Waxman v. United States, 9 Cir., 12 F.2d 775, with Pritchett v. State, 78 Okl.Crim. 67, 143 P.2d 622, 623–625; Smuk v. People, 72 Colo. 97, 209 P. 636, 637, with Salata v. United States, 6 Cir., 286 F. 125, 127, and may reflect imperfectly the factual situations before the courts that decided them, they point to no compelling solution in the present case." See also, People v. Burke, 47 Cal.2d 45, 301 P.2d 241; People v. Smith, 141 Cal.App. 2d 399, 402, 296 P.2d 913; People v. Allen, 142 Cal.App.2d 267, 281, 298 P.2d 714.

Upon oral argument counsel for appellant contended that the question of free consent is one of law because it must be decided by the judge upon evidence received in the absence of the jury. This position cannot be sustained. The question is one of fact (unless the evidence is wholly free from conflict and diverse inferences) to be decided by the judge, who then must determine and declare as a matter of law whether the evidence secured through the search is admissible. This is the teaching of People v. Gorg, 45 Cal.2d 776, 780, 782, 291 P.2d 469, and People v. Burke, 47 Cal.2d 45, 301 P.2d 241.

[3] Federal cases cited by appellant[1] are not controlling. We deal here with a question of evidence, People v. Cahan, 44 Cal.2d 434, 440–442, 282 P.2d 905; Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448, and hence are not bound by federal precedents as would be the case with a constitutional problem. We again quote from People v. Lujan, supra, 141 Cal.App.2d at page 148, 296 P.2d at page 96: "Appellant relies upon Johnson v. United States, 333 U.S. 10, 12–13, 68 S.Ct. 367, 92 L.Ed. 436, which holds that a police officer's entrance into a home after identifying himself and saying, '"I want to talk to you a little bit,"' 'was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional

1. United States v. Alberti, D.C., 120 F. Supp. 171; United States v. DeBousi, D.C., 32 F.2d 902; Byars v. United States, 273 U.S. 28, 47 S.Ct. 248, 71 L. Ed. 520; Higgins v. United States, 93 U.S.App.D.C. 340, 209 F.2d 819; Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L.Ed. 436; Judd v. United States, 89 U.S.App.D.C. 64, 190 F.2d 649.

right.' 333 U.S. at page 13, 68 S.Ct. at page 368. The California Supreme Court declined to follow this and certain other federal precedents, saying that 'they point to no compelling solution in the present case.' People v. Michael, supra, 45 Cal.2d 751, 753, 290 P.2d 852, 854. Our conclusion that the mere fact of custody and handcuffs does not *per se* make a consent to a search involuntary, seems to be fore-shadowed by the Michael and Gorg rulings, supra." It is a dangerous process to reason from one combination of facts to another. The cited cases recognize that presence or absence of free consent is primarily one of fact, but some of them hold it to be absent as a matter of law in the circumstances present in the particular case.

That was the situation in the California case of People v. Wilson, 145 Cal.App.2d 1, 301 P.2d 974. In that instance defendant had been arrested for vagrancy when evidence of suspected bookmaking did not materialize. The court said, 145 Cal.App.2d at page 5, 301 P.2d at page 977: "The present case is a good example of overzealous law enforcement. The arrest for vagrancy was an obvious subterfuge to try and secure evidence of bookmaking, and when that arrest, and the search of the person, failed to produce evidence of that activity, the police officers determined to search defendant's automobile." It was further observed that the search "certainly was not for the purpose of finding evidence that defendant was a vagrant." 145 Cal.App.2d at page 6, 301 P.2d at page 977. The arrest itself having been held improper, the search was justifiable only on the basis of consent, which the officers claimed to have been given. Recognizing that the question of consent is ordinarily one of fact, the court held, 145 Cal.App.2d at page 7, 301 P.2d at page 978, that the circumstances there presented showed as a matter of law that there was "not a real or proper consent."

[4] We cannot do that in the instant case. We adhere to the views expressed in Lujan. The fact that defendant is under arrest at the time of giving consent is one of the factors, but not the only one, to be considered in determining whether it was freely given; the trial judge who sees and hears the witnesses is best able to pass upon the matter. In this case the decision was made by a veteran trial judge and we cannot see that he abused his discretion in weighing the evidence and in holding the consent to have been voluntarily given.

Judgment and order denying motion for new trial affirmed.

MOORE, P. J., and FOX, J., concur.



Keith REYNOLDS, a minor, by his guardian ad litem, William J. Reynolds, Jr., Plaintiff and Respondent,

v.

Melville E. WILLSON and Rayona E. Willson, Defendants and Appellants.*

Civ. 5360.

District Court of Appeal, Fourth District, California.

March 18, 1957.

Rehearing Denied April 17, 1957.

Hearing Granted May 15, 1957.

Child brought action against owners of swimming pool under the attractive nuisance doctrine for injuries sustained in fall in pool, which had only been partially drained during the winter, and the floor of which was muddy and slippery. The Superior Court of Fresno County, Milo Popovich, J., entered an order denying the motion of the owners of the pool for judgment notwithstanding a jury verdict for the child, and the owners of the pool appealed. The District Court of Appeal, Griffin, Acting P. J., held that evidence sustained verdict.

Order affirmed.

1. Judgment ⇐199(3.9)

Motion for judgment notwithstanding verdict may be granted only if motion for

* Opinion vacated 331 P.2d 48.

directed verdict should have been granted. West's Ann.Code Civ.Proc., § 629.

2. Judgment ⇐199(3.9)

The same rules apply to a motion for judgment notwithstanding the verdict as in the case of a motion for directed verdict.

3. Trial ⇐171

Power of court to direct a verdict is subject to the same limitations as its power to grant a nonsuit.

4. Trial ⇐139(1)

A nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff, if such verdict were given.

5. Trial ⇐142

Where it is manifest that reasonable minds can draw but one inference, and that inference points inevitably to insufficiency of plaintiff's evidence, the law will step in and deny recovery under the verdict.

6. Negligence ⇐39

Generally, a body of water, natural or artificial, such as a swimming pool, in and of itself, is not an "attractive nuisance" as that term is generally used, and will not ordinarily subject an owner to liability for trespassing children who are attracted thereto and are drowned, but there is an exception where there is a dangerous trap on the premises.

See publication Words and Phrases, for other judicial constructions and definitions of "Attractive Nuisance".

7. Negligence ⇐33(3)

Possessor of land is subject to liability for bodily harm to young children trespassing thereon, caused by a structure or other artificial condition which he maintains on land, if place is one on which possessor knows or should know that such children are likely to trespass, and condition is one of which possessor knows or should know and which he realizes or should realize involves unreasonable risk of death or serious bodily harm to such children, and children because of their youth do not discover condition or realize risk involved in intermeddling in it or in coming within area made dangerous by it, and utility to possessor of maintaining condition is slight as compared to risk to children.

8. Negligence ⇐134(3)

In action against owners of swimming pool by child under the attractive nuisance doctrine for injuries sustained in fall in swimming pool, which had only been partially drained during the winter and the floor of which was muddy and slippery, evidence sustained verdict for child.

Leonard, Hanna & Brophy, by Donald R. Brophy, San Francisco, Stammer, McKnight & Barnum, and Wild, Christensen, Barnard & Wild, Fresno, for appellants.

Bruce Walkup, San Francisco, Dubsick & Helon, by Nicholas H. Dubsick, and William B. Boon, Fresno, for respondent.

GRIFFIN, Acting Presiding Justice.

[1–5] Since defendants have appealed only from the order denying their motion for judgment notwithstanding the verdict, the disposition of this appeal is covered by certain prescribed principles. It may be granted only if the motion for directed verdict should have been granted Code Civ. Proc.Sec. 629. The same rules apply as in the case of a motion for directed verdict. Washer v. Bank of America, 87 Cal.App.2d 501, 505, 197 P.2d 202. The power of the court to direct a verdict is subject to the same limitations as its power to grant a nonsuit. Pellett v. Sonotone Corporation, 26 Cal.2d 705, 708, 160 P.2d 783, 160 A.L.R. 863. A non-suit or directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination

that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff, if such verdict were given. In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768. Where, however, it is manifest that reasonable minds can draw but one inference and that inference points inevitably to the insufficiency of plaintiff's evidence, then the law will step in and deny a recovery under the verdict. Washer v. Bank of America, supra.

William J. Reynolds, Jr., as guardian ad litem of his minor son Keith Reynolds, brought this action for damages for personal injuries to the son on January 31, 1953, he having climbed down into and slipped in a partially filled private swimming pool maintained by defendants upon their adjoining residential property. A trial by jury resulted in a judgment for plaintiff for $50,000. No complaint is made as to the amount of the judgment. Keith, then aged two years and three months, lived with his parents and older brothers and sisters at 4140 N. Wilson Avenue (S. E. Corner of Wilson and Buckingham Way) in the Fig Garden residential area in Fresno. Defendants lived at 4137 Van Ness Boulevard (S. W. Corner of Van Ness and Buckingham.) Buckingham Way is the cross-street between Van Ness and Wilson, and it runs in an East-West direction. Van Ness and Wilson both run north and south. The rear or most easterly property line of the home of Keith's parents was also the rear and most westerly property line of defendants' property. The two properties were separated by a solid masonry wall about five feet high, six inches thick and 162 feet in length. It extended east on the Buckingham side of defendants' residence toward Van Ness for about 80 feet. There then is an opening, 10 ft. 6 inches wide for a paved driveway or side entrance to the garage, yard and pool area. The wall then continues easterly toward Van Ness for 49 feet and thence south to the corner of the house. Near the house is a 3-foot opening for a gate. On the opposite or south side of the lot the fence is of about equal length and height. The Willson residence occupies the front portion of the lot, which lot measures approximately 280 feet by 140 feet facing east on Van Ness. A large 2-story garage occupies the northwest corner of the lot at the rear and a concrete swimming pool, about 20 by 40 feet, graduated from 3 feet to 9 feet 4 inches in depth, is located in the southwest corner at the rear of the lot. There is a considerable amount of shrubbery and trees on the property. As thus enclosed, the view of the swimming pool is obstructed to the height of the fence and by the length and width of the garage to persons passing along Buckingham, with the exception of the 10-foot 6-inch passageway. The Willsons' home and swimming pool were built in 1932, and they moved onto the property in April, 1951. The Reynolds family moved into their home in 1950. That district, which was previously considered urban, has been built up to a great extent with large residences. There is a grade school about four blocks east of Van Ness and 50 to 60 children, ranging in age from two to ten years, lived in the surrounding neighborhood at the time. Many played in the streets and on the various lots and some walked by defendants' residence on Buckingham on their way to school. It appears that the Willsons and Reynolds were neighboriy and invitation was extended to the Reynolds and their children to use the swimming pool in the warm season, but with the admonition that some adult must be present on all such occasions. Evidently they and other neighbors took advantage of this invitation with the conditions attached. This invitation was extended from one season to another. Keith was taken to the pool by his father or mother two to four times a week during the 1951 season, and the children also played on the grass and mound surrounding the pool. At the close of the 1952 season the water in the pool was only partially drained, apparently for preservation of the concrete. The two previous winters it had been fully drained. On the date of the injury it was filled over the concrete floor up to the steps leading down in the shallow end. Near the center of the floor was a rather sudden decline to

deeper water. It appears that in the four winter months, as thus partially filled, it had accumulated much filth and dirt, and algae had formed on the surface of the concrete floor, causing the lower portion to become very slippery and dangerous to anyone who would step on it. Photographs reflecting this condition are in evidence showing the boy's footprints in the mud or dirt, leading from the steps. They indicated he was running or walking around in the shallow water, and then the footprints led to the center portion where the sudden decline commenced or where the "pool drops off at a rapid angle". A scuff mark is indicated at that point and no further footprints are shown.

On the day of January 31, 1953, Mrs. Reynolds left Keith in charge of her maid at her home. He became interested in the construction of a building across Buckingham. He was put to bed at 3 p. m. and when the maid was busy on the telephone, the boy climbed out of the low French window of the bedroom and disappeared. The maid looked around the neighborhood for him and at the new building across the street, but was unable to find him. Later, Mr. Reynolds came home, was informed of the facts and he immediately went to the Willsons' home and the swimming pool and found the boy face down in the water in the pool. He endeavored to lift him out but he slipped and almost fell because of the slippery condition of the pool. He finally pulled him out and administered artificial respiration. He injected adrenaline directly into the boy's heart. About 30 minutes later very weak heartbeats were heard. The boy was unconscious for six days and at the end of ten days was completely paralyzed. There was brain damage and he never became normal.

It is defendants' contention that the recovery in this action cannot be supported by the doctrine or theory of "attractive nuisance", an exception to the general rule of a landowner's liability or duty to a trespasser, or any other theory, citing Baugh v. Beatty, 91 Cal.App.2d 786, 205 P.2d 671; and Copfer v. Golden, 135 Cal.App.2d 623, 288 P.2d 90.

[6] It is the general rule accepted in California that a body of water, natural or artificial, such as a swimming pool, in and of itself, is not an attractive nuisance as that term is generally used, and will not ordinarily subject an owner to liability for trespassing children who are attracted thereto and are drowned. Wilford v. Little, 144 Cal.App.2d 477, 301 P.2d 282.

Ward v. Oakley Co., 125 Cal.App.2d 840, 271 P.2d 536, involved the death of children while wading in defendants' slough. This subject, and the several late cases involving that doctrine, were fully discussed in that case and need not be here repeated. Some exceptions are there noted, particularly Sanchez v. East Contra Costa Irrigation Co., 205 Cal. 515, 518, 271 P. 1060, where defendant company maintained a canal and a syphon leading from it. A child was playing at the edge of the canal, fell into it and then into the syphon, which could not be seen because of the muddy water. A recovery was allowed, not because the canal was an attractive nuisance but upon the theory of the concealed danger of the syphon and that the shallow water in the canal was the "bait of the trap". It stated that the child assumed the risk of the open obvious danger incident to the canal but did not assume the risk of the unknown concealed and unguarded danger, i. e., the concealed syphon. Also discussed was Faylor v. Great Eastern Quicksilver Mining Co., 45 Cal.App. 194, 187 P. 101, 103, where it was held that the rule of nonliability was not to be applied in "instances where the owner maintains on his land something in the nature of a trap, or other concealed danger, known to him, and as to which he gave no warning to others". Betts v. City and County of San Francisco, 108 Cal.App.2d 701, 239 P.2d 456, relied upon by defendants, is also cited in Ward v. Oakley, supra. There a seven-year-old boy was drowned in a public park reservoir when he slipped down a steep, mossy, wet spillway into the water. Plaintiff sought

recovery under the hidden or concealed danger theory. The appellate court reversed the judgment on the ground that the hazard causing death was an open source of danger and the perils thereof should have been obvious to the boy.

In Lake v. Ferrer, 139 Cal.App.2d 114, 293 P.2d 104 (Hearing in the Supreme Court denied) a child two and a half years old went onto a neighbor's land, being directed there by a pool and a lustrous metallic ladder rising about three feet above the level of the pool, and was drowned. It was there held that the attractive nuisance doctrine had no application under the facts; that no matter how young a child may be, its age will not cast its care upon a stranger nor give rise to a duty where none otherwise would exist. It then applies the rule adopted in Whalen v. Streshley, 205 Cal. 78, 81, 269 P. 928, 929, 60 A.L.R. 445, to the effect that "Unless the case falls within the doctrine of the turntable cases—a doctrine which this court and others have refused to extend—the plaintiff may not recover * * *." Another late case involving swimming pools is Wilford v. Little, supra. There, the children could see the swimming pool and diving board from adjacent property. A four and a half year old boy was attracted thereto by the diving board and pool. The lad jumped or fell from the diving board and drowned. It was held that the attractive nuisance doctrine was not applicable.

In King v. Simons Brick Co., 52 Cal.App. 2d 586, 126 P.2d 627, a child, aged 12 years, was drowned in an unguarded pool of water in a clay pit dug by defendant on its own property adjacent to a populated area. After reviewing the several cases, beginning with Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598, to that date, it held that the doctrine of attractive nuisance did not apply to the facts and that it is only in those cases where a dangerous trap on the premises, otherwise safe, is concealed from view or when an artificial device attractive to children is left exposed and upon premises accessible, open and unguarded, that the owner is liable for damages resulting by reason of injuries to children who are attracted to the premises by such contrivances. From these authorities we must reasonably conclude that the swimming pool, in and of itself, was not an attractive nuisance. The pivotal question is whether plaintiffs have shown sufficient facts or circumstances which would bring them within the exception noted.

[7] The rule in California is stated in Copfer v. Golden, 135 Cal.App.2d 623, 288 P.2d 90, 92. There it quotes from Restatement of the Law of Torts, Sec. 339, p. 920, and says:

> "'A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if
>
> "'(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and
>
> "'(b) the condition is one of which the possessor knows or should know and which he realizes or should realize is involving an unreasonable risk of death or serious bodily harm to such children, and
>
> "'(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and
>
> "'(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.'"

See also Long v. Standard Oil Co., 92 Cal. App.2d 455, 207 P.2d 837, 842, where a four-year-old child fell into a ditch excavated by defendant for repair of its pipeline near a housing project and drowned. Muddy water had partially filled the excavation and a judgment for damages was sustained. It quotes the Comment on Clause (c) in Restatement of the Law of Torts above mentioned, page 925, where it is said:

"A possessor of land is * * * under a duty to keep so much of his land as he knows to be subject to the trespasses of young children, free from artificial conditions which involve an unreasonable risk of death or serious bodily harm to them. This does not require him to keep his land free from conditions which even young children are likely to observe and the full extent of the risk involved in which they are likely to realize. The purpose of the duty is to protect children from dangers which they are unlikely to appreciate and not to protect them against harm resulting from their own immature recklessness in the case of known danger * * *."

It cited Blaylock v. Jensen, 44 Cal.App.2d 850, 113 P.2d 256, 257, where, in upholding a judgment for plaintiff it is said:

"The conclusion of the trial court may be sustained under the general rule that a landowner may not construct or maintain a trap or pitfall into which he knows or has reason to believe that a trespasser will probably fall. The liability of the owner in such cases depends upon the circumstances surrounding the maintenance of the 'trap', the extent of the danger involved and the comparative ease or difficulty of preventing the danger without disturbing or impairing the usefulness of the thing which is claimed to be a trap or pitfall."

Marino v. Valenti, 118 Cal.App.2d 830, 259 P.2d 84, 95, involved an eleven-year-old child trespassing on defendant's property, entering an old shack and finding dynamite caps, the explosion of which resulted in injuries. The court, in discussing the question as to whether it was the shack or the caps which constituted the attractive nuisance, held that where a trespassing child is injured, "whether we look upon caps as an attraction within an attraction or as a concealed highly dangerous condition, a 'trap', on the premises", the liability is measured by the test indicated in section 339 of Restatement of the Law of Torts. See also Lopez v. Capitol Co., 141 Cal.App.2d 60, 66, 296 P.2d 63.

Considering the facts and allowable inferences and deductions from the evidence in the instant case, in the light of that section, it appears that the swimming pool, partially filled with water, with its floor in the muddy and slippery condition described, particularly at the sudden decline of the floor of the pool at the point indicated, was "(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass", particularly since the Reynolds had accepted the defendants' invitation to come upon and use the swimming pool area on previous occasions subject to having an adult present. It is quite apparent that the injured child did not have knowledge of the exception. There is evidence of a statement by Mrs. Willson that she knew other children had entered the pool in the past when no adult was present, and that she was quite shocked to find them there. There is other evidence that this swimming pool area was partially visible to children passing by on the street; that on one occasion Keith was found wandering in defendants' yard alone, was returned to his mother, and was found headed that way on another occasion. As to subdivision (b), that defendants knew or should have known or realized the condition, as described, might involve serious bodily harm to such trespassing children, defendant himself testified he knew of the "slippery nature of the sedimentary deposit on the bottom of the pool" and would not expect a two or three year old child to have the knowledge and appreciation which he did of that condition. That it was muddy and quite slippery and would be an unreasonable risk for a child or grown person to walk upon it cannot be well disputed. As to subdivision (c), that the child, two years and three months old, because of his youth did not discover or realize the risk involved in coming within the area made dangerous by it, is sufficiently established to support such a finding. Copfer v. Golden, supra, 135 Cal.App.2d at page 628, 288 P.2d at page 93; Prosser on

Torts, p. 617, sec. 77. As to subdivision (d), concerning the requirement that "the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein", plaintiffs claim (1) that the pool could have been emptied as it had been in previous years, or cleaned and the water replaced without any appreciable cost; (2) that the entire pool could have been fenced; and (3) that a gate could have been installed across the 10½ foot opening at a very small cost.

As to claims (2) and (3) our attention has not been called to any statutory requirement that swimming pools, as such, in Fresno, must be fenced against children or that inconvenient gate enclosures in driveways must be maintained for this purpose. The cases cited are not this far reaching in their requirements as to swimming pools.

[8] There may be some merit to the first claim. The general principle of law running through the several cases is that the questions presented under Restatements, particularly subdivisions (a), (b), and (c) and (d) above specified, and whether there was a concealed dangerous structure or artificial condition or "trap" maintained upon the land are generally questions of fact to be determined by the jury, and if there is sufficient evidence supporting such a finding an appellate court is bound by the recognized rule. While the question as to whether the evidence of the maintenance of the condition in the pool at the time, as described, constituted a dangerous condition or "trap", is a close one, we must assume that the jury was fully and properly instructed on this subject. We conclude that from the evidence and allowable inferences the jury was justified in so finding. Copfer v. Golden, supra; Faylor v. Great Eastern Quicksilver Mining Co., 45 Cal.App. 194, 204, 187 P. 101; Sanchez v. East Contra Costa Irrigation Co., 205 Cal. 515, 271 P. 1060; Marino v. Valenti, 118 Cal.App.2d 830, 850, 259 P.2d 84; Montgomery Ward & Co. v. Ramirez, Tex.Civ.App., 127 S.W. 2d 1034, 1036; Lambert v. Western Pacific Railroad Co., 135 Cal.App. 81, 89, 26 P.2d 824; Blaylock v. Jensen, 44 Cal.App.2d 850, 113 P.2d 256; Long v. Standard Oil Co., 92 Cal.App.2d 455, 207 P.2d 837; Eaton v. R. B. George Investments, Inc., 152 Tex. 523, 260 S.W.2d 587.

Order affirmed.

MUSSELL, J., concurs.

BARNARD, P. J., being disqualified, did not participate herein.



149 Cal.App.2d 593

Elmer MARTIN, Plaintiff and Respondent,

v.

William CHERNABAEFF, Susie Chernabaeff, et al., Defendants and Appellants.

Civ. 5374.

District Court of Appeal, Fourth District, California.

March 29, 1957.

Action by broker to recover commission from purchasers who allegedly agreed to pay commission out of money paid into escrow by them. The Superior Court, Kern County, Robert B. Lambert, J., rendered judgment for plaintiff and the defendants appealed. The District Court of Appeal, Griffin, J., held that evidence supported finding that vendors and purchasers conspired to defraud broker of commission by consummating the sale independently of broker.

Affirmed.

1. Brokers ⇐48

Where real estate broker, as agent of owners, within life of contract, produces bona fide purchaser who is ready, willing and able to buy, and obtains a binding and valid contract on the terms described in the written agreement, broker is entitled to recover commission from owners.

2. Appeal and Error ⇐1010(1)

District Court of Appeal is bound by finding which has evidentiary support.

3. Brokers ⇐86(1)

In broker's action to recover commission from purchasers, evidence supported finding that purchasers' agreement to pay commission was not conditioned on broker procuring a loan for purchasers.

4. Pleading ⇐8(15)

Allegations of fraud in general terms are merely allegations of conclusions of law and present no issuable facts.

5. Conspiracy ⇐18

In broker's action to recover commission from purchasers who had allegedly agreed to pay commission out of money paid into escrow by purchasers, complaint sufficiently stated cause of action on theory that vendors and purchasers conspired to defraud broker by consummating the sale independently of broker.

6. Conspiracy ⇐19

In broker's action to recover commission from purchasers who allegedly agreed to pay commission out of money paid into escrow by them, evidence sustained finding that vendors and purchasers conspired to defraud broker by consummating the sale independently of broker.

Siemon & Siemon, Bakersfield, for appellants.

Mack, Bianco, King & Eyherabide, Bakersfield, for respondent.

GRIFFIN, Justice.

This is an action to recover a real estate commission. The original complaint alleged that plaintiff, as a real estate broker, entered into the services of defendants, at their request, to negotiate for them the purchase of a 300-acre tract of land owned by one Doberstein at $35,000 cash; that defendants were to pay plaintiff's commission in the sum of $1,750; and that plaintiff procured the agreement of all parties on the terms set forth. It then alleged that plaintiff duly performed all the conditions of the agreement on his part to be performed and that the sum of $1,750 was due and unpaid.

After denying the allegations generally, defendants set forth certain claimed defenses to said cause of action, namely, that they never entered into any agreement in writing, authorizing or employing plaintiff as agent or broker to purchase said real estate for them, for a commission or otherwise; that the $1,750 mentioned was to become payable only upon the purchase by defendants of the property described; that defendants did not purchase it but it was subsequently sold to defendants' son, Alex, by Doberstein; that it was orally agreed between plaintiff and defendants that defendants would pay said commission *only* upon the condition that plaintiff procure a loan for defendants with which proceeds defendants were to pay the purchase price; that plaintiff never procured such a loan or any loan, and that the transaction failed because of such fact; that after the time mentioned in the escrow had expired, February 5, 1951, the sellers withdrew their escrow and sold the property to defendants' son, and accordingly no commission was due under the agreement. Judgment was entered in favor of plaintiff for $1,750. The court made findings generally in accordance with the allegations and prayer of plaintiff's complaint without any specific finding as to whether the allegations contained in defendants' answer were true or untrue. On appeal from that judgment this court, in Martin v. Chernabaeff, 124 Cal. App.2d 648, 269 P.2d 25, held in effect that there was sufficient evidence, by written memorandum, to support the court's finding that Martin was acting as Doberstein's authorized agent in effecting the sale, and that defendants were to pay any commission due plaintiff; that defendants authorized, acknowledged and ratified this agreement and authorized the agent to buy or sell the real estate for a commission; that they directed the escrow agent to pay the commission from the proceeds of the sale; and that there was a sufficient compliance

with section 1624, subdivision 5 of the Civil Code in this respect. For further particulars of the evidence produced and conclusions reached as to the transaction see statement of the case in the former appeal. It is quite lengthy and involved and will not be here repeated. This court reversed the former judgment mainly because there was no finding as to whether the claimed defenses above set forth in defendants' answer were true or untrue. An amendment of the complaint was permitted to allow plaintiff to plead fraud and specify whether he was relying upon the allegation of full performance on his part or whether he was prevented or excused from performing by the fraud or actions of defendants. After reversal, plaintiff amended his complaint alleging generally that defendants and Doberstein entered into a conspiracy to unlawfully cheat, wrong and defraud plaintiff of his commission of $1,750; that pursuant to and in furtherance of said conspiracy defendants deposited $10,000 with Doberstein on account of the purchase price of said property, and on April 16, 1951, the above-mentioned escrow was canceled by the parties thereto; that pursuant to and in furtherance of said conspiracy and simultaneously with the cancellation of said escrow, another escrow was thereupon entered into with the title company wherein the Dobersteins agreed to sell said property to Alex Chernabaeff and his wife; that the transfer pursuant to this agreement was for the benefit of William and Susie Chernabaeff; that said transfer was for the same price originally agreed upon save and except the $1,750 commission payable to plaintiff; that thereafter and in furtherance of said conspiracy, Alex and his wife transferred said property to William and Susie Chernabaeff. Demurrers to this amended complaint, both general and special, were overruled. After a short argument the respective parties agreed to and did submit the case upon the former transcript, records and exhibits received in evidence in the former proceedings and the trial court then found generally in favor of plaintiff and additionally found, with considerable amplification, that defendants and Doberstein did conspire to defraud plaintiff of his commission in the manner indicated by the amended complaint, and particularly found that the consummation of the sale failed solely because of the conspiracy of defendants and Doberstein. It then found as untrue, in some detail, all of the claimed defenses set forth in defendants' answer. Minute objections were made to these findings, and the amended complaint and these objections were again urged on the motion for a new trial and are again urged on this appeal. Judgment was entered in favor of plaintiff for the same amount. In addition to the question of the sufficiency of the pleadings and findings, the principal question here presented is whether the evidence justifies the findings made.

The claim is that no actionable conspiracy or fraud on the part of defendants was shown or pleaded; that there was no showing of any act or conduct of these defendants which prevented or excused plaintiff from doing anything; that the seller had the unquestionable right to cancel the escrow at the time it was canceled by him; that defendants were under no obligation to pay plaintiff a commission; that the commission was to be paid from the purchase price money paid into the escrow and that the same was not paid; that the previous decision of this court is conclusive as to certain issues; that defendants were not obligated to plaintiff to complete the purchase through the first escrow, and accordingly, in the absence of such purchase, plaintiff would not be entitled to a commission; that there was no showing that the action of defendants in canceling the escrow violated any of plaintiff's contractual rights; that the evidence shows, without dispute, that the purchase of the property by the son in the second escrow was for his sole benefit; that the findings as to the special defenses are contrary to the weight of the evidence, particularly in holding that the payment of the fee alleged was not dependent on plaintiff's securing a loan for defendants

to complete the deal; that the evidence conclusively shows the purchase loan was never secured and the deal was abandoned; that the escrow instructions were not binding after February 5, 1951, and accordingly the entire transaction and agreement to pay a commission was properly canceled at that time.

It is plaintiff's claim that the evidence supported the findings in all respects; that direct proof of the conspiracy was next to impossible but the inference of a conspiracy and fraud, which was drawn by the trial court, was justified; that Doberstein had fully complied with his escrow instructions and all that was necessary for defendants to do was to pay the money into the escrow, and had they done so the transaction would have been consummated since it was stipulated that, at the time, defendants had the financial ability to carry it out; that the purchase price, in the transaction whereby defendants' son took title from Doberstein, was exactly the same as in the transaction whereby defendants were to buy the property, with the exception of the payment of the $1,750 commission, and that within nine months the son transferred the property to defendants by deed, without revenue stamps attached; that the purpose of this "Round Robin" was for defendants to acquire the property without the payment of the commission, and the only purpose of the transaction, in concert with Doberstein, was to defraud plaintiff of his commission.

In considering the question of finding a purchaser, not only ready and willing but financially able to live up to the terms offered by the principal, it has been said that though the broker procures an acceptance of the principal's offer, if he accepted this conditioned upon the buyer's being able to raise money to pay the purchase price, he had not procured a purchaser ready, willing and able to purchase; that the proposed purchaser need not have in his immediate possession, or to his credit in the bank all of the money required to close the transaction; that he is financially able if he can command the necessary funds to close the deal within the time required, or if no time is specified, within a reasonable time, as where he is financially worth enough to command such funds at the proper time or where he has made arrangements for such funds to be available, although part of them are to be secured on the purchase property itself; but where an owner of property accepts the offer made by a person produced by the broker employed to make the sale, he thereby admits the readiness, willingness and ability of the purchaser to consummate the sale; and that the right of a broker to his commission is not affected by the failure of either party to carry out the agreement. Meyer v. Selggio, 80 Cal.App.2d 161, 181 P.2d 690; 9 Cal.Jur.2d p. 246, sec. 82. It is not here indicated that defendants were financially unable to live up to the terms of the agreement. In fact defendants' counsel stipulated that defendant was financially able to complete the agreement.

[1–3] The principal question now involved, under the present pleadings and findings, is whether plaintiff, as agent of the Dobersteins, within the life of the contract, produced a bona fide purchaser, ready, willing and able to buy and obtained a binding and valid contract on the terms described in the written agreement. If so, he would be entitled to recover a commission from the seller. Twogood v. Monnette, 191 Cal. 103, 215 P. 542; Martin v. Chernabaeff, supra, 124 Cal.App.2d at page 654, 269 P.2d 25; 9 Cal.Jur.2d 240, 241, sec. 79, and cases cited. If plaintiff was entitled to a commission from the seller then, by the agreement, the buyers agreed to pay that commission out of the money paid into escrow by them. As to the first escrow, apparently the sellers fully complied with their part of the agreement and placed the necessary deeds in escrow to transfer title to the buyers. The evidence is in conflict as to whether defendants were to make the payment of the purchase price and plaintiff was to be paid his real estate commission conditioned on his ability to secure a loan for the buyers. The trial court has now, on a retrial, definitely found

that no such condition was attached. Although the evidence might well otherwise indicate, that finding has evidentiary support and we are bound by it. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. Had the purchasers placed the amount agreed upon in the escrow, as required, plaintiff would have been entitled to his commission in the amount agreed upon to be paid from money deposited in escrow. Defendants would have been required to pay it. We must therefore assume, as found by the court, that plaintiff, at the time the agreements were signed, had performed all conditions required of him, and the buyers and sellers could not, in concert, for the purpose of effecting a sale of the said property to the same parties with intent to defraud, mutually abandon the contract and sale without the consent of the agent, without assuming liability for the commission then due under the agreement. 9 Cal. Jur.2d p. 260, sec. 92; Hill v. McCoy, 1 Cal.App. 159, 81 P. 1015; Coulter v. Howard, 203 Cal. 17, 262 P. 751; Calhoun v. Downs, 211 Cal. 766, 297 P. 548. See also Pryor v. McGuire, 59 Cal.App. 234, 210 P. 532, where it was held that where the seller and the buyer were for the first time brought together by the broker, and a sale was subsequently consummated by such parties, independently of the broker, and the broker had not abandoned his agency and the agency had not been revoked, the broker was the procuring cause of the sale. In the instant case, although there was evidence that the agent, as well as the buyer and seller, had abandoned the sale, the court found otherwise on sufficient evidence.

[4–6] The next question is whether the claimed fraud, as found, is sufficiently pleaded and supported by the evidence. It is true that allegations of fraud in general terms are merely allegations of conclusions of law, and present no issuable facts. Meyer v. Selggio, 80 Cal.App.2d 161, 181 P.2d 690. The allegations in respect to the claimed fraud are set forth above, and incorporated therein by reference are certain allegations of the original complaint which include many of the facts related in the former opinion in this case. It is therein claimed that by virtue of these facts defendants and the sellers conspired together to defraud plaintiff of his commission due under the agreement. We conclude that the allegations set forth in the complaint and the findings based thereon are sufficient. Although a contrary finding might well have been indicated, there is sufficient evidence to support the ultimate findings of the court which recite in some detail the facts heretofore related, and conclude that thereby plaintiff did procure a purchaser ready, willing and able to purchase the property according to the terms agreed upon; that by virtue of the subsequent transactions the purchase price was paid into escrow by defendants; that title ultimately was placed in defendants through the nominal purchaser, the son of defendants; and that accordingly, plaintiff's commission of $1,750 agreed upon by defendants, was due and payable by them. Although there is no direct proof of such fraud or conspiracy it may be inferred from the facts established. Johnstone v. Morris, 210 Cal. 580, 590, 292 P. 970; McPhetridge v. Smith, 101 Cal.App. 122, 142, 281 P. 419; Coulter v. Howard, 203 Cal. 17, 23, 262 P. 751; Dandini v. Dandini, 120 Cal.App.2d 211, 214, 260 P.2d 1033; Biggs v. Tourtas, 92 Cal.App.2d 316, 206 P.2d 871. This sufficiently disposes of the real issues and questions here raised on appeal.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

In the Matter of the ESTATE of Edgar Laurence DOW, alias, Deceased.

Maxine Patricia HUTCHINSON, Appellant,

v.

Maxine B. DOW, Individually and as Administratrix with the Will Annexed of the Estate of Edgar Laurence Dow, alias, deceased, Respondent.

No. 17055.

District Court of Appeal, First District, Division 1, California.

March 11, 1957.

Rehearing Denied April 10, 1957.

Hearing Denied May 8, 1957.

Proceedings for settlement of third, fourth, and final accounts of administratrix and for final distribution, and on a petition for partial distribution. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered a decree of settlement of accounts in question and of final distribution and denied petition of decedent's daughter for partial distribution and she appealed from certain portions of such decree and order. The District Court of Appeal, Bray, J., held, inter alia, that where decedent's daughter received by decree of distribution everything she could obtain by reversal of order denying partial distribution, appeal from order denying daughter's petition for partial distribution became moot and would be dismissed.

Order in accordance with opinion.

See also 308 P.2d 488; 308 P.2d 489; 308 P.2d 492.

1. Wills ⇐641, 656

Although a testator is free to dispose of his property on whatever conditions he wishes to impose so long as the conditions are not prohibited by law or contrary to public policy, and a provision in a will providing for forfeiture of a legacy or devise in the event of a contest of the will by a legatee or devisee is binding, and such a no-contest provision in a will is not against public policy and must be enforced as written, such a clause is to be strictly construed.

2. Wills ⇐665

Where testator's widow and beneficiary under his will brought an action in which she contended that all property of testator was community property but did not pursue such contention far enough to get a court determination, but waived such contention, and as a result of her action obtained considerable assets for the estate, such action was not in violation of no-contest provision in testator's will, and did not preclude her from taking under the will.

3. Wills ⇐665

Where widow of testator, who was a beneficiary under his will, brought an action against his estate for value of certain stock which was widow's separate property but had been converted by testator to his own use, such action was not equivalent to contesting testator's will and did not violate no-contest clause of his will, and did not preclude widow from taking under such will.

4. Wills ⇐665, 792(1)

Widow-beneficiary's conduct in applying for and receiving family allowances did not constitute an election by widow to stand on her rights outside testator's will rather than to take through it, nor did her action in applying for such allowances violate the no-contest clause of testator's will, and therefore her action did not preclude her taking under the will.

5. Jury ⇐12(3)

Where there were no questions of fact to be determined in heirship proceedings, but merely questions of law, probate court properly denied demands for a jury trial.

6. Wills ⇐665

In proceeding for final distribution of an estate, evidence sustained finding that widow-beneficiary of testator did not violate no-contest clause of testator's will.

7. Executors and Administrators ⇐454

Mere failure of judgment creditor of estate to file a transcript of the judgment in the estate as required by statute within five years after same was obtained did not

outlaw the judgment or render it uncollectible, in view of fact that a copy of the judgment was filed in the estate file, and everyone connected or interested in the estate knew of existence of such judgment. West's Ann.Prob.Code, § 730; West's Ann.Code Civ.Proc., § 685.

8. Executors and Administrators ⇐454

Purpose of statute requiring filing of a certified transcript of a judgment against an estate is to protect executor or administrator of the estate, the creditors and other interested persons from judgments which are unknown at the time the estate, by payment of claims, distribution or otherwise, disposes of property which would have been applied to the judgment, were its existence made known. West's Ann.Prob. Code, § 730.

9. Executors and Administrators ⇐501

Where statutory commissions allowed administratrix failed to credit prorated commissions theretofore paid her predecessors, amount payable to her would be reduced accordingly.

10. Executors and Administrators ⇐501

Evidence supported valuation of certain stock upon which administratrix' statutory commissions were based.

11. Executors and Administrators ⇐497, 501

Allowance of extraordinary fees to an administrator is a matter of discretion with trial court and is not to be interfered with on appeal except for abuse, and such discretion not only vests trial court with power to determine whether the character of the services is such as to warrant extra compensation, but to determine the amount.

12. Executors and Administrators ⇐501

In proceeding for settlement of final account of administratrix, record failed to establish that trial court abused its discretion in fixing administratrix' statutory commissions.

13. Executors and Administrators ⇐501

Where allowance of attorneys' fees to administratrix for extraordinary services included services rendered for administratrix personally and not for the estate, District Court of Appeal, based on its own experience, and facts and circumstances as they appeared in the record, would fix such attorneys' fees at a figure lower than that allowed by trial court.

14. Attorney and Client ⇐140

Judges of District Court of Appeals have a fair understanding of value of attorneys' services, and may use such understanding in determining what is a reasonable fee.

15. Executors and Administrators ⇐216(2)

In proceeding for settlement of final account, record did not establish that trial court abused its discretion in granting an attorney $500 for his services in representing a beneficiary under testator's will.

16. Executors and Administrators ⇐296

Mere fact that a supplemental account would necessarily have to be filed dealing with fiscal matters subsequent to the ones last accounted for in final account due to receipts and disbursements after date of final account did not preclude a distribution subject to such supplemental account.

17. Executors and Administrators ⇐316

Where trial court, on petition for partial distribution, found that distribution of a certain number of shares of stock held by the estate could be made without injury to the estate or persons interested in it, such distribution should have been made, notwithstanding fact that a distribution of a greater number of shares of such stock might have left the estate in such a situation that if a co-beneficiary had not forfeited her interest, that interest might be required to bear more than its fair share of the debts and charges of the estate.

18. Executors and Administrators ⇐314(12)

Where testator's daughter received, by decree of distribution, everything she could obtain by a reversal of order denying partial distribution, appeal from order denying daughter's petition for partial distribution became moot and would be dismissed.

Hutchinson & Quattrin, William A. White, San Francisco, for appellant.

Goldstein, Barceloux & Goldstein, San Francisco, for respondent.

BRAY, Justice.

Appellant has taken two appeals: (1) from certain portions of the decree of settlement of the third and the fourth and final accounts of respondent and of final distribution; (2) from certain portions of the order denying her petition for partial distribution.[1]

Questions Presented.[2]

First appeal.

1. Did respondent, widow of the decedent, violate the no-contest clause of the will?

2. Alleged jurisdictional defects: (a) jury trial; (b) findings.

3. Had the "Sutro" judgment outlawed?

4. Error in commissions and fees.

5. Alleged inadequacy of fees to appellant's attorney.

6. The final account generally.

Second appeal.

Did the pendency of a proceeding to determine that Mrs. Dow had forfeited her interest in the estate justify denial of partial distribution to appellant?

First Appeal.

1. No-contest.

The will bequeathed to respondent wife certain personal property, and to testator's two sons by a former marriage certain articles of personal ornament. "And I further declare that any and all securities or property that I have given or may give prior to may death to my wife or any one of my children evidenced by a transfer of such securities or property shall be conclusive evidence of their ownership, and shall not be considered a part of the Trust hereinafter created.

"*Fourth:* I herewith and hereby declare that all other property of every kind and character, and all the estate whereof I die possessed is separate property accumulated, owned and possessed by me prior to my present marriage, or is the increase, profits and accumulations that have been directly derived from such property, and the increase in value of securities owned by me or from the investment or reinvestment of my separate funds or property owned or possessed prior to my said marriage."

It then states that since his marriage his only income other than that derived from his separate property has been his salary of $12,000 as president of River Farms Company of California and that the living expenses of himself and family have averaged approximately $25,000 per year. Testator devises and bequeaths to a trustee all of his estate of every description wherever situated "and however held which is or may be subject to my testamentary disposition at the time of my death" (excepting the personal property bequests above mentioned). The will sets forth the power of the trustee and the terms of the trust, primarily that the income shall be used for the joint support and benefit of appellant and respondent, with a provision that his two sons would participate if the income exceeds a certain amount annually. So far as concerns the questions here, the trust was to terminate on January 1, 1952, at which time the trust

1. This, and two companion appeals this day decided by this court, 308 P.2d 488, 489, are additional proceedings in the long and acrimonious litigation between appellant and respondent, respectively the daughter and the widow of the decedent. For the history of the estate and the litigation see In re Estate of Dow, 1949, 91 Cal.App.2d 420, 205 P.2d 698; In re Estate of Dow, 1953, 120 Cal.App.2d 296, 260 P.2d 970; Dow v. Superior Court, 1956, 140 Cal.App.2d 399, 297 P.2d 30; and In re Estate of Dow, Cal.App.1956, 305 P.2d 205, modified, hearing granted by Supreme Court.

2. No good reason being shown therefor, appellant's request in her closing brief that this court strike certain pages from respondent Mrs. Dow's brief is denied.

estate was to go one-third to appellant, one-third to respondent and one-sixth to each of the two sons. The no-contest clause (paragraph twenty-first) reads in part as follows: "I hereby declare, and it is my will, that if any of the beneficiaries herein named shall contest or question this my will or cause it to be contested or questioned in any court then, and in such event, I hereby revoke any devise or bequest herein made to such beneficiary or beneficiaries, and such beneficiary or beneficiaries" shall receive the sum of $1 each. There were many other provision in the will, which was a lengthy one. They will be referred to hereafter if material to the questions presented.

There are three acts of respondent which appellant contends violated this clause and constituted an election to take community or other statutory rights in lieu of the benefits of the will. 1. *The so-called "community property" action* (Dow v. Dow, No. 233,370, San Francisco Superior Court). Mrs. Dow in 1932 sued the executor of the Dow estate, Edgar L. Dow, Jr., Marian F. Dow, his wife, Gerald H. Dow, and American Trust Company, claiming that the gifts to the sons, to Marian and to American Trust Company in trust for the sons, made prior to testator's death, and all of the property in the estate, were community property of herself and the decedent, to one-half of which plaintiff was entitled. The administrator of the estate [3] and Edgar filed answers, claiming that all of the property mentioned in the complaint was separate property of the decedent. The administrator alleged that it belonged to the estate. Edgar alleged that all such property as well as stocks and bonds in Edgar's name and in Sutro & Company and 3093 shares of River Farms Company of California stock, had been assigned by decedent to Edgar in trust, subject to an assignment thereof from Edgar to decedent to be used only in the event Edgar predeceased his father.[4] November 16, 1935, Mrs. Dow, Edgar and the administrator entered into a compromise agreement.[5] This agreement provided that (1) the Mayflower Mine be conveyed by Edgar to a trustee for the benefit in equal shares of Mrs. Dow, Edgar and the estate. (2) All parties release Edgar's trust. (3) A bank account resulting from a securities account in Edgar's name was released to the administrator. (4) The 3093 shares of River Farms stock was divided between Edgar and the administrator. (5) Other properties listed in the assignment were released to Edgar. (6) Edgar assign and cause Gerald to assign their interests in the estate to Mrs. Dow and appellant. (7) Judgment in the action to provide accordingly. The agreement further provided: "Said first party, Maxine B. Dow, shall have the right to participate in the distribution of the Estate of Edgar L. Dow, deceased, in accord with the terms of the will of said deceased, and no objection of any kind shall be made to such participation." Mrs. Dow agreed that she had no community interest in any of the assets or property of the estate and that all constituted decedent's separate property. The probate court granted the administrator permission to execute the agreement, also providing "That Maxine B. Dow relinquish to the estate all claims to property therein on the ground that it is community property of her and the decedent herein and recognize that the same is the separate property of the decedent." Judgment was entered in Dow v. Dow in accordance with the agreement.[6]

3. The executor had resigned.

4. The executor had instituted a prior action (not completed) against Edgar seeking recapture for the estate of practically the same property.

5. Gerald, who had filed an answer which was practically a general denial, was not a named party to this agreement. However, he signed it "Approved—Gerald H. Dow."

6. Subsequently appellant unsuccessfully brought an action against Mrs. Dow to set aside the compromise agreement and the judgment.

2. March 2 and May 25, 1931, respectively, Mrs. Dow commenced actions against the administrator, referred to as the "*Sutro actions.*" Both actions were based upon the same transaction and alleged facts. The first (San Francisco No. 226,192) was for the return of securities formerly in an account with Sutro & Company in Mrs. Dow's name. This action was never brought to trial, and in the decree of distribution herein the court found that because of the time element of more than 20 years, that action was "aborted" and could not be "considered for any purpose." The second action (San Francisco No. 228,219) was to enforce a claim against the estate for the conversion of said securities by testator. judgment in favor of Mrs. Dow and against the estate for $12,822.32 plus interest was rendered.

3. *Family allowance proceedings.* Originally the estate was insolvent. A pre-inventory family allowance was granted, terminating December, 1931. By April 30, 1947, however, the estate had become solvent. On that day Mrs. Dow applied for a family allowance in the sum of $1,000 per month retroactive to December, 1931. Had the allowance been granted in the sum requested it would have amounted to considerably more than the then value of the estate. The court granted an allowance of $500 per month restricted to six months beginning July 1, 1947. No appeal followed. May 13, 1948, on petition therefor, Mrs. Dow was granted a family allowance of $500 per month commencing January 1, 1948, and continuing until the further order of the court. Appellant appealed. 91 Cal.App.2d 420, 205 P.2d 698. The order was affirmed. In 1953 appellant applied to the probate court for a termination of this allowance. She appealed from the order denying termination. 120 Cal.App.2d 296, 260 P.2d 970. The reviewing court ordered the allowance terminated as of the date the motion to terminate was made. On October 5, and on November 30, 1953, Mrs. Dow applied for further family allowances. Both applications were denied. The total amount received in family allowances by Mrs. Dow is $38,500.

The probate court expressly and independently found that the legal actions above mentioned were not in any way contests or actions contemplated under paragraph twenty-first of the will nor did they violate its terms, and that Mrs. Dow is entitled to inherit under the will. The court found that the "community property action" resulted in "three outstanding matters which clearly benefited" appellant and the estate: (a) the estate became owner of an additional 1,526½ shares of River Farms having a book value of $75 per share; (b) the estate became the owner of a one-third interest in the Mayflower Mine, of the present value of $10,000; and (c) that Edgar and Gerald assigned to appellant and Mrs. Dow their right to a one-third share of the entire estate, and that neither of the sons has now any claim in the estate. The probate court found that the matter of family allowance being a statutory right, Mrs. Dow, by her various petitions for family allowance, had not violated paragraph twenty-first of the will.

[1, 2] While a testator is free to dispose of his property on whatever condition he wishes to impose so long as the condition is not prohibited by law or contrary to public policy, and a provision in a will providing for forfeiture of a legacy or devise in the event of a contest of the will by a legatee or devisee is binding, and an in terrorem provision in a will is not against public policy and must be enforced as written, such a clause is to be strictly construed. In re Estate of Fuller, 143 Cal. App.2d 820, 300 P.2d 342, 345. "Whether there has been a contest within the meaning of the language used in a will is to be determined according to the circumstances in each case." It is rather interesting that in Re Estate of Dow, supra, 91 Cal.App.2d 420, 205 P.2d 698, appellant made the contention that by the compromise agreement in the "community property" action Mrs. Dow had waived all rights except the right to receive under the will and contended that

therefore she was not entitled to a family allowance. Appellant now claims that Mrs. Dow has no right to receive under the will. The court there held to the contrary of the contention. 91 Cal.App.2d at page 426, 205 P.2d at page 701. It should be remembered that while Mrs. Dow contended that all the property of the decedent was community property she did not pursue the contention far enough to get a court determination but waived the contention and as a result of her action obtained considerable assets for the estate as well as for appellant. The "community property" action, while differing somewhat in form, was, in effect (particularly in view of the compromise effected) an action for declaratory relief similar to Colden v. Costello, 50 Cal.App.2d 363, 122 P.2d 959, where the widow brought an action in declaratory relief to determine whether her husband's estate was separate or community property. As said in the decree of distribution in our case, "an examination of all of the pleadings, the agreement entered into by the plaintiff, defendants, and intervenors, and the Findings and Judgment as entered in that case, fails to indicate that said action was anything other than an effort by said Maxine B. Dow, widow of the deceased, to enhance the assets of said Estate, by moneys and property, which she claimed actually belonged to the deceased but which was in the hands of Edgar L. Dow, Jr., et al, without consideration: * * *." While the Colden case held in effect that such an action should be brought in the probate court, it definitely held, 50 Cal.App.2d at page 373, 122 P. 2d at page 965, that "applications to the court in such connection, and the offering of proof to show that all, any or no part of the estate is community property, will not violate" an in terrorem provision of a will which the court characterized as, 50 Cal.App.2d at page 365, 122 P.2d at page 961, "a comprehensive 'disinheriting' provision" in case of contest or opposition to the plan of the will. Mrs. Dow's action brought back in to the estate property which Edgar was claiming as his own.

[3] In the "Sutro" case the court found that testator had converted to his own use certain stock which was Mrs. Dow's separate property. It then gave judgment against the estate for the value of that stock, $12,822.32 with interest "payable in due course of administration," a situation similar to that in Re Estate of Madansky, 29 Cal.App.2d 685, 85 P.2d 576, where there was an in terrorem clause much more comprehensive than in our case. The court there held that the assertion of a creditor's claim against the estate by the son legatee, even though the assertion was unsuccessful and the claim was disallowed, in no wise violated the forfeiture clause. It "is not equivalent to contesting the will of decedent * * *." 29 Cal.App.2d at page 686, 85 P.2d at page 577.

[4] Appellant contends that by Mrs. Dow's conduct in applying for and receiving family allowances she thereby elected to stand on her rights outside the will rather than take through it. Appellant has cited no authority for the contention that obtaining a family allowance places a widow in such position, nor that such action violates the no-contest clause of the will, the second contention made by appellant concerning the family allowances. However, it is appellant's contention that the allowances here were not the ordinary and customary ones in an estate, but were sought and obtained by Mrs. Dow fraudulently and for the purpose of circumventing the will. This contention was made and answered adversely to appellant in In re Estate of Dow, supra, 91 Cal.App.2d 420, 428, 205 P.2d 698.[7]

The situation in Savings Bank Santa Rosa v. Schell, 142 Cal. 505, 509–510, 76 P. 250, is not comparable to the one here. There the court found that the widow executrix fraudulently planned by means of

7. In Re Estate of Dow, supra, 120 Cal. App.2d 296, 260 P.2d 970, the family allowance then under consideration was impliedly upheld even though the reviewing court ordered it terminated.

a family allowance to deprive a mortgagee of the amount of his mortgage. The findings of the probate court as well as the reviewing court in 91 Cal.App.2d 420, 205 P. 2d 698, supra, disclaim any ulterior motive of the widow here.

Thus, the courts having held that the widow was properly and fairly entitled to the allowances, the sole question is whether Mrs. Dow thereby barred herself from participating under the will. On this question we have no doubt that she did not. There is no language in the will which would indicate that the testator intended that in any way she be denied this statutory right. Therefore Mrs. Dow was in no way *contesting* or *questioning* the provisions of the will. See In re Estate of Boyd, 95 Cal. App.2d 44, 46, 212 P.2d 17.

There are a number of cases in California in which appellant claims that actions somewhat similar to those taken by Mrs. Dow were held to constitute a violation of the in terrorem clause of the particular will. However, they can be easily distinguished from our case, either in the terms of the particular clause or the circumstances of the particular case. In In re Kitchen's Estate, 192 Cal. 384, 220 P. 301, 30 A.L.R. 1008, a niece legatee presented a claim against the estate upon a claimed oral contract with the testator to perform the duties of a daughter to the decedent. The in terrorem clause was very comprehensive, inhibiting the commencement of suit in any court or to sue or "disturb" the executor by any ways or means. In Re Estate of Howard, 68 Cal.App.2d 9, 155 P.2d 841, the husband resisted an action against him by the executors of the wife's estate to quiet title to property as her separate estate. The in terrorem clause in the will was even broader than that in the Kitchen case. Among other matters it inhibited a legatee from being a party to any pleading or proceeding which would draw in question the operation of any of the provisions of the will or in any way question testatrix' acts in making the will or any of its provisions. In Re Estate of Mathie, 64 Cal.App.2d 767, 149 P.2d 485, it was held that the husband's acts in destroying his wife's will and petitioning for letters of administration, then petitioning for probate of a will prior to the one he destroyed, and petitioning for a probate homestead alleging in bad faith that the property was community property, constituted a contest of the destroyed will, thereby invoking an in terrorem clause therein. In our case, the court expressly held that Mrs. Dow's claims that the estate was community property were made in good faith. Significant in this connection is the statement of the then administrator with the will annexed of the Dow estate in the petition asking authority to compromise the "community property" action—"That your petitioner is well acquainted with the facts and circumstances in connection with the property concerned in the litigation; that your petitioner feels that it would be difficult to prove that the said property was the separate property of the said decedent."

In Re Estate of Seipel, 130 Cal.App. 273, 19 P.2d 808, a daughter brought two actions against the executrices of a will containing a strong in terrorem clause. The first was for an accounting by them of certain shares of stock and bank deposits, and transferred to them by testatrix in her lifetime. (This action was dismissed.) The second alleged fraud of the executrices by which they possessed themselves of the stock money. It demanded that such be inventoried as assets of the estate. The executrices won out. It was held that bringing these actions did not constitute a contest of the will, a failure to abide by the provisions of the will, or a violation of the in terrorem clause.[8]

2. Jurisdiction. (a) Jury trial.

8. Appellant contends that the type of answer filed by Mrs. Dow to appellant's "Answer to Petition for Partial Distribution of Maxine B. Dow and Petition for an Order Determining the Persons Entitled to Distribution of the Above Entitled Estate" constituted an admission of the affirmative allegation of the answer. It was not so treated by the parties in the probate court. No one had any doubt but that Mrs. Dow was not admitting those allegations.

[5] The probate court properly denied appellant's demands for a jury trial in the heirship proceedings, as there were no questions of fact to be determined. The interpretation of the no-contest clause of the will, the determination of what appellant refers to as the "inherent issue of fact of the testator's intention" and whether Mrs. Dow had violated it by bringing the proceedings above mentioned, were questions of law for the court, as there was no dispute over the fact that she had brought such proceedings. Court records so showed. Her motives in bringing the "community property" and the "Sutro" actions could not be a basis for a dispute of fact as she was well within her rights in so doing. Moreover, that she did not act in bad faith was determined in Hutchinson v. Dow (San Francisco No. 378,558),[9] where appellant attempted to set aside the judgment in the community property action and to impress the testamentary trust on all property received by Mrs. Dow on the ground of her fraud and bad faith. Practically every point raised by appellant here in her contention that Mrs. Dow violated the no-contest clause was raised in that case and decided adversely to appellant's contentions. Likewise her motives in obtaining the family allowances have also heretofore been determined to be proper. The conflict in the testimony of appellant and that of Mrs. Dow as to the latter's motives in the allowance matter was determined in Re Estate of Dow, supra, 91 Cal.App.2d at page 428, 205 P.2d at page 703: "Appellant contended below that the administratrix was purposely delaying the administration of the estate in order to mulct it by a prolonged family allowance, and by increasing interest on her claims against the estate. Appellant testified that Mrs. Dow had told her she would do so. Mrs. Dow denied making such statement. All these matters were before the court and apparently the court did not believe that such was the purpose of the administratrix."

(b) Findings.

[6] Appellant contends that there are no findings on the issue raised in the heirship proceedings as to whether Mrs. Dow had violated the no-contest clause of the will, in spite of the fact that in the decree of distribution the court expressly found that none of the proceedings taken by Mrs. Dow violated that clause. Apparently appellant means that the court did not correctly find on that issue. This contention is not well founded.

3. The "Sutro" Judgment.

[7, 8] The decree ordered that Mrs. Dow be credited with the amount of the "Sutro" judgment and interest heretofore mentioned. Appellant contends this judgment had outlawed and was uncollectible because no transcript of the judgment was filed in the estate. The judgment "payable in due course of administration" was obtained October 29, 1935. June 2, 1947, a certified photostatic copy of it was filed in the estate file. A certified transcript was not filed until 1950. At the date of the judgment section 730, Probate Code, provided that a judgment against an estate on a claim for money "conclusively establishes the validity of the claim for the amount of the judgment" and that "A certified transcript of the original docket of the judgment must be filed in the administration proceedings. No execution shall issue upon the judgment, nor shall it create any lien upon the property of the estate, or give the judgment creditor any priority of payment."[10] We do not believe that the failure originally to comply with section 730 either invalidated the judgment or caused it to outlaw. The section obviously is to protect the executor or administrator of an estate, the creditors and other interested persons, from judgments which are un-

9. Notice of appeal from the judgment therein was filed January 30, 1951. The appeal has never been perfected.

10. In 1945 the section was amended to permit the filing of an abstract of the judgment if there was no original docket of the judgment.

known at the time the estate, by payment of claims, distribution or otherwise, disposes of property which would have been applied to the judgment were its existence made known. Here, although no transcript of the judgment was filed for many years, everyone connected with or interested in the estate knew of the judgment's existence. In the fourth accounting of administration filed by Hiram W. Johnson, Jr., as administrator de bonis non with the will annexed, filed in 1936, the fact of the judgment having been obtained against the estate is reported and the statement made that it had not been satisfied in whole or in part. This accounting was approved by the court. In Re Estate of Dow, supra, 91 Cal.App.2d 420, 205 P.2d 698, the judgment is referred to, and the amount then due thereunder given. It is referred to as one of Mrs. Dow's claims against the estate. In 1948 appellant unsuccessfully brought an action against Mrs. Dow individually and as administratrix (San Francisco No. 378,558) to, among other things, set aside this judgment on account of alleged fraud. In Re Estate of Dow, supra, 120 Cal.App.2d 296, 297, 260 P.2d 970, 971, the court states that Mrs. Dow is "the owner of a claim," being the judgment in question, and ordered that "all claims" be paid within six months from the date of the remittitur. 120 Cal.App.2d at page 300, 260 P.2d at page 973.[11] December 8, 1952, the probate court, after a hearing of appellant's petition for an accounting, termination of family allowance and for other relief, rendered a judgment, a portion of which provided that interest on the "Sutro" judgment and Mrs. Dow's claim thereon be disallowed for periods subsequent to October 16, 1952. Appellant appealed from the probate court's judgment except as to that portion dealing with interest. In effect, the probate court's action was a determination that Mrs. Dow's claim against the estate on the judgment was a valid one and that she was entitled to interest thereon up to October 16, 1952. On December 2, 1953, appellant petitioned the probate court to instruct the administratrix to pay "all interest asserted accrued upon a claim, or judgment, asserted by said Maxine B. Dow in her individual capacity * * *."

Appellant's contention that unless section 730 is complied with prior to the expiration of five years from the date of the judgment the latter outlaws, is without merit. Even a civil judgment does not outlaw in five years. Section 685, Code of Civil Procedure, which appellant cites as authority for her proposition, allows a civil judgment to be enforced after five years. A judgment against an estate is only payable in due course of administration (execution may not issue on it; it does not create a lien upon property of the estate nor give the judgment creditor any priority of payment, Probate Code, § 730). The judgment must await the administration of the estate. Its right to be paid in due course of administration exists until it is paid or the court determines that there are no asset from which it may be paid. In Bank of America N. T. & S. A. v. Katz, 45 Cal.App.2d 138, 113 P.2d 759, it was held that the probate court had power under section 685, Code of Civil Procedure, to grant leave to enforce against the estate of a judgment debtor a money judgment obtained against him more than five years prior to death, by the presentation of a claim against his estate and by bringing an action thereon if the claim is rejected. It would be an idle and unnecessary act to require a creditor holding a judgment against an estate, which judgment can only be paid in course of administration, to petition the probate court before the expiration of a five-year period to reallow his claim which section 730, Probate Code, says his judgment has conclusively established. The action of the probate court in approving the Johnson fourth account, the recognition of the judgment against the estate in Re

11. It is interesting to note that in that proceeding appellant was insisting that this claim should have long since been paid. She is now equally insistent that it not be paid.

Estate of Dow, supra, 91 Cal.App.2d 420, 205 P.2d 698; the order in Re Estate of Dow, supra, 120 Cal.App.2d 296, 300, 260 P.2d 970, and the order in the decree of distribution requiring payment of the judgment, would, if such action were necessary, constitute the recognition of the claim discussed in the Katz case, supra.

4. Commissions and Fees.

The decree allows Mrs. Dow's statutory commissions in the sum of $2,058.14. She had received $1,500 in 1946, making her total commissions $3,558.14. Appellant contends that included in the base of estate assets upon which these commissions and the attorney's commissions in equal amount were figured was a sum of $186,324.99 gross value of a hypothecated partnership interest, which after liquidation by the surviving partner netted the estate only $10,000. All parties concede that only the latter sum could be considered. An examination of the record demonstrates that appellant is in error. The commissions were based only upon moneys accounted for and the valuation of the River Farms stock and the Mayflower Mine.

[9] Appellant's contention that the commissions allowed Mrs. Dow fails by $294.90 to credit prorated commissions theretofore paid her predecessors is correct, and the amount payable to her should be reduced accordingly.

[10] The valuation of the River Farms stock upon which the commissions were based is $45 per share. Appellant's contention that the evidence does not support that valuation is not well founded. The mere fact that the offer to purchase at that price was for only 1,000 shares, does not determine that the balance of the stock in view of all the other evidence upon the subject is not worth an equal amount per share. See Dow v. Superior Court, supra, 140 Cal.App.2d 399, 406, 297 P.2d 30, stating that the trial court found that the River Farms stock was "readily salable" at not less than $45 per share.

[11, 12] The court allowed Mrs. Dow $5,000 finding that during her administration of the estate she had "performed further extraordinary services, consisting of many vital problems in connection with said Estate, covering a period of over seventeen (17) years * * *." "'The allowance of extraordinary fees is a matter of discretion with the trial court and is not to be interfered with on appeal except for abuse. Such discretion not only invests the trial court with the power to determine whether the character of the services is such as to warrant extra compensation, but to determine the amount.' In re Estate of Scherer, 58 Cal.App.2d 133, 142, 136 P.2d 103." In re Estate of Raphael, 128 Cal. App.2d 92, 98–99, 274 P.2d 880, 884.

One item of Mrs. Dow's services we pointed out in Re Estate of Dow, supra, 91 Cal.App.2d 420, 425, 205 P.2d 698, 701: "In 1946, Mrs. Dow succeeded in settling claims against the estate amounting to around $18,000 for a sum around $4000." The probate court knew, too, the entire history of the estate and the contentions of appellant. See In re Estate of Raphael, supra, 128 Cal.App.2d at page 99, 274 P.2d at page 884 for effect of such knowledge. Without detailing the services rendered (Mrs. Dow's testimony covered many pages of transcript, most of which detailed her services) we think the record fails to disclose that the court abused its discretion in making this allowance.

[13, 14] The court allowed the administratrix' present attorneys $2,500 for extraordinary services since their appointment in December, 1953. This raises a very serious question. In the listing of these services made by the late J. Oscar Goldstein it appears that most of the services rendered were for Mrs. Dow personally and not for the estate. His services as detailed seem to fall into three categories: (1) Services rendered for Mrs. Dow personally. In this category are the following which he conceded at the hearing did not entitle him to fees from the estate: his appearances in the family allowance matters and his appearance on a petition of appellant for instructions to the administrator. His conferences with appellant's attorneys were,

as he stated, for the purpose of trying to effect a compromise or settlement in the bitter warfare between mother and daughter. (2) Services which were primarily for Mrs. Dow's interests with possibly a pro forma appearance on behalf of the estate. These were appearances in opposition to appellant's petition for partial distribution and to appellant's petition for heirship. (3) Services directly for the estate's benefit. Such services as preparing the order of sale of 200 shares of stock, the proceedings for which had been initiated before his connection with the estate, an estate income tax matter, his appearance for the administratrix on the acutely contested hearings on appellant's opposition to many of the items of the final account, and some other matters. Unfortunately no segregation was made by the witness and the probate court made a lump sum allowance. We have no way of knowing what portions thereof were allocable to proper charges against the estate. We have two alternatives: (1) We can reverse the portion of the decree making the allowance and instruct the probate court to redetermine the matter, In re Estate of Buchman, 138 Cal.App.2d 228, 237, 291 P.2d 547; or (2) under the inherent power of this court to modify a judgment where "justice between the parties may be accomplished by a modification thereof," Schnierow v. Boutagy, 33 Cal.App. 336, 337, 164 P. 1132, 1133,[12] we can modify the decree. In view of the past history of this estate it would appear that justice between the parties requires that if possible we make a final determination of all matters raised on this appeal. Were we to refer the matter back to the trial court, it is reasonable to assume from the history of this estate that the trial court's determination would not be permitted to be final, and therefore we feel that we should now determine the matter. The evidence of the services rendered by the attorneys is before us. As judges we have a fair understanding of the value of attorneys' services.[13] Based upon the record we determine that a reasonable compensation for the extraordinary services rendered the estate by Goldstein, Barceloux and Goldstein, as shown by the record, is the sum of $1,000.

5. Inadequacy of Fees Allowed Appellant's Attorney.

[15] The court allowed Mr. White $500 for his services, $250 characterized as ordinary services and $250 as extraordinary services.[14] These fees were allowed under the principle that although he represented appellant in the proceedings which he brought, those proceedings resulted in increasing or preserving the assets of the estate and under the rule set forth in Re Estate of Reade, 31 Cal.2d 669, 672, 191 P.2d 745, the court may make an allowance for legal services which have redounded to the benefit of the estate. The services claimed to have been rendered were (1) opposing the retroactive family allowance, (2) presenting the proceedings and appeal which terminated the family allowance retroactively for 15 months and prospectively for 19 months, (3) successfully opposing the fourth and fifth applications for further allowances, and (4) seeking an accounting and opposing "exorbitant demands in the instant hearings." While undoubtedly Mr. White's services were worth much more than the amount allowed, it must be remembered that

12. See 5 C.J.S., Appeal and Error, § 1883, p. 1370; 4 Cal.Jur.2d § 662, p. 546.

13. See Peyre v. Peyre, 79 Cal. 336, 339–340, 21 P. 838, 839: " 'The court could determine from its own experience and from the facts and circumstances of the case, as they appeared to it from the pleadings and other papers and proceedings, what was a reasonable fee.' DeLlamosas v. Llamosas, 62 N.Y. 618: [In re] Estate of Dorland, 63 Cal. 281, 282." That statement concerning the power of the trial court applies equally to that of this court.

14. As Mr. White, at no time, was an attorney for the estate, it is not clear on what basis fees for "ordinary services" and "extraordinary services" which usually refer to services of an attorney for the estate, where allowed him. However, the names given the services are not important.

half of all moneys saved to the estate goes to Mrs. Dow. She should not be required to pay for those moneys which, in effect, she merely transfers from one pocket to another. The other half goes to Mr. White's own client who should pay for his services. The reason for the rule in Re Estate of Reade, supra, 31 Cal.2d at page 672, 191 P.2d at page 746, is "to compel those for whose benefit the action or proceeding was taken to bear their share of the expenses of the litigation * * *." Under the circumstances here we cannot say that the court abused its discretion in not granting Mr. White a larger fee from the estate.

6. The Final Account.

[16] Appellant contends that this is not a final account because although the decree was rendered February 2, 1955, the account itself records no receipt later than December 31, 1953, and, contends appellant, there have been receipts and disbursements later than those dates. Whether the account is a final one in the true sense is immaterial. Everyone concedes that the estate is in condition to be, and should be, distributed. Upon the termination of this appeal, the administratrix will immediately abide by the terms of the decree of distribution except as modified hereby. A supplemental account will necessarily have to be filed, dealing with fiscal matters subsequent to the ones last accounted for. If there are not moneys on hand sufficient to pay the claims and charges allowed in the decree, taxes, closing expenses, etc., sufficient stock will have to be sold to do so. The administratrix should immediately determine this question and withhold only such stock, if any, as may be necessary for that purpose and distribute the balance as provided in the decree, half to herself and half to appellant. There is no reason for any delay in this respect.

Second Appeal.

Appellant petitioned the probate court for a partial distribution to her of 2,000 of the 4,358½ shares of River Farms Company stock belonging to the estate, as well as for other relief. Mrs. Dow answered, asking for partial distribution to her and appellant of 1,000 shares each. She then filed a supplemental answer denying appellant's right to any share in the estate because of alleged violation by appellant of the no-contest clause of decedent's will. After a hearing, the court found against Mrs. Dow's charges that appellant had violated the provisions of the will but refused partial distribution to either party. Appellant appeals from those portions of the order which denied her distribution of 2,000 shares "and, in the alternative, one thousand (1,000) shares" of River Farms stock. At the time of the hearing there was then pending a petition by appellant to determine the persons entitled to distribution of the estate, the main purpose of which petition was to have determined appellant's contention that Mrs. Dow had violated the no-contest clause of the will. The sole question here is whether the pendency of that proceeding required the denial of appellant's petition for partial distribution.

Findings.

The court found "That the condition of said estate is such that partial distribution of two thousand (2,000) shares of the capital stock of River Farms Company of California * * * may be had without injury to any person interested in said estate, provided, however, that said shares were distributed equally and between petitioner and said administratrix," but denied partial distribution for the reason "That the proceedings upon * * * petition for an order determining the persons entitled to distribution of the above-entitled estate * * * cannot be immediately heard, concluded and determined, and the pendence of said proceedings prevents any partial distribution to Maxine B. Dow as a legatee under said will, or otherwise, at this time and until the determination of the issues presented * * * for this reason, and not otherwise, the Court deems it improper to order partial distribution of any asset of said estate to petitioner herein at this date."

Partial Distribution.

[17] Inasmuch as the court found that distribution of 2,000 shares could have been had without injury to the estate, and that "the assets of said estate remaining in the custody of said administratrix after distribution of said two thousand (2,000) shares of said stock, if had equally between petitioner and said administratrix, are sufficient to satisfy all claims, demands, family allowances and costs of administration heretofore incurred or necessarily to be incurred in the future pending the closing of said administration and, after satisfaction of the same, to satisfy any and all legacies, if any, to which said Maxine B. Dow shall be entitled under said will," the court should have distributed 1,000 shares to appellant. See In re Estate of Stephenson, 65 Cal.App.2d 120, 123, 124, 150 P.2d 222. Under the will and the assignments, the entire estate is to be divided between appellant and Mrs. Dow. If Mrs. Dow had forfeited her right to share in the estate that share would have gone to appellant. Under any situation appellant was entitled to such portion of her half of the estate as could safely be distributed regardless of what happened to Mrs. Dow's half. Appellant was entitled to a partial distribution of such portion of her interest as could be distributed without injury to the estate itself or persons interested in it. See In re Estate of Ross, 180 Cal. 643, 648, 182 P. 755, and In re Estate of Stephenson, supra, 65 Cal.App.2d 120, 124, 150 P.2d 222. The court found that distribution to her of 1,000 shares would not have caused such injury. Therefore it should have been made. The court felt and the record shows that a distribution to her of 2,000 shares might have left the estate in such situation that, if Mrs. Dow had not forfeited her interest, that interest might be required to bear more than its fair share of the debts and charges of the estate. However, such fact would not justify the refusal of 1,000 shares to appellant, as the condition of the estate as well as the court's findings show the distribution of that number of shares could safely be made.

[18] As we are herein affirming the decree of distribution, and therefore both appellant and Mrs. Dow are immediately entitled to their distributive shares therein, less only such assets as are necessary to meet charges accruing subsequently to those approved in the decree of distribution, has the denial of partial distribution become moot? We believe it has. Appellant receives by the decree of distribution everything she could obtain by a reversal of the order denying partial distribution and by our instructing the probate court to distribute to her separately 1,000 shares of the stock distributed to her in the decree. If any dividends have been paid since the order was denied, they will have gone into the assets of the estate of which appellant will receive under the decree of distribution half, unless they are required to be used to pay charges of the estate. (Appellant would in any event be liable for half of such charges.) So that there may be no further question in the matter and in the perhaps vain hope of trying to get this estate finally settled, the administratrix is ordered within 60 days of the date of the remittitur hereon to distribute 1,000 shares of the River Farms stock to appellant and a like number to herself, and in addition to obtain from the court a determination of the amount of estate assets required to be withheld to cover the claims and charges due or to become due from the estate, and then forthwith to deliver the balance of their distributive assets to appellant and herself.[15] Because this appeal has now become moot, it should be and hereby is dismissed.

The allowance in the decree of distribution of commissions to Mrs. Dow is reduced $294.90. The allowance of fees for extra services to Goldstein, Barceloux and Goldstein is reduced to $1,000. In all other respects the decree is affirmed. Respondent Mrs. Dow will recover costs, less the sum

15. See decision of the appeal from the order directing administratrix this day filed. In re Estate of Dow, Cal.App., No. 17057, 308 P.2d 489.

of $452.70, the amount expended by appellant for the transcript of certain testimony. See Hutchinson v. Dow, Cal.App., Nos. 17055, 17056, 17057, 308 P.2d 492, this day filed.

PETERS, P. J., and FRED B. WOOD, J., concur.



149 Cal.App.2d 67

In the Matter of the ESTATE of Edgar Laurence DOW, alias, Deceased.

Maxine Patricia HUTCHINSON, Petitioner and Appellant,

v.

Maxine B. DOW, Individually and as Administratrix with the Will Annexed of the Estate of Edgar Laurence Dow, alias, deceased, Respondent.

No. 17056.

District Court of Appeal, First District, Division 1, California.

March 11, 1957.

Proceeding for final distribution of an estate. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered an order refusing to limit the record in an appeal from decree of distribution, and refusing to vacate estimate of costs on appeal and a legatee of the estate appealed. The District Court of Appeal, Bray, J., held that where, at time set for hearing of legatee's request for correction of transcript to exclude transcription of testimony involving certain attorneys' fees, appeal was still pending from entire decree of distribution, including fixing of attorneys' fees and costs, trial court properly refused to eliminate requested testimony from transcript, and its estimate of cost on appeal.

Order affirmed.

1. Executors and Administrators ⇐314(13)

Under a rule on appeal administratrix of an estate was responsible for cost of exhibits transcribed at request of administratrix, and prior testimony requested by administratrix of seven attorneys, respecting fees, as to whose allowances there was no appeal, and a legatee who appealed from certain parts of decree of distribution, including fixing of attorneys' fees and costs, and paid therefor, was entitled to reimbursement of the costs thereof. West's Ann.Rules on Appeal, rule 5(b).

2. Executors and Administrators ⇐314(12, 13)

Where, at time set for hearing of legatee's request for correction of transcript to exclude the transcription of testimony involving certain attorneys' fees, appeal was still pending from entire decree of distribution, including fixing of attorneys' fees and costs, trial court properly refused to eliminate requested testimony from transcript and its estimate of costs on appeal.

Hutchinson & Quattrin, William A. White, San Francisco, for appellant.

Goldstein, Barceloux & Goldstein, San Francisco, for respondent.

BRAY, Justice.

Appellant appeals from an order respecting the record in Re Estate of Dow, No. 17055 [1] refusing (1) to limit the record and (2) to vacate the estimate of costs on appeal by eliminating therefrom (a) exhibits transcribed at the request of respondent and (b) prior testimony requested by respondent of seven attorneys, respecting fees, as to whose allowances there is now no appeal.

1. This day decided, Cal.App., 308 P.2d 475.

[1] As to (2) (b), the attorneys for respondent conceded at oral argument that under Rules on Appeal 5(b) respondent is responsible therefor and that appellant having paid therefor should be reimbursed the cost thereof, $125. They agreed to personally make such reimbursement. Therefore we need consider this matter no further.

[2] Appellant's notice of appeal from the decree of distribution was filed February 2, 1955. On February 9 she filed a request for a reporter's transcript which apparently was not to include the testimony of the attorneys above mentioned. On February 16, naturally assuming from the fact that as appellant had appealed from the entire decree including the "fixing of attorneys' fees and costs, and for additional compensation for extraordinary services rendered by administratrix with the will annexed, and her attorneys," that appellant was attacking the awards therein to the seven sets of attorneys, respondent on February 16 requested that the testimony of said attorneys as to the services rendered the estate by them be included in the transcript. February 21, the clerk sent appellant's attorneys an estimate of the cost of preparing the transcript on appeal, which included the cost of transcribing said testimony, the latter being $452.70. February 23, appellant filed a request for correction of transcript. It was set for hearing March 8. March 16 appellant filed an amended notice of appeal withdrawing her appeal as to certain portions of the decree including those portions allowing fees to said attorneys.[2] On April 28, a minute order was entered denying "the motion to vacate estimate cost of preparing the Clerk's and Reporter's Transcript on appeal made on the 21st day of February, 1955."[3]

No transcript of the proceedings on March 8 appears in the record. As, at that time, appellant's appeal was still from the entire decree of distribution, the court properly refused to eliminate the requested testimony from the transcript and its cost from the estimate.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

2. See Dow v. Superior Court, 140 Cal.App. 2d 399, 404, 297 P.2d 30, for statement of portions of the decree as to which the appeal was abandoned and the effect of such abandonment.

3. Evidently this date is in error, as appellant's notice was not filed until February 23 and was to be heard on March 8.

WEST KEY NUMBER SYSTEM

149 Cal.App.2d 69

In the Matter of the ESTATE of Edgar Laurence DOW, alias, Deceased.

Maxine Patricia HUTCHINSON, Respondent,

v.

Maxine B. DOW, individually and as Administratrix with the Will Annexed of the Estate of Edgar Laurence Dow, alias, deceased, Appellant.

No. 17057.

District Court of Appeal, First District, Division 1, California.

March 11, 1957.

Probate proceedings. The Superior Court, City and County of San Fransisco, Thomas M. Foley, J., entered an order directing administratrix to comply with certain portions of a decree of final distribution from which an appeal had been taken in part, and administratrix appealed. The District Court of Appeal, Bray, J., held that order was proper in view of fact it affected only nonappealed portions of final decree, except as to certain stock involved in the estate, and as to such stock order would be modified to require delivery to a legatee of such estate a lesser amount of such stock pending determination by trial

court of what assets of the estate, money or stock or both, were required to be withheld to meet all foreseeable contingencies.

Order modified and affirmed.

1. Executors and Administrators ⇐314(12)

An appeal from a decree of distribution stays only portions of decree to which it applies and therefore an administratrix was under a duty to follow nonappealed portions of the decree and deliver property ordered distributed or ordered paid by the decree.

2. Executors and Administrators ⇐314(12)

Order directing administratrix to comply with certain portions of a decree of final distributions from which an appeal had been taken in part was proper in view of fact it affected only nonappealed portions of final decree, except as to certain stock involved in the estate, and as to such stock order would be modified to require delivery to a legatee of such estate a lesser amount of such stock pending determination by trial court of what assets of the estate, money or stock, or both, were required to be withheld to meet all foreseeable contingencies.

Goldstein, Barceloux & Goldstein, San Fransisco, for appellant.

Hutchinson & Quattrin, William A. White, San Fransisco, for respondent.

BRAY, Justice.

After the decree of distribution was entered and after respondent appealed from certain portions thereof[1] respondent petitioned the probate court for orders "(1) Directing Administratrix to satisfy and comply with the portions of the decree of final distribution which have become final, (2) Directing a further accounting by Administratrix, (3) For revocation of the Letters of Administration of Maxine B. Dow, heretofore issued, and (4) Appointing a qualified and disinterested Administrator with the Will Annexed." Appellant appeals from the order dated September 7, 1955, issued on said petition. In that order the court "made certain findings and ordered Maxine Dow, forthwith and in all events on or before September 17, 1955: (1) as administratrix, (a) to pay to the persons named in the order the amounts set opposite their names [compensation for professional services rendered to the estate; each in the amount of the award, except that as to one person the amount was increased by $350 by way of compromise and dismissal of his appeal and as to another a reduction in the amount of $750 in response to his wish for prompt payment], aggregating $10,300; (b) to convey to Maxine Hutchinson, as devisee, her undivided one-half interest in the estate's undivided interest in certain real property known as the Mayflower Mine; (c) to deliver to Maxine Hutchinson 2,200 shares of the stock of River Farms Company, from the 4,758.5 shares held by the estate [partial distribution of the distributee's one-half interest in all the shares awarded by the decree]; and (2) personally, not as administratrix, (a) to pay Maxine Hutchinson's costs on appeal in 120 Cal.App.2d 296, 260 P.2d 970, and (b) to refund to the estate the money which she had paid out of estate funds in the appeal in 120 Cal.App.2d 296 [260 P.2d 970]. Each of these directions to pay, convey or deliver pertained to an order or award which was no longer subject to appeal and had become final." Dow v. Superior Court, 140 Cal.App.2d 399, 405, 297 P.2d 30, 34.

[1] Appellant contends in effect that an appeal from a portion of the decree prevents the carrying out of other portions until the appeal is heard. As the appeal stays only the portions of the decree to which it applies, see Dow v. Superior Court, supra, 140 Cal.App.2d 399, 297 P.2d 30, as to severability of the portions appealed from, from those not appealed from, and as no appeal was taken, the decree was in full effect as to the nonappealed portions. As to these it was the duty of the administratrix to follow the decree and deliver

1. See In re Estate of Dow, Cal.App., No. 17055, 308 P.2d 475, this day filed.

to the persons the property distributed or ordered paid by the decree. The order of September 7 therefore determined that these portions were severable from those appealed from. Appellant contends that in obeying the order by delivering to respondent her distributive share there might not be sufficient moneys accruing subsequent to the accounts settled by the decree to meet all obligations of the estate.

[2] Unfortunately the court took no evidence. The entire hearing was devoted to argument of counsel. However, respondent did not offer, or request an opportunity to offer, evidence. The probate court was familiar with the condition of the estate at the time of making the decree of distribution, but no accounting was had of the receipts and disbursements since December 31, 1953. (The decree was rendered February 2, 1955.) Moreover, subsequent to the entry of the decree an order was made granting appellant family allowance of $500 per month "during the progress of the settlement of the Estate, and the Appeal now pending from the Judgment and Decree of Final Distribution, or until the further Order of this Court."[2] The situation at the time of the decree of distribution and at the time of the making of the order appealed from justified the court, without taking further evidence, in making the order it did as regards everything but the delivery to respondent of 2,200 shares of River Farms Company stock. This would have left in the estate 2,558½ shares. Assuming that the decree of distribution finding that Mrs. Dow was entitled to half of the estate was affirmed,[3] there would be only 358½ shares plus what moneys may then have been on hand over and above that required to make the payments ordered by the decree and by said order, to insure the payment of all charges and claims not provided for in the decree of distribution, without resorting to the 2,200 shares to which Mrs. Dow would be entitled to place her on an equal basis with respondent. If the family allowance order is affirmed, there already has accrued thereon a sum in excess of $12,000. The court should have taken evidence to determine what were the moneys then on hand, the probable claims and charges not yet accounted for, accrued or to accrue, including the family allowance if eventually sustained. It should be pointed out that the decree of distribution did not fully take into account the fact that it might be followed by an appeal or the appeals then already brought. For example, it provides as a "reserve for the closing expenses of said Estate, and for the payment of any taxes which may be properly assessed against said Estate" the sum of $100 only. We cannot determine from the record that the reservation of 358½ shares (at $35 per share they would bring $12,547.50) with the income thereon and with the undetermined amount of money then on hand, would have been an adequate reserve to meet the foreseeable contingencies during the final determination of all estate matters. In the affirmance of the decree of distribution in Re Estate of Dow, Cal.App., No. 17055, 308 P.2d 475, we pointed out that 1,000 shares of River Farms stock should be immediately delivered to respondent and appellant respectively, and that the probate court should determine at once what assets of the estate, money or stock or both, are required to be withheld to meet all foreseeable contingencies.

The decree of distribution ordered payment to Attorney Caubu of $3,250, and to Attorney Bryant of $350. The order reduces the Caubu amount to $2,500, and increases the Bryant amount to $700. Bryant had appealed from the $350 allowance. Appellant's criticisms of these changes are captious and unfounded. In the petition for the order respondent alleged that Mr. Caubu was willing to accept $2,500 in compromise of the amount awarded him. Appellant answered that she was not willing to

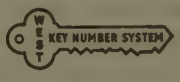
2. That order also has been appealed, see In re Estate of Dow, Cal.App., 305 P.2d 205, hearing granted in Supreme Court.

3. It was in Re Estate of Dow, No. 17055, Cal.App., 308 P.2d 475, this day decided.

accept the compromise, because Mr. Caubu's services were worth the $3,250 awarded. The court obviously having in mind the interests of the estate, properly ordered the lower amount paid. As to the Bryant amount, respondent alleged that he had appealed from the award to him but would accept $700 in compromise. Appellant answered admitting his appeal but taking no position on the suggested compromise. Here, again, under the circumstances, the court was justified in acting for the best interests of the estate.

The order is modified to require delivery to respondent of only 1,000 shares of River Farms stock. In all other respects the order is affirmed. Respondent shall recover costs.

PETERS, P. J., and FRED B. WOOD, J., concur.



149 Cal.App.2d 73

Maxine Patricia HUTCHINSON, Appellant,

v.

Maxine B. DOW, as Administratrix with the Will Annexed of Edgar Laurence Dow, deceased, and Maxine B. Dow, Individually, Respondents.

Maxine Patricia HUTCHINSON, Appellant and Petitioner,

v.

The SUPERIOR COURT of the State of California IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, and Maxine B. Dow, as Administratrix with the Will Annexed of the Estate of Edgar Laurence Dow, deceased, Respondents,

Maxine B. Dow, Individually, Real Party in Interest.

Nos. 17055–17057.

District Court of Appeal, First District, Division 1, California.

March 11, 1957.

Proceeding on petition for writs of mandate, prohibition, certiorari or other writs as might be appropriate, as an alternative to petitioner's appeal from certain portions of a decree of settlement of accounts of an administratrix, and decree of final distribution, in case District Court of Appeal should decide it did not have power to determine matters raised by such appeal. The District Court of Appeal, Bray, J., held that in view of fact its decision on petitioner's appeal decided all matters raised upon that appeal, petition would be denied.

Petition denied.

1. Certiorari ⇐31
Mandamus ⇐16(1)
Prohibition ⇐13

Where a legatee of an estate petitioned for writs of mandate, prohibition, certiorari or such other writs as might be appropriate, as an alternative to her appeal from certain portions of a decree of settlement of third, fourth, and final accounts of administratrix, and a decree of final distribution, in case court should decide it did not have power to determine matters raised by that appeal, and court in its decision of such appeal decided all matters raised upon such appeal, petition would be denied.

2. Executors and Administrators ⇐314(13)

Where, on appeal from certain portions of a decree of distribution, certain testimony in regard to attorneys' fees was not needed to be and was not used on appeal, and inclusion of such testimony could have awaited determination of question of severability of appeal and an augmentation of the record made thereafter, if necessary, and appellant-legatee paid out the amount of its cost, she would be provided with a credit in that amount to be deducted from costs payable by her on her appeal from the decree of distribution.

Hutchinson & Quattrin, William A. White, San Francisco, for petitioner.

Goldstein, Barceloux & Goldstein, San Francisco, for real party in interest.

BRAY, Justice.

[1] Petitioner petitioned for writs of mandate, prohibition, certiorari or such other writs as might be appropriate, as an alternative to her appeal in Re Estate of Dow, Cal.App. No. 17056, 308 P.2d 488, in case this court should decide it did not have the power to determine the matters raised by that appeal. In our decision of that appeal this day filed, In re Estate of Dow, No. 17056, 308 P.2d 488, we decided all matters raised upon that appeal. However, in this proceeding petitioner additionally has raised matters occurring subsequent to the order appealed from in that proceeding, and which were not and could not be considered therein. They relate to subsequent proceedings with relation to appellant's attempts to eliminate from the transcript on appeal from the decree of distribution, In re Estate of Dow, Cal.App. No. 17055, 308 P.2d 475, this day decided, the testimony of seven attorneys described in Re Estate of Dow, Cal.App. No. 17056, 308 P.2d 488. In spite of the fact that in the order of April 28, 1955, the probate court refused to grant petitioner's motion to exclude from the estimate of costs of the transcript the $452.70 representing the cost of the transcription of said testimony, the testimony was not included in the reporter's transcript later prepared and presented to the court for certification. On September 29, 1955, respondent requested correction of said transcript by insertion therein of said omitted testimony. September 30, petitioner filed objections to such insertion on the ground that by her amended notice of appeal from the decree of distribution filed March 8 the allowances to said seven attorneys were no longer appealed from and therefore their testimony was immaterial. October 10 the matter was heard. Respondent contended that all matters in the decree of distribution were inseverable and hence petitioner having originally appealed from the decree as a whole could not, by the amended notice of appeal, appeal only from portions thereof. The probate court thereupon granted respondent's request and denied petitioner's objections upon the ground of the question of severability, stating, in effect, that if respondent's position thereon were incorrect the matter could be taken care of when costs were assessed. In April, 1956, in Dow v. Superior Court, 140 Cal. App.2d 399, 297 P.2d 30, this court held that the orders for payment of fees to the seven attorneys, among other matters, were severable from the rest of the decree and that the effect of petitioner's amended notice of appeal was that there no longer was an appeal from such orders. However, at the time of the hearing of October 10, 1955, the question of the severability of the appeal had not been determined and the court was well within its rights in refusing to keep the requested testimony out of the transcript.

[2] Now, on the appeal from the decree, it is apparent that the testimony need not have been included. No part of it needed to be or was used on the appeal. Its inclusion could very well have awaited the determination of the question of severability of appeal, and an augmentation of record made thereafter, if necessary. For that reason, and as petitioner has paid out the amount of its cost, in our decision of the appeal from the decree of distribution we have provided for a credit in that amount to be deducted from the costs payable by petitioner.

The petition is denied.

PETERS, P. J., and FRED B. WOOD, J., concur.

149 Cal.App.2d 215

AMERICAN ALLOY STEEL CORPORATION, a corporation, Plaintiff and Appellant,

v.

Sidney D. ROSS and Harold Baker, d/b/a Baker Metal Products, Defendants and Respondents.

Civ. 21942.

District Court of Appeal, Second District, Division 3, California.

March 18, 1957.

Proceeding by former employer to enjoin former employee and his new employer from soliciting former employer's customers. The Superior Court, Los Angeles County, A. Curtis Smith and Aubrey N. Irwin, JJ., sustained demurrers of former employee and his new employer, and rendered judgments of dismissal, and former employer appealed. The District Court of Appeal, Vallée, J., held that former employer's complaint was insufficient in that allegation that list of customers was secret and confidential was mere conclusion and facts alleged negatived such allegation.

Affirmed.

1. Injunction ⇐56

If knowledge gained by former employee from former employer was confidential and secret, its use by former employee will be enjoined, but if it was not, its use by former employee will not be enjoined.

2. Master and Servant ⇐60

Some knowledge gained by employee is of such general character that equity will not restrict its later use.

3. Master and Servant ⇐60

An employee has the right, after cessation of employment, to use anything that is not property of his employer, but trade and business secrets and confidential information are property of employer and cannot be used by employee for his own benefit.

4. Master and Servant ⇐60

A salesman necessarily becomes somewhat acquainted with particular requirements of his customers, but knowledge he obtains in this manner is not in and of itself confidential information which is property of employer.

5. Injunction ⇐128

Injunctive relief should be granted a former employer to restrain former employee from doing business with former employer's customers only on convincing proof of harmful violation of the former employer's rights, and instances in which rights are violated by a former employee's misuse of information gained during his employment with former employer constitute an exceedingly small proportion of the whole.

6. Master and Servant ⇐60

A salesman who leaves one employer has a right to enter employment of competitor of the former employer.

7. Injunction ⇐56

The doctrine, under which injunctive relief is granted to former employer against former employee to restrain former employee from doing business with former employer's customers, should not be given application that would overemphasize the former employer's right to the detriment of former employee, by treating as confidential and secret all knowledge and information which were gained by former employee and which might be of assistance to former employee and his new employer.

8. Injunction ⇐118(2)

Former employer's complaint to enjoin former employee from soliciting former employer's customers for new employer was insufficient in that allegation that list of customers was secret and confidential was mere conclusion and facts alleged negatived such allegation.

9. Master and Servant ⇐60

If customer list is not secret and confidential it is not property of employer.

10. Injunction ⇐56

Master and Servant ⇐60

Where former employee and his new employer had allegedly done nothing except

sell to former employer's customers in field which was known and open to all competitors of former employer, there was no duty on employee to refrain from soliciting persons whose names he learned when employed by former employer, and hence there was no basis for injunction or damages.

Arthur V. Kaufman, Los Angeles, for appellant.

Milton A. Krug and Albert A. Albeck, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from judgments of dismissal entered on the sustaining of separate demurrers of defendants to the fourth amended complaint. The demurrers were sustained with leave. Plaintiff declined to amend and the judgments of dismissal followed. The demurrers were general and special. The record does not disclose the ground or grounds on which the demurrers were sustained, a practice we have had occasion to criticize.

The allegations of the fourth amended complaint may be summarized as follows:

Defendant Harold Baker, doing business as Baker Metal Products, is engaged in the business of selling tool steel, alloy steel, and other steel products of the same type as sold by plaintiff. One Evans was engaged for more than seven years in the business of dealing with such products in Los Angeles County. In November 1954 plaintiff corporation was organized and on November 24, 1954 it acquired the business, assets, and good will of Evans. Since November 1954 plaintiff has been engaged in that business. In the course of its business plaintiff and its predecessor Evans, through solicitation and circularizing in person and by mail, have built up a good reputation among purchasers of its products and have become well known to the trade as a source from which tool steel and alloy steel may be purchased.

Since November 1954 defendant Ross was employed by plaintiff as a salesman, and was at all times during his employment furnished with lists of customers of plaintiff and purchasers of its tool steel and alloy steel. The names and addresses of such customers constituted part of the good will of plaintiff's business and a trade secret of great value.

The type of steel dealt with by plaintiff is used for the maintenance and repair of machinery and plant production machines and is known in the steel trade as tool steel and alloy steel. The only customers who have use for such steel are factories and plants whose equipment and machinery are in continuous operation and have wearable parts which must be replaced by this tool steel and alloy steel. While there are hundreds of steel purchasers and prospective steel purchasers, all of whom are listed in various directories, there is no directory or any list of those customers who would have use for the tool steel and alloy steel sold by plaintiff. In order to ascertain the specific users of such tool steel and alloy steel it was necessary for plaintiff and its predecessor Evans, by means of personal contact, letters, and advertisements, to screen all the steel companies and steel users in order to pick out the companies who would require such tool steel and alloy steel. The list of users so obtained by plaintiff and its predecessor is not readily accessible to others and is a confidential and secret list. Such list was disclosed to Ross only by reason of his employment by plaintiff. An established business relationship has been developed between plaintiff and each of the users of plaintiff's tool steel and alloy steel so obtained, which would normally continue unless interfered with by Ross. For any competitor to compile a list of such concerns would entail considerable time and effort as well as expense, and by reason thereof the list is very valuable to plaintiff.

On June 24, 1955 Ross entered the employment of Baker in Los Angeles County and immediately thereupon began to solicit plaintiff's customers whose names he obtained by reason of his employment with plaintiff, and endeavored to induce said

customers to cease purchasing their tool steel and alloy steel from plaintiff and to become customers of Baker. Ross is soliciting plaintiff's customers with the intent to injure plaintiff's business.

Plaintiff demanded of Ross that he refrain from such practices. Ross has refused to comply with the demand. On information and belief, it is the intention of Ross to continue his efforts to take from plaintiff its customers and to take advantage of the knowledge and information obtained while an employee of plaintiff. It is the intention of Ross to obtain as many of plaintiff's customers as possible for the purpose of selling them tool steel and alloy steel of the type dealt with by plaintiff.

Prior to the commencement of this action plaintiff advised Baker that Ross had acquired the list of plaintiff's customers while in plaintiff's employ and that such list constitutes a trade secret and confidential information. Plaintiff demanded of Baker that he require Ross to refrain from contacting such customers for the purpose of purchasing tool steel and alloy steel of the type dealt with by plaintiff. Baker refused.

Unless Ross is enjoined from soliciting the patrons and customers of plaintiff he will continue to do so. The damage which plaintiff will sustain is practically impossible to determine and plaintiff will suffer great and irreparable damage.

On information and belief, between June 24, 1955 and the filing of the fourth amended complaint Ross, in behalf of Baker, has solicited and sold to customers of plaintiff, whose names and addresses he obtained by reason of his employment with plaintiff, tool steel and alloy steel of the value of $10,000. By reason thereof plaintiff has been damaged in the sum of $5,000. If Ross continues to solicit the customers of plaintiff he will sell said customers steel of the value of $6,000 a month and plaintiff will lose sales in that amount to its damage in the sum of $3,000 a month. The prayer is for an injunction and damages.

This action was filed July 7, 1955.

[1–7] We have recently had occasion to consider a complaint in substantially the same form as the fourth amended complaint in this action. Mathews Paint Co. v. Seaside Paint & Lacquer Co., 148 Cal.App.2d 168, 306 P.2d 113. Without repeating all that is there said, we adopt the reasoning and authorities to be found in that opinion. We stated, 148 Cal.App.2d at page 171, 306 P.2d at page 115:

"In California Intelligence Bureau v. Cunningham, 83 Cal.App.2d 197, 188 P.2d 303, an injunction against the former employes of the plaintiff was affirmed. On pages 201 and 202 of 83 Cal.App.2d, on page 305 of 188 P.2d of the opinion two groups of cases are listed, one, the so-called 'route cases,' in which injunctive relief was held proper, and another group in which it was denied. * * * The opinion enumerates the features which cast a given case into one group or the other. Without repeating it we adopt what was said as to the basis for classification. The opinion proceeds, 83 Cal. App.2d at page 203, 188 P.2d at page 306: 'The fundamental difference in the decisions, as we read them, is whether in a given case the knowledge gained by an employee is secret and confidential. If it is, its use by a former employee will be enjoined. If it is not, its use by a former employee will not be enjoined. Some knowledge gained by an employee is of such a general character that equity will not restrict its later use. An employee has a right, after cessation of employment, to use anything that is not the property of his employer. Trade and business secrets and confidential information are the property of the employer and cannot be used by the employee for his own benefit.' This is the principle that controls in the instant case. * *

"[148 Cal.App.2d at page 174, 306 P. 2d at page 117.] A salesman necessarily becomes somewhat acquainted with the particular requirements of his custom-

ers, but the knowledge he obtains in this manner is not in and of itself confidential information which is the property of the employer. * * *

"Injunctive relief should be granted only upon convincing proof of a harmful violation of the plaintiff's rights, and the instances in which such rights are violated by an employe's misuse of information gained during his employment constitute an exceedingly small proportion of the whole. A salesman who leaves one employer has a right to enter the employment of a competitor. He necessarily is possessed of information gained in the earlier employment which will enable him to better succeed in later ones. The doctrine under which injunctive relief is granted should not be given application that would overemphasize the employer's right to the detriment of the employe by treating as confidential and secret all knowledge and information gained by the employe that might be of assistance to him and a later and competing employer."

[8–10] The fourth amended complaint does not allege that Ross acquired trade and business information which was not readily accessible to others. In fact, it in effect alleges that defendants, by doing what Evans and plaintiff did, could have obtained a similar list. It is alleged that Baker is engaged in the business of selling tool steel and alloy steel of the same type sold by plaintiff. It is obvious that purchasers of tool steel and alloy steel are generally known in the trade or could be readily ascertained. It is not alleged that other producers of tool steel and alloy steel, including Baker, were not at all times competing with plaintiff for the sale of their products to the firms on plaintiff's list and to others in the same category. That is to say, it is not alleged that among plaintiff's customers were any who were not equally well known to plaintiff's competitors. The allegation that the list of plaintiff's customers was secret and confidential is a mere conclusion. Persons and corporations having factories and plants whose equipment and machinery are in continuous operation and have wearable parts which must be replaced by tool steel and alloy steel are not alleged to be secret and obviously they are not. It is not alleged that the tool steel and alloy steel sold by plaintiff are any different from that sold by its competitors. The inference is to the contrary. Baker sells the same type as plaintiff. The facts alleged negative secrecy and that the information is confidential. If the customer list is not secret and confidential it is not the property of the employer. Continental Car-Na-Var Corp. v. Moseley, 24 Cal.2d 104, 109, 148 P.2d 9. Defendants are alleged to have done nothing except sell and that they intend to sell to customers in a field which is known to and open to all competitors of plaintiff. There was no duty on Ross to refrain from soliciting persons whose names he learned in plaintiff's employ—hence there is no basis for an injunction or for damages.

The fourth amended complaint does not state facts sufficient to constitute a cause of action.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



149 Cal.App.2d 250

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Austin HECKFORD, Defendant and Appellant.

Cr. 3258.

District Court of Appeal, First District, Division 1, California.

March 19, 1957.

Rehearing Denied April 18, 1957.

Hearing Denied May 15, 1957.

Defendant was convicted of burglary in the second degree on the first count in the Superior Court, City & County of San

Francisco, John B. Molinari and Walter Carpeneti, JJ., and the defendant appealed. The District Court of Appeal, Bray, J., held that errors in cross-examination of defendant as to why he lost his job and tieing possession of prybars in with a subsequent arrest did not require reversal, where evidence left no doubt of guilt.

Judgment and order affirmed.

1. Witnesses ⇐268(1)

Legitimate cross-examination does not extend to matters improperly admitted on direct examination.

2. Witnesses ⇐383

It is not within the proper scope of impeachment to show that a witness has given false testimony as to a matter which could not be proved independently.

3. Burglary ⇐37

In prosecution for burglary, examining the defendant as to whether he owned or had prybars in his possession was proper in view of way the burglarized premises had been entered.

4. Witnesses ⇐277(5)

In burglary prosecution, cross-examination as to why defendant lost his job with an oil company was improper as relating to a purely immaterial matter.

5. Witnesses ⇐277(5)

In burglary prosecution, fact that defendant without any objection gave a reason why he lost his job with an oil company did not open the door for cross-examination on the subject.

6. Burglary ⇐37

In prosecution for two burglaries, attempting to tie possession of defendant with prybars in another's car, which defendant was occupying, with the subsequent arrest of defendant was improper, where fact of that arrest was not admissible by itself nor could it be brought in on any theory that it was used to test the defendant's credibility.

7. Criminal Law ⇐1186(4)

In burglary prosecution, improper cross-examination as to why defendant lost his job with an oil company and attempting to tie possession of prybars in with a subsequent arrest of defendant for another burglary was not prejudicial where, under the evidence, there was no doubt of the defendant's guilt. West's Ann.Pen.Code, §§ 1258, 1404; West's Ann.Const. art. 6, § 4½.

8. Criminal Law ⇐372(10)

In burglary prosecution, testimony as to circumstances of a later visit of defendant and another to the burglarized tavern when the juke machine coin box was found pried open, and an attempt had been made to pry the boards in the men's room, was admissible as disclosing a common scheme.

Donald M. Haet, Coleman Blease, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of the State of Cal., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant was tried by a jury on two counts of burglary (1) at the Sea Gull Tavern, (2) at the Red Mill Tavern. He was acquitted on the second count and found guilty of second degree burglary on the first count. He appeals from the judgment of conviction thereon and from the denial of his motion for new trial.

Questions Presented.

Defendant concedes that the evidence is sufficient to support the conviction. He contends that this is a very close case depending upon circumstantial evidence, possession of stolen goods, and defendant's credibility or lack of it concerning his explanation of that possession. Therefore, he says, alleged error in permitting cross-examination of himself as to why he lost his job was highly prejudicial.

Evidence.

August 2, 1955, between 2:30 and 7:00 a. m. the Red Mill Tavern was burglarized, apparently by entry gained by knocking in a side door. The contents of the coin

boxes of the juke box, cigarette and pinball machines were taken, plus a radio, the cord of which apparently broke in the taking. Defendant, his wife and child lived in a cottage at the rear of this tavern.

September 14, the Sea Gull Tavern located a few doors away, was burglarized between 2:30 and 8:30 a. m., entry being gained through a side window which was pried open by some type of prybar. Contents of the coin boxes of the juke box, cigarette and pinball machines were taken. Among other things taken were some 45 R.P.M. records, 6 bottles of liquor, a hammer, a hatchet and 9 beer glasses.

Several weeks later defendant, Winsett and another entered the Sea Gull and played the pinball machine. Risinger, the proprietor, noticed that they were not playing it very much. He thought that something was a "little strange." He requested them to leave. He then noticed that the coin box on the machine had been pried but nothing was taken. Also someone had tried to force open the boards nailed over the window in the men's room. He was not sure that defendant had been in that room, although Winsett had. Risinger did not see defendant do either thing, but was suspicious of defendant, and after acquiring defendant's identity and address informed Police Inspector Barden. On October 8th, Barden saw defendant and his wife in the Red Mill, told them that he would like to talk to defendant about the recent burglaries. The three plus defendant's brother-in-law went to defendant's cottage. There, there was a stock of liquor which defendant claimed to have bought in several San Francisco places. Risinger came over to the cottage and identified some of the bottles as stolen from his tavern on September 14th. One was a rare type of Philippine rum, bearing a serial number corresponding to that of one purchased some time prior. Other bottles were identified by the peculiar pouring spouts thereon. Five beer glasses were identified as similar to the stolen glasses. Although Risinger could not positively identify the records found in defendant's cottage, they were of the same speed, songs and performers as those taken. Defendant, both before Risinger arrived and after Risinger identified the bottles and glasses as above stated, claimed to have brought the beer glasses when some time prior he had moved from Sharp Park, and to have bought the liquor down town. Defendant claimed that he had bought all the records, some of them from Winsett. Winsett testified he had sold defendant some records. Defendant's wife testified to the same effect.

Barden indicated that he was not satisfied with defendant's explanation of possession and that he was going to arrest defendant. Defendant then changed his story. He said that on the morning of September 14 (the date of the Sea Gull burglary) he was troubled with a toothache and went to the kitchen to rinse his teeth. Hearing a noise like glass breaking coming from the lot between the Red Mill and the Sea Gull he went outside to investigate. From the gate in the fence at the back of the lot, he could see the side of the Sea Gull which was lit by the headlights of a municipal bus parked in the terminal for the Judah Street line. The side window of the tavern was partially open and just below on a ledge there seemed to be glasses. Defendant went over and found 4 bottles of liquor and 5 beer glasses which he brought home. A radio and its broken cord which Barden found in defendant's cottage was identified by De Marchi, the proprietor of the Red Mill, as the one stolen from that tavern on August 2d. Defendant told Inspector Barden that about the beginning of August, Winsett phoned him saying there was a present for him near defendant's garbage can. There defendant found the radio. Defendant's wife confirmed this story, saying she was the one who first answered Winsett's call. Winsett denied making the call or leaving the radio.

On October 8th Barden looked in the trunk of defendant's car, seeing a hammer and hatchet there. The following day defendant agreed to a search of the car and opened it. Barden asked defendant where he got "those," referring to the hammer

and hatchet. There were other tools in the car. Defendant claims that in answering that they were his, he understood Barden to refer to the tools generally. The hammer and hatchet were identified by Risinger as those stolen from his place. Defendant thereafter said these tools were not there previously and that Winsett must have put them there. Defendant claimed that he loaned his car to Winsett about the date of the Sea Gull burglary. His wife testified that it was after that date. Winsett testified that defendant loaned him one of his cars after that date but that it was a Mercury. The hammer and hatchet were found in defendant's Dodge. Winsett admitted defendant had loaned the Dodge to him on occasion, but denied putting the tools in it.

At the trial Barden testified to an experiment. A municipal bus placed where defendant claimed the bus was which lighted the side of the Sea Gull, flashed its lights on the side of the building. Standing where defendant claimed to have stood, Barden could not see the ledge beneath the side window nor a bottle which he had placed there. Moreover the lower part of the window was in the dark. One Austin testified for defendant that he had made the same test on three separate nights and he was able to see the window and bottles on the ledge. Austin testified the distance from the bus terminal to the tavern was 140 feet; Barden testified it was 200 feet.

Cross-Examination.

[1–6] On direct examination defendant testified that he had been working since he was 17, and that he had been working for Standard Oil from March, 1955, "until just recently." This, of course, covered the period of the two burglaries. On cross-examination, over objection, defendant was asked if he was presently working for Standard Oil. He said he was not. Then without objection he was asked if he was working for anybody at the present time. He said he was not. Later, without objection, he was asked if he owned any prybars or had two in his possession on January 26th. He answered "no." On redirect his counsel asked him when he last worked for Standard Oil. He stated up to about "four days ago." His counsel asked him "And is it true that you lost your job because of this trouble?" He replied, "That's correct." He was then asked if he had worked steadily for them including the months of August and September, earning a weekly salary. He said that he had. On recross-examination the following occurred:

"Q. Mr. Heckford, you said you were released from the Standard Oil Company job on account of this trouble. A. That is correct.

"Q. You were released from the Standard Oil Company job because you were arrested last Saturday night in possession of two prybars in front of the Sea Gull Tavern. A. I was not.

"Mr. Haet [counsel for defendant]: I will object to the question on the grounds it is prejudicial and has no materiality in this case.

"The Court: Overruled.

"The Witness: I was not in possession of prybars, whatsoever, no.

"The Court: You were not asked—he didn't ask you whether you were in possession of the prybars. He asked you if that was the reason why you were dismissed.

"The Witness: Yes.

"The Court: Because it was alleged that you had these in your possession, that is the question, I take it.

"The Witness: Dismissed from my job because I—

"Mr. Campbell [assistant district attorney]: Q. I say, the reason you were dismissed from your job was because you were arrested Saturday night in front of the Sea Gull Tavern—we will stop it right there. A. Yes."

Defendant's attorney then asked defendant whether the car he was in at this time was Winsett's car and was directly across the street from the Red Mill which is in front of his home. The court then sustained an objection to a question asking

"* * * what were you doing at the time?" on the ground that they were not concerned with the circumstances of the arrest as the court had permitted the evidence on the question of the reason for his dismissal because defendant had stated that he was dismissed because of the present charge and that the evidence went to his credibility. The court then instructed the jury, at some length, that it was not to draw any implication that the defendant had committed any offense that night, that the question was asked merely as to the reason why his employment had been terminated. The court permitted the witness to testify that there were no prybars in the car on this occasion, and as to the reason he lost his job. He stated that he had not shown up for work on Sunday or explained his absence, "and it had been investigated right away and evidently they had found out what had happened * * *" Why defendant lost his job was a purely immaterial matter. The prosecution would not in the first instance have been permitted to prove it. The fact that defendant without any objection by the plaintiff gave a reason did not open the door for cross-examination on the subject. "'* * * Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony.' (People v. McDaniel, 1943, 59 Cal.App.2d 672, 677, 140 P.2d 88, 90.) Neither is it within the proper scope of impeachment to show that a witness has given false testimony as to a matter which could not be proved independently in the case." People v. Wells, 33 Cal.2d 330, 340, 202 P.2d 53, 59. Examining defendant as to whether he owned or had prybars in his possession was proper in view of the way in which the Sea Gull had been entered. In his opening brief defendant states that at the time in question, defendant was in another's car in which there were two prybars. Defendant testified without objection that he did not know there were prybars in the car. However, attempting to tie possession in with the subsequent arrest was highly improper. The fact of that arrest was not admissible by itself nor could it be brought in on the theory that it was being used to test defendant's credibility.

[7] The question then arises as to whether the above mentioned error was prejudicial. (See Const., art. VI, § 4½; Penal Code, §§ 1258, 1404.) In view of all the circumstances of the case it does not seem reasonable that the jury would not have convicted defendant without the reference to the second arrest. The fact of defendant's possession of property stolen in the burglaries, coupled with his contradictory stories and his evasiveness, leave room for no doubt of his guilt. In spite of the apparent conflict between the testimony of Winsett and that of defendant and his wife, we agree with the statement of the trial court on the hearing of the motion for new trial that this was not a close case, and that as to defendant's story that what really happened the night of the Sea Gull burglary was that defendant had frightened away the real burglar who had then returned and hidden the hammer and hatchet in defendant's car to point the finger of suspicion at defendant, it is fantastic. The combination of a toothache, the sound of breaking glass, the illumination by the bus lights, the open window and the objects on the ledge required too many convenient incidents not to have been fabricated. The mention of the subsequent arrest could have been only a drop in a full pail of water. See People v. Watson, 113 Cal.App.2d 799, 803, 249 P.2d 38; People v. Flores, 113 Cal. App.2d 813, 821, 249 P.2d 66.

[8] Risinger's testimony as to the circumstances of the later visit of defendant, Winsett and another to the tavern when the juke machine coin box was found pried open, and an attempt had been made to pry the boards in the men's room, was admissible as helping to disclose a common plan or scheme. See People v. Grimes, 113 Cal.App.2d 365, 248 P.2d 130.

The fact that the jury acquitted defendant of the Red Mill burglary in nowise indicates that the case was a close one. As the trial court stated, the jury was "magnanimous."

Judgment and order affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



ESTATE of Emma C. HEARD, Deceased.

MOST WORSHIPFUL GRAND LODGE OF FREE AND ACCEPTED MASONS OF The State of CALIFORNIA, an unincorporated association, The Regents of The University of California, Martha C. La Berge and Norris Cummings, a/k/a Norris E. Cummings, Appellants,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION and Shirley T. Heard, Guardian of the person and estate of John Wilkerson Heard III, a minor, Respondents.

Civ. 5362.

District Court of Appeal, Fourth District, California.

March 21, 1957.

Rehearing Denied April 18, 1957.

Hearing Granted May 15, 1957.

Proceeding in the matter of the estate of deceased wherein testamentary trustees filed a petition for instructions as to construction of a provision of the will. From an order of the Superior Court, Kern County, Robert B. Lambert, J., certain beneficiaries appealed. The District Court of Appeal, Griffin, J., held, inter alia, that under facts including showing that child was not adopted by testatrix' son until 15 years after testatrix made will and over 10 years after her death, and which failed to show that son or his wife was at any time incapable of producing a child or that subject was ever discussed or made known to testatrix or that adoption of child was ever contemplated, testatrix did not intend to include in phrase "lawful issue" adopted child of her son.

Order reversed.

1. Adoption ⇐21

In 1935, for inheritance purposes a grandmother would not legally be the grandmother to an adopted child of her son, and son's adopted child would not succeed to her estate.

2. Wills ⇐498

A testatrix is presumed to know the law as it existed at time of making of will and such is true of an attorney who drew the will, especially where words "legal issue" are used several times in the will and no other such term is used which would indicate any other meaning or that an exception to the rule should attach to those words. West's Ann.Prob.Code, §§ 100, 101, 106, 108.

3. Wills ⇐457

A presumption obtains that legal terms embodied in a will drawn by a lawyer were used in their legal sense. West's Ann.Prob.Code, §§ 100, 101, 106, 108.

4. Wills ⇐498

Neither section 1334 of the Civil Code as it existed prior to 1931 nor any of succession statutes alter the prima facie, technical meaning of the term "lawful issue" within will as limited to heirs of the body. West's Ann.Prob.Code, § 108.

See publication Words and Phrases, for other judicial constructions and definitions of "Lawful Issue".

5. Wills ⇐439

The paramount rule in construction of wills, to which all other rules must yield, is that a will is to be construed according to intention of testator. West's Ann.Prob.Code, §§ 100, 101.

6. Wills ⇐440, 470

To determine testator's intention, a will must be examined in its entirety, and court's inquiry is limited to ascertaining what testator meant by language which

was used. West's Ann.Prob.Code, §§ 100, 101.

7. Wills ⇐435, 440

The court's function is to construe a will, not make one, and to ascertain testator's intention as expressed.

8. Wills ⇐498

Under facts including showing that a child was not adopted by testatrix' son until 15 years after testatrix made will and over 10 years after her death, and which failed to show that son or his wife was at any time incapable of producing a child or that subject was ever discussed or made known to testatrix or that adoption of child was ever contemplated, testatrix did not intend to include in phrase "lawful issue" adopted child of her son. West's Ann.Prob.Code, §§ 100, 101, 106, 108.

William R. Hulsy, Bakersfield, for appellants Martha C. La Berge and Norris Cummings.

Thomas J. Cunningham, Berkeley, for appellant Regents of the U. of Cal., John E. Landon, Berkeley, of counsel.

Henry C. Clausen and Henry C. Clausen, Jr., San Francisco, for appellant Most Worshipful Grand Lodge of Free and Accepted Masons of the State of Cal.

Conron, Heard & James, Bakersfield, for respondent Shirley T. Heard, guardian of the person and estate of John W. Heard III, a minor.

GRIFFIN, Justice.

Respondent Bank of America National Trust and Savings Association (hereinafter referred to as the Bank) as testamentary trustee under the last will and testament of Emma C. Heard, deceased, filed a petition under section 1120 of the Probate Code for instructions as to the construction of a certain provision of the will and the distribution thereunder of a portion of decedent's estate. All potential beneficiaries under the trust were made parties. They include Shirley T. Heard, as guardian of John Wilkerson Heard III, her adopted son, Norris Cummings, Martha C. La Berge, Most Worshipful Grand Lodge of Free and Accepted Masons of the State of California (hereinafter referred to as Grand Lodge), Bakersfield Masonic Lodge, and the Regents of the University of California (hereinafter referred to as the University).

Emma C. Heard made her will on September 28, 1935, and on October 22, 1935, made a codicil thereto. These instruments, drafted by an attorney, provided for spendthrift trusts, the principal beneficiaries of which were her son John W. Heard, Jr. and his "lawful issue". The will makes the following pertinent provisions: After several specific bequests, one to her brother for $5 and no more; the residue was given in trust to respondent Bank to pay from the net income $200 per month to her son for life; several small payments, including one for $50 per month to her cousin May Durham Cummings, and the remainder of the net income to her son "or if he be deceased, then to his lawful issue, if any, distributed per stirpes and not per capita." It provided further that if her son left "no lawful issue at the time of his death", then the income was to go to May Durham Cummings, for life, and "after her death to her living issue", per stirpes. Emergency power to invade the corpus was given to the trustee for payments to the son or "his said lawful issue". The will further provided, in one place, that upon the death of her son the residue of income should be distributed "among his lawful issue, if any, by right of representation", and in another, that in the event of the death of her son "without lawful issue" the income was to be paid to May Durham Cummings, or upon her death "to her issue by right of representation". The trust was made terminable upon the death of the last survivor of "such of the children of said May Durham Cummings as may be living" at the time of her death, one G. Stanley Rice, Eulalia Bethel, her son, and "the lawful issue, if any, of my said son".

The trust then provided that "If, at the termination of said trust as hereinabove provided, there should not then be living any

lawful issue of my said son, John W. Heard, Jr., then the whole of the residue of my estate shall be forthwith paid over and distributed as follows: (a) To the * * * Grand Lodge * * * $5,000 * * *"; and the residue to the University. For further particulars see In re Estate of Heard, 25 Cal.2d 322, 153 P.2d 553; and In re Estate of Heard, 107 Cal.App.2d 225, 236 P.2d 810, 27 A.L.R.2d 1313.

Five years before the above will was made her son, John W. Heard, Jr., married and was later divorced and had a nervous breakdown. He drank quite a bit and in 1933 he married Shirley Heard. From the date of his second marriage John W. Heard, Jr. was ill "off and on" until the death of his mother on November 23, 1939. Her son was then 40 years old and his wife was 33. They had no children.

On March 18, 1946, the estate was distributed, pursuant to and in accordance with the terms of the will. On October 19, 1950, John W. Heard, Jr. and his wife adopted one Rickey Johnson, then aged 6 years and 9 months, and he is a stranger to the blood of decedent. John W. Heard, Jr. died on March 14, 1955. May Durham Cummings died about eight months after Mrs. Heard, and left two children, Mrs. Bertha D. La Berge and Norris Cummings, appellants herein. On April 8, 1955, Shirley Heard was appointed guardian of the person and estate of the adopted child, and in that capacity she made formal demand upon the trustee for payment of the residue of the income of the trust under the provisions of the will and the decree.

After a short hearing on the question, the trial court made its findings that the testatrix intended to include in the phrase "lawful issue" any adopted children of her son, and the order was entered accordingly. La Berge, Cummings, the Grand Lodge and the University appealed. The sole question involved is whether the trial court was justified in so finding.

It is the contention of appellants that since there was no conflict in the evidence and no issue of fact presented, the trial court construed the phrase here involved erroneously, ignored the rules of interpretation, the case decisions on the subject, and the intention of the testatrix, as expressed in the will, and accordingly this court, on appeal, is not only authorized, but impelled to make a contrary construction, citing In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; In re Estate of Lefranc, 38 Cal.2d 289, 296, 239 P.2d 617; In re Estate of Clark, 64 Cal.App.2d 636, 149 P.2d 465; In re Estate of Pierce, 32 Cal.2d 265, 271, 196 P.2d 1; In re Estate of Sullivan, 86 Cal.App.2d 890, 894, 195 P.2d 894; and In re Estate of Boyd, 24 Cal.App.2d 287, 289, 74 P.2d 1049.

It is respondents' claim that the term "lawful issue", as used in the will, had no strict meaning; that as between John W. Heard, Jr. and the adopted son, he was his "lawful issue"; that under the old common-law adoption was unknown and accordingly the term "issue" did have a meaning synonymous to the heirs of the body, but that the modern cases and statutory interpretation of the word "issue" has often included an adopted child, citing Ansonia National Bank v. Kunkel, 105 Conn. 744, 136 A. 588; Bray v. Miles, 23 Ind.App. 432, 54 N.E. 446; and 1334, Civil Code, now Probate Code section 108, originally enacted in 1872, which was in effect until 1931, at which time the word "issue" was omitted. That section provided in part:

> "A testamentary disposition to 'heirs,' 'relations,' * * * 'issue', * * * of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession, in this code."

Respondents contend that since a legally adopted child is the "lawful issue" of the adoptive parents the reference to the child in the will was all inclusive, citing In re Estate of Tibbetts, 48 Cal.App.2d 177, 178, 119 P.2d 368; In re Estate of Winchester, 140 Cal. 468, 74 P. 10; Estate of Newman,

75 Cal. 213, 16 P. 887; and In re Estate of Pierce, 32 Cal.2d 265, 196 P.2d 1.

It is then argued that since the will was drawn by a lawyer who understood the technical meaning of the word "lawful issue", as disclosed by the above authorities, the testatrix likewise had this technical knowledge of the term, and that thereby she intended it to apply to her son's adopted children as well as his natural-born children, and that the use of the words "issue per stirpes", and "issue by right of representation", included an adopted child. Appellants use the same argument to reach a contrary conclusion. Finally, respondents maintain that upon this showing, and from the very terms of the will itself, when considered as a whole and with the surrounding facts, it could be rightfully held that the testator, at the time of the execution of the will, intended that any adopted children of her son would take under it.

In determining this last claim very little evidence was taken as to the surrounding facts, not otherwise disclosed by the documents to be construed and the facts here presented. It mainly involves the condition of John W. Heard's health and marital status, both prior to and after the execution of the will, as above indicated.

From the sequence of events above related respondents argue that the trial judge may well have concluded that the testatrix knew that her son, due to his physical condition, was unlikely to have children; that the adoption of a child might well be contemplated; and accordingly she intended to make provision for such "lawful issue" of his. This conclusion lacks evidentiary support. There is no evidence that John W. Heard, Jr. or his wife was at any time not capable of producing a child, that this subject was ever discussed or made known to the mother, or that an adoption of this or any other child was ever contemplated. In fact this child was not adopted until 15 years after Mrs. Heard made the will and over ten years after her death. Had a child been adopted by them before she made the will or had such an adoption been contemplated, all within her knowledge at the time, a different question might well arise. In some cases the *time* of the adoption has been held to be a "circumstance of controlling importance", or a "controlling circumstance". Hall v. Crandall, 25 Del.Ch. 339, 20 A.2d 545; Middletown Trust Co. v. Gaffey, 96 Conn. 61, 112 A. 689, 692. See also Wyeth v. Merchant, D.C.W.D.Mo. 1940, 34 F.Supp. 785, affirmed in a memorandum opinion in Merchant v. Wyeth, 8 Cir., 1941, 120 F.2d 242; In re Puterbaugh's Estate, 261 Pa. 235, 104 A. 601, 5 A.L.R. 1277; 70 A.L.R. 621, 626, and cases cited.

In Brunton v. International Trust Co., 114 Colo. 298, 164 P.2d 472, and Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420, 144 A.L.R. 664, it was held that where, as in the instant case, the adoption follows the demise of the testator, an almost conclusive presumption arises that he did not intend to provide for the adoptee. Some states have attempted to resolve the problem by declaring adopted children to be included by statutory enactment. Sec. 16(b) Pennsylvania Wills Act of 1917, now 20 P.S. § 180.14. But it is of interest to note, under the Commissioner's notes in reference to that revision it is said:

> "'This clause is also new. It is limited to the case of children adopted before the date of the will since it is a statutory canon of construction referable to the time when the testator makes his will. An extension to include children adopted after the date of the will would tend to defeat the intention of the testator.'" See In re Ashhurst's Estate, 133 Pa.Super. 526, 3 A.2d 218, footnote 3, at page 219.

California does not have a comparable statute. The legislature of New York, in adopting section 115 of its Domestic Relations Law, McK. Consol Laws, c. 14, a part of its adoption statute, provides:

> "As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the foster child is not deemed the child of the foster parent

so as to defeat the rights of remaindermen."

Historically, the word "issue" included only the descendants begotten from the loins of the named ancestor. No legal machinery for the adoption of children existed to raise the question of its broader inclusiveness.

Webster's Collegiate Dictionary, Fifth Edition, defines "issue" as "A going, * * * or flowing out * * * The outcome or result; * * *. Progeny; offspring". In Hall v. Crandall, 25 Del.Ch. 339, 20 A.2d 545, 547, it is said that: "* * * the prima facie meaning of the word 'issue' is 'heirs of the body'." In Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420, 425, 144 A.L.R. 664, it states:

> "Generally * * * 'issue,' * * * in a will * * * [is] intended to refer to natural or blood relationships, and would not include an adopted child in the absence of circumstances clearly showing that the testator so intended."

See also Grundmann v. Wilde, 346 Mo. 327, 141 S.W.2d 778, 780, and In re Cuddeback's Will, 174 Misc. 322, 20 N.Y.S.2d 862, 864, where it is said: "There is no such person as 'issue' by adoption." To the same effect is In re Gurlitz' Will, 134 Misc. 160, 235 N.Y.S. 705, 709, where it is said:

> "'Issue' is a legal term * * * and its use is persuasive of the thought that the aim of testatrix was to limit her bounty to those in whose veins the same blood as her own coursed."

Likewise is In re Howlett's Estate, 366 Pa. 293, 77 A.2d 390, 393. In an early California case, In re Comassi's Estate, 1895, 107 Cal. 1, 7, 40 P. 15, 17, 28 L.R.A. 414, it is said that "The adoption of a stranger in blood is not the issue of the marriage, and cannot be treated as its equivalent." See also In re Estate of Pierce, 32 Cal.2d 265, at pages 271–272, 196 P.2d 1, where it is held that "lawful issue" is the offspring of the parentage and excludes adopted children.

Restatement of the Law of Property, Section 292, Comment *a*, page 1546, reads in part:

> "Persons who are not offspring of the designated person are included in neither 'children' nor 'issue' without an affirmative finding of the conveyor's intent to make such inclusion, based upon additional language or circumstances. * * *."

See also In re Estate of Pierce, 32 Cal.2d 265, 271, 196 P.2d 1, 5, where it is said:

> "* * * the meaning of 'lawful issue' has been determined from the general scheme or purpose of a will considered as a whole * * * or from the fact that the testator used different terms such as heirs, issue, and children interchangeably to identify the same persons * * * the meaning of the term has frequently been determined by the circumstances surrounding the execution of the will, such as the testator's knowledge of the adoption and his approval or disappproval thereof * * * or the testator's knowledge of the inability of persons, whose 'issue' are provided for in the will, to bear children." The court there concluded that the circumstances preceding the execution of the will in that case indicated that the testator intended to use the expression 'lawful issue' in its ordinary meaning, as offspring of parentage, and to exclude adopted children, citing 3 Page on Wills, 152; and cases collected in 117 A.L.R. 691.

See also In re Estate of Clark, 64 Cal. App.2d 636, 149 P.2d 465. 3 Page on Wills states (Sec. 1027, pp. 152, 154):

> "Issue is a word whose primary meaning, in the absence of anything to show a contrary intent, is that of legitimate lineal descendants indefinitely * * *. It does not include an adopted child."

Thompson on Wills, 3rd Ed. p. 434, sec. 278, states as follows:

> "Unless the context shows a different intention, the term 'issue' does not include illegitimate offspring, stepchildren, or adopted children."

Probate Code section 106 provides:

"Technical words are not necessary to give effect to any species of disposition by a will; but technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense."

In Stevenson on "Drafting Wills and Trust Agreements—Dispositive Provisions" [1955] p. 288, sec. 12.3, it is said:

"The weight of authority in this country seems to be that the 'children', 'issue', or 'descendants' of a son or daughter would not include adopted—even formally adopted—children of that son or daughter. 'To hold otherwise', one court has said, 'would make it possible for the property of a testator to be directed to strangers of his blood without his knowledge or consent.'"

Restatement of the Law of Property, sec. 287, p. 1521, Comment *a* on Subsection (1) reads in part:

"* * * the conveyor normally does not desire the designated parent to have power, by adopting any person he may choose, in effect to appoint the subject matter of the conveyance to such person."

[1–3] At the time of the execution of the will here involved, the California law on succession and adoption was that any adopted child of a testator's son would be his heir but not the testator's heir. For inheritance purposes a grandmother would not legally be the grandmother to an adopted child of her son, and the son's adopted child would not succeed to her estate. In re Estate of Jones, 3 Cal.App.2d 395, 39 P.2d 847; In re Estate of Rowell, 132 Cal.App.2d 421, 282 P.2d 163. It is a well recognized rule of law that a testatrix is presumed to know the law as it existed at the time of the making of the will and such is true of an attorney who drew the will. In re Estate of Heard, 107 Cal.App.2d 225, 232, 236 P.2d 810, 27 A.L.R.2d 1313; In re Estate of Watkinson, 191 Cal. 591, 217 P. 1073. This is particularly true where the words "legal issue" are used several times in the will and no other such term is used which would indicate any other meaning or that an exception to the rule should attach to these words. There is a presumption that legal terms embodied in a will drawn by a lawyer were used in their legal sense.

[4–8] Regardless of the provisions of section 1334 of the Civil Code as it existed prior to 1931, the construction of that section as applied to the instant case has been sufficiently disposed of in Re Estate of Pierce, supra; In re Estate of White, 69 Cal.App.2d 749, 754, 160 P.2d 204; In re Estate of Jobson, 164 Cal. 312, 315, 128 P. 938, 43 L.R.A.,N.S., 1062; In re Estate of Blake, 157 Cal. 448, 108 P. 287; and 33 C.J. Sec. 5, pp. 818–819; 48 C.J.S., Issue, p. 779. Neither section 1334 of the Civil Code nor any of the succession statutes alter the prima facie, technical meaning of the term "lawful issue". The paramount rule in the construction of wills, to which all other rules must yield, is that a will is to be construed according to the intention of the testator. Probate Code secs. 100 and 101; In re Estate of Foley, 126 Cal.App.2d 810, 812, 273 P.2d 26. To determine such intention, a will must be examined in its entirety, and the court's inquiry is limited to ascertaining what the testator meant by the language which was used. Its function is to construe a will, not make one, and to ascertain the testator's intention as expressed. Moxley v. Title Insurance & Trust Co., 27 Cal.2d 457, 165 P.2d 15, 163 A.L.R. 838. In re Estate of Northcutt, 16 Cal.2d 683, 688, 107 P.2d 607; Security-First National Bank of Los Angeles v. Wellslager, 88 Cal.App.2d 210, 198 P.2d 700; In re Estate of Pierce, 32 Cal.2d 265, 196 P.2d 1.

Order reversed.

BARNARD, P. J., and MUSSELL, J., concur.

WEST COVINA ENTERPRISES, Inc., a corporation, Plaintiff and Respondent,

v.

John H. CHALMERS, Defendant and Appellant.*

Civ. 22108.

District Court of Appeal, Second District, Division 2, California.

March 21, 1957.

Rehearing Denied April 17, 1957.

See 309 P.2d 907.

Hearing Granted May 15, 1957.

Action by hospital owner for damages for breach of an architectural contract wherein defendant cross-complained for compensation and damages. The Superior Court, Los Angeles County, Donald E. Dunbar, J., entered judgment for hospital owner and overruled defendant's motion to vacate the judgment, and defendant appealed from such order and judgment. The District Court of Appeal, Ashburn, J., held that where contract provided that defendant would prepare plans and specifications complying with certain state and federal regulations, and one of such regulations provided that plans and specifications for hospitals should be prepared by a duly licensed architect, defendant, upon entering into such contract obligated himself to become licensed by the state so that the contract could be performed lawfully, and therefore such contract was not unenforcible on any theory of illegality, and owner was entitled to damages upon defendant's default.

Judgment and order affirmed.

1. Licenses ⇐39.40

Statute making it a misdemeanor to practice architecture in the state without a license to do so but providing that a person might make plans or drawings for a building for another person if he informs him that he is not an architect, authorizes an uncertificated architect to practice all phases of his profession if he informs his employer in writing that he is not an architect and does so before accepting the employment. West's Ann.Bus. & Prof. Code, §§ 5536, 5537.

2. Contracts ⇐153

Where a contract could be construed so as to sustain its validity, rather than to render it illegally, it would be construed to sustain validity.

3. Licenses ⇐39.40

Where contract for architectural services provided that defendant would prepare plans complying with certain state and federal regulations, and one of such regulations provided that plans and specifications for hospitals should be prepared by a duly licensed architect, defendant, upon entering into such contract, obligated himself to become licensed by the state so that the contract could be performed lawfully, and therefore such contract was not unenforcible on any theory of illegality, and owner was entitled to damages upon defendant's default. West's Ann.Bus. & Prof.Code, §§ 5500, 5536, 5537; West's Ann.Health & Safety Code, §§ 1411, 1417.

Louis M. Welsh, Los Angeles, David H. Thompson, San Diego, for appellant.

Morrow & Morrow, Los Angeles, for respondent.

ASHBURN, Justice.

Plaintiff, having decided to erect an addition to a hospital, employed defendant Chalmers to render the architectural services under a written contract dated January 2, 1954. The agreement called for completion of preliminary plans on or before May 1, 1954, final drawings and specifications by September 1, 1954, start of construction on or before October 1, 1954, and completion by December of that year. Defendant did some preliminary work and then refused to perform further upon the ground that, as he was not a licensed architect, the contract was illegal. Plaintiff sued for damages and defendant cross-complained for compensation alleged to be due and for damages. The court held the contract to be valid and to have been breached by defendant without cause. It awarded plaintiff dam-

* Opinion vacated 322 P.2d 13.

ages in the sum of $13,075 and denied relief on the cross-complaint. Defendant moved to vacate the judgment and enter a different one pursuant to § 663, Code of Civil Procedure, and the motion was denied. Defendant appeals from that order and from the judgment.

[1] Alleged illegality of the agreement is the burden of appellant's argument. Section 5536, Business & Professions Code, makes it a misdemeanor to practice architecture in this State without a license so to do, but § 5537 qualifies this, saying: "This chapter does not prevent any person from making any plans or drawings for his own buildings or from furnishing to other persons plans, drawings, specifications, instruments of service, or other data for buildings, if, prior to accepting employment or commencing work on such plans, drawings, specifications, instruments of service, or other data, the person, so furnishing such plans, drawings, specifications, instruments of service, or data, fully informs such other person or persons, in writing, that he, the person proposing to furnish such plans, drawings, specifications, instruments of service, or data, is not an architect." The contract at bar requires defendant to inspect and superintend the construction of the building, as well as to prepare the instruments specifically mentioned in § 5537. It has been held, however, that the effect of that section is to permit an uncertificated architect to practice all phases of his profession if he informs the employer in writing that he is not an architect [1] and does so before accepting the employment.

This is the ruling of McDowell v. City of Long Beach, 12 Cal.App.2d 634, 637–638, 55 P.2d 934, 935. The case arose under an earlier statute which was substantially the same as § 5537, although its terminology was more abbreviated, the reference being to "furnishing plans or other data for buildings for other persons." Stats.1901, p. 641, Gen.Laws 1931, Act 486, as amended by Stats.1903, p. 522, § 5. At page 638, of 12 Cal.App.2d, at page 936 of 55 P.2d the court said: "When the statute refers to the 'practice of architecture' and to 'furnishing plans or other data for buildings,' the former expression is not used in any broader sense than the latter; in other words, the preparation of plans and data is used as synonymous with 'practice of architecture.' In allowing an unlicensed person under certain conditions to prepare plans and data, the statute does not expressly grant him the right to supervise construction, but neither does it withhold that right, nor could it be arbitrarily withheld from him while all others were allowed to exercise it.

"Under the facts established, plaintiff's services in preparing plans and data were expressly authorized by the law; his services, consisting of supervision of construction, were not prohibited." This case was followed in People v. Wright, 131 Cal. App.2d Supp. 853, 859, 281 P.2d 384, 388, wherein the court said: "It therefore must follow that Section 5537 in the respect mentioned authorizes the person who does not possess the certificate 'to practice architecture.'" The McDowell case, supra, also holds that the permission thus extended to unlicensed architects applies to a nonresident, 12 Cal.App.2d at pages 636–637, 55 P.2d at page 935. The contract under consideration recites that "Chalmers is not an architect," and the court found that prior to making the agreement defendant fully informed plaintiff in writing that he was not an architect licensed in this State.

This reduces appellant's contention to one based upon the contract provision which specifies that Chalmers "[p]repare for Owner plans, drawings and specifications for said building including preliminary plans, final and working drawings

1. The word architect is defined as referring "to a person who holds a certificate to practice architecture in this State under authority of this chapter." Bus. & Prof.Code, § 5500.

and specifications complying with the requirements and regulations of the California State Department of Public Health, the California State Fire Marshal, the United States Department of Public Health." Counsel points out that § 406 (b) of the regulations of the California State Department of Public Health, Title 17, Cal.Adm.Code, provides with respect to hospitals: "Plans and specifications shall be prepared by a duly licensed architect or a registered civil engineer." This regulation rests upon § 1411, Health and Safety Code.[2] Section 1417 thereof provides that a violation "of the rules and regulations promulgated under this chapter" is a misdemeanor. The applicable regulations of the United States Department of Public Health provide as follows: "* * strict compliance with all applicable state and local codes and regulations is required." 42 C.F.R. 53, Appx. "A," p. 176.

Counsel for appellant argues that such an administrative regulation has the force of law, see Mitchell v. McKevitt, 128 Cal. App. 458, 461, 17 P.2d 789; Viner v. Civil Service Comm., 59 Cal.App.2d 458, 465, 139 P.2d 88, and that, as the contract expressly provides for an illegal act, it is unlawful and void and the law will grant no relief by way of enforcing the same. Respondent argues that § 1411, Health and Safety Code, has no relation to construction of the building, does not attempt to cover the field occupied by the architects licensing Act, and that the regulation requiring plans to be drawn only by a licensed architect is void because it exceeds the bounds of § 1411 and conflicts with the provisions of § 5537, Business and Professions Code. The solution of the problem thus raised is not free from difficulty or doubt and we find it unnecessary to pass upon it. It will be assumed for purpose of further discussion that appellant is correct in his claim that the regulation is a valid one. It does not follow, however, that the contract is thereby rendered unenforceable.

[2] If that agreement calls for a violation of said regulation through preparation of plans, etc., without procuring an architect's license, it is of course illegal (upon the assumption that § 406(b) is a valid regulation). But if it contemplates that defendant shall procure a license before performing, if that is the fair interpretation of the contract, it will be so construed in order to sustain its validity. Vagim v. Brown, 63 Cal.App.2d 504, 510, 146 P.2d 923, 926: "If an agreement does not provide for a method whereby its purpose is to be accomplished, it must be assumed, if it can be accomplished by any legal method, that such method was contemplated when the contract was made, and will be pursued. Burne v. Lee, 156 Cal. 221, 104 P. 438.

"It is the universal rule that where a contract can be performed legally it will not be presumed that the parties intended to perform it in an illegal manner (Fites v. Marsh, 171 Cal. 487, 153 P. 926), and where a contract can be performed in a legal manner, as well as in an illegal manner, it will not be declared void because it was in fact performed in an illegal manner. Teachout v. Bogy, 175 Cal. 481, 166 P. 319. This last principle stated is applied where the contract manifests no intent or purpose that it is to be performed in an illegal manner and where also the party complaining does not participate in, or cooperate with the illegal performance." To the same effect see Fadel v. Slayman, 84 Cal.App.2d 6, 9, 189 P.2d 771; Barham v. Barham, 33 Cal.2d 416, 429, 202 P.2d

2. § 1411. "The State department, after consultation with the advisory board and receipt of the recommendations of the advisory board in respect thereto, shall make and promulgate, and may thereafter modify, amend, or rescind, reasonable rules and regulations to carry out the purposes of this chapter, classifying hospitals and prescribing minimum standards of safety and sanitation in the physical plant, of diagnostic, therapeutic and laboratory facilities and equipment for each class of hospitals."

289; Freeman v. Jergins, 125 Cal.App. 2d 536, 546, 271 P.2d 210; Fites v. Marsh, 171 Cal. 487, 488, 153 P. 926; Dougherty v. Cross, 65 Cal.App.2d 687, 698, 151 P.2d 654; Gardiner v. Burket, 3 Cal.App.2d 666, 669–670, 40 P.2d 279; Thacker v. American Foundry, 78 Cal.App.2d 76, 83, 177 P.2d 322; 12 Cal.Jur.2d § 69 p. 272; § 127, p. 340; 17 C.J.S., Contracts, § 190, p. 545; 12 Am.Jur. § 153, p. 647; § 251, p. 793.

The court found that defendant, before accepting employment, not only informed plaintiff that he was not an architect licensed in California, but also said he then was licensed as such in Nebraska where he had practiced for several years, that he had prepared plans for a hospital while in the air force and that he intended to apply to the State of California for an architect's license; it was also found that defendant at all times was in fact licensed to practice in Nebraska. In these circumstances the obtaining of a California certificate became an implied obligation of his contract. Actually he never tried to do so until August, 1955, some 18 months after the contract was made.

The procuring of a California license should have been no real task for one possessing defendant's qualifications (he must be taken at his word in that respect). Section 5540, Business & Professions Code, provides for issuance of a temporary certificate to an out-of-state architect. It says: "This chapter does not prevent a person, who is engaged in the practice of architecture outside this State, from preparing plans and specifications for a stipulated building or other structure within this State if he pays the fee provided by this chapter, presents satisfactory evidence to the board that he is competent to practice architecture and the board issues a temporary certificate to him for the stipulated structure." Moreover, the statute provides for certification of any applicant who can pass the prescribed examination and otherwise qualify. §§ 5550–5551. The attorney general has ruled that such certificates cannot be denied to applicants solely upon the ground of nonresidence. (4 A.G. 400.)

[3] It being an implied term of his contract that defendant would perform lawfully, it became his duty to take and pass any examination necessary to comply with the Board of Health regulations under discussion. Having engaged to do so, an impossibility arising from personal inability to pass the examination or to otherwise qualify would not excuse performance on defendant's part. Civ.Code, § 1597; 12 Cal.Jur.2d § 238, p. 461; 12 Am. Jur. § 378, p. 954; Hein v. Fox, Mont., 254 P.2d 1076, 1079; Standard Oil Co. of New York v. Central Dredging Co., 225 App.Div. 407, 233 N.Y.S. 279, 282–283, affirmed in 252 N.Y. 545, 170 N.E. 137.

Defendant made no effort before this lawsuit was filed to procure a certificate, either the temporary one issuable to a nonresident licensed architect or the permanent one which follows the formal examination of §§ 5550–5551. He repudiated the contract in October, 1954, at which time he advised plaintiff that he would no further perform "unless plaintiff would agree to release defendant from said agreement and enter into a new agreement with defendant and another architect, the terms of said proposed new agreement being less favorable to plaintiff than said agreement executed by plaintiff and defendant and providing for additional payments to be made by plaintiff in an amount of at least $4,575.00." (Finding VI.) Defendant thus defaulted without any legal excuse therefor.

No question is raised as to the propriety of the amount of damages awarded.

The judgment and the order under appeal are affirmed.

MOORE, P. J., and FOX, J., concur.

149 Cal.App.2d 500

Hobert VAN WINKLE and Edna Van Winkle, Plaintiffs and Respondents,

v.

CITY OF KING, a California municipal corporation, and body politic, and Edward A. Thompson, d/b/a By-Chemical Products Company, Defendants and Appellants.

Civ. 17214.

District Court of Appeal, First District, Division 1, California.

March 28, 1957.

Rehearing Denied April 26, 1957.

Hearing Denied May 22, 1957.

Parents of child two years and ten months of age brought action against city and city's lessee for death of child who drowned in sewage disposal plant. The Superior Court, County of Monterey, Stanley Lawson, J., entered judgment for parents and an order denying motions of city and its lessee for judgment notwithstanding the verdict, and the city and its lessee appealed. The District Court of Appeal, Agee, J. pro tem., held that where city leased land to lessee to manufacture chemicals and authorized lessee to rent living quarters in barrack buildings on the land and to use sewage disposal plant located near the land, and lessee rented a unit in one of the barrack buildings to parents of child, and child went from barrack building 850 or 900 feet and then down stairway 85 feet in length to sewage disposal plant where he drowned, the attractive nuisance doctrine did not apply, and that parents were not entitled to recover, in absence of evidence of active negligence on part of city or licensee, because status of child was that of a trespasser, or at best a licensee.

Judgment and order reversed with directions to enter judgment for city and lessee

1. Municipal Corporations ⇐827(1)
Negligence ⇐32(4)

Where city leased land to lessee to manufacture chemicals and authorized lessee to rent living quarters in barrack buildings on the land and to use sewage disposal plant located near the land, and lessee rented a unit in one of the barrack buildings to parents of child two years and ten months of age, and child went from barrack building 850 or 900 feet and then down stairway 85 feet in length to sewage disposal plant where he drowned, there was no implied invitation to child to play at sewage disposal plant, and child would not be deemed an "invitee" in action by parents against city and lessee for death of child.

See publication Words and Phrases, for other judicial constructions and definitions of "Invitee".

2. Negligence ⇐136(9)

Though extent of an implied invitation is generally one of fact rather than of law, where there is neither dispute nor conflict as to essential facts, and evidence and only reasonable inferences therefrom inescapably lead to conclusion that area of any invitation has been substantially over-stepped, question becomes one of law.

3. Negligence ⇐33(3)

In action for death of child two years and ten months of age, who drowned in sewage disposal plant, child was to be treated in the same manner as an adult in determining whether he was a trespasser.

4. Negligence ⇐39

Where city leased land to lessee to manufacture chemicals and authorized lessee to rent living quarters in barrack buildings on the land and to use sewage disposal plant located near the land, and lessee rented a unit in one of the barrack buildings to parents of child two years and ten months of age, and child went from barrack building 850 or 900 feet and then down stairway 85 feet in length to sewage disposal plant where he was drowned, parents of child could not recover from city and lessee for death of child under the attractive nuisance doctrine.

5. Municipal Corporations ⇐827(1)
Negligence ⇐32(4), 33(3)

Where city leased land to lessee to manufacture chemicals and authorized lessee to rent living quarters in barrack buildings on the land and to use sewage disposal plant located near the land, and lessee rent-

ed a unit in one of the barrack buildings to parents of child two years and ten months of age, and child went from barrack building 850 or 900 feet and then down stairway 85 feet in length to sewage disposal plant where he drowned, the status of the child was that of a trespasser, or at best a licensee, and parents could not recover from city and lessee for death of child, in absence of evidence of active negligence on part of city or lessee.

J. T. Harrington, Salinas, Gordon R. Daley, King City, for appellant, City of King.

Hoge, Fenton & Jones, Monterey, for appellant, Thompson, By-Chemical.

Mandl & Atteridge, Salinas, for respondents.

AGEE, Justice pro tem.

This is an appeal from a judgment for plaintiffs and from an order denying the respective motions of defendants City of King and Edward A. Thompson, doing business as By-Chemical Products Company, for judgment in their favor notwithstanding the verdict of the jury against them. The action is one for wrongful death brought by the parents of a minor child who was drowned in a pool of water.

In 1939 or 1940 the City of King acquired a large tract of land just outside of its corporate limits by means of a general bond issue. In 1940 the City leased the property to the United States Government for the purposes of constructing defense plants and an airport for the training of pilots. During World War II the Government constructed upon this property hangars, runways, barracks, a sewage disposal plant, butane tanks and other buildings. In 1947 the lease expired and the property together with the improvements reverted to the City. All of this property was thereafter annexed to the City prior to the drowning involved herein.

On August 6, 1947, the City and Thompson entered into a lease agreement whereby a portion of this property was leased to Thompson for a period of ten years at a rental of $1.00 per year. The lease recited that the leased premises were to be used "for the purpose of manufacturing chemical and chemical by-products." However, the City authorized Thompson to rent the living quarters in the barrack buildings to individual families until the housing shortage subsided.

The lease expressly excluded the sewage disposal plant from the premises leased to Thompson but permitted him the use of its facilities and (apparently in return) he was required to maintain it at his own expense. The sewage plant also served the hangars at the airport and some other housing units owned by the City which were located three-fourths of a mile therefrom. The City continued to inspect the plant four or five times a year, furnish the chlorine needed in the plant's operation, and assist whenever any repairs to the machinery or equipment became necessary.

On or about January 1st, 1955, Thompson rented a unit in one of the barracks to respondents and their three minor children, the oldest of whom was seven. The barracks were located on a plateau. The sewage plant was located below this plateau. A stairway extended from the level of the plateau down to the level of the land upon which the sewage plant was located. The difference in altitude between the two levels is about 60 feet, the angle of the slope from the plateau down to the lower level being approximately 45°, and the stairway being approximately 85 feet in length.

The distance from the unit occupied by respondents to the plant on a direct line is approximately 950 feet. The distance from said unit to the top of the stairway on a direct line is approximately 880 feet.

The disposal plant includes two rock filter beds which adjoin two rectangular-shaped concrete basins filled with sewage water. The rock filter beds are higher than the pools of sewage water.

On the afternoon of February 3, 1955, the respondents' son, Philip, who was then

two years and ten months of age, accompanied by Warren Leader, seven years of age, and two little girls, seven and six years of age, went to the edge of the plateau at the top of the stairway. The girls stayed there but the boys went down the steps. Philip went onto the rock filter beds and began throwing rocks therefrom into the water pools. Warren started back up. On the way he turned around and looked back and saw Philip lying in one of the pools of water. Efforts to rescue him were unsuccessful.

The main issue in this case is the status of the deceased child while on the plant premises. Appellants contend that he was a trespasser, to whom they owed only a duty to refrain from inflicting wanton or wilful injury. Demmer v. City of Eureka, 78 Cal.App.2d 708, 712, 178 P.2d 472. They correctly point out that there would be no liability even to a licensee where, as here, there is no evidence or claim of active conduct by them constituting negligence. Free v. Furr, 140 Cal.App.2d 378, 383, 295 P.2d 134. Respondents admit that there was no express invitation to Philip to come upon the plant premises but assert that such invitation can be implied from the circumstances.

The circumstances upon which respondents rely are: (1) the invitation to rent living quarters carried with it an invitation to the tenants and their children to play and be in the surrounding area, including the sewage plant; (2) public property is open to everyone and the sewage plant was owned by the City; (3) the mere presence of the stairway was an invitation to the plant. We will discuss these points in the order made.

[1, 2] Certainly said children were authorized to and it was their general custom to play in the area occupied by the barracks which were under lease to their landlord, Thompson. But to travel a distance of 850 or 900 feet to reach the top of a stairway 85 feet in length, descend such stairway, and then proceed to a sewage plant in an isolated location is stretching an implied invitation beyond the bounds of reason. As before pointed out, the premises leased by Thompson did not even include the sewage plant and he had no right or authority to invite anyone there for purposes not connected with the use or maintenance of the plant. Neither Thompson nor the City even knew that anyone ever visited the plant for play or sightseeing purposes. While the extent of an implied invitation is generally one of fact rather than of law, when there is neither dispute nor conflict as to the essential facts, and the evidence and the only reasonable inferences therefrom inescapably lead to the conclusion that the area of any invitation has been substantially over-stepped, the question becomes one of law. Powell v. Jones, 133 Cal.App.2d 601, 607, 284 P.2d 856.

Even if the deceased child is treated as a licensee, whose presence was tolerated by appellants, there would be no liability upon them unless they committed some overt act toward him amounting to negligence. As was said in Ward v. Oakley Co., 125 Cal. App.2d 840, at page 844, 271 P.2d 536, at page 539, where two young boys were drowned in a slough on property of the defendants: "Where a person goes on premises of another without invitation and as a bare licensee, and the owner of the property acquiesces in his presence, if injury is sustained by reason of a mere defect in the premises the owner is not liable since the licensee takes all the risks arising from the condition of the premises."

The same question was considered in Polk v. Laurel Hill Cemetery Ass'n, 37 Cal. App. 624, 174 P. 414, where an 8-year-old boy was drowned in an open unguarded reservoir maintained by defendant in its cemetery. The defendant admitted that it extended a general invitation to the public to visit the cemetery and that this invitation included children. It was also admitted that the children residing in the neighborhood customarily played in the cemetery and that, among other activities, they cast stones into the reservoir. The court held, *as a matter of law,* that the invitation only extended to the purposes for which the cemetery was intended and concluded, as

follows: "When therefore they [the children] were in the cemetery for the purpose of playing only, they were not there for any purpose to which the cemetery is put or designed to be put, nor were they there under the general privilege accorded or general invitation extended to the public to visit the cemetery." 37 Cal.App. at pages 631–632, 174 P. at page 417.

The argument that public property is open to everyone is obviously incorrect if this is meant to include public property which is not customarily open to the public or to which the person in question has gone for a purpose not connected with the use of such property. Demmer v. City of Eureka, 78 Cal.App.2d 708, 711, 178 P.2d 472. Respondents cite Gibson v. County of Mendocino, 16 Cal.2d 80, 105 P.2d 105, in support of their statement that: "The property was public property, [citation], open for everyone; it was not private property." In this case, the county was held liable for injuries sustained by a plaintiff as a result of the defective condition of the entrance way to the county courthouse. Plaintiff did not intend to transact any business in the courthouse and was merely using it as a passage-way. The court pointed out that "it was the general custom for the residents of that community to cross through the court house as a 'short cut' to reach the streets lying to either side of the building." 16 Cal.2d at page 84, 105 P.2d at page 107. Thus, by general custom, plaintiff's use of the courthouse premises was authorized by the county. This is a far cry from the factual situation involved herein. There is not the slightest evidence of any such custom or authorization in the instant case. As was said in Betts v. City & County of San Francisco, 108 Cal.App. 2d 701, at page 704, 239 P.2d 456, at page 458, in distinguishing Gibson v. County of Mendocino, supra: "A different question arises when public property is being used by a trespasser for a forbidden private purpose. * * * In such a case it would seem clear that he would not come under the terms of the Public Liability Act."

Respondents also argue that the mere presence of a stairway to the rocks and pools was an open invitation to the area, citing Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19, 156 A.L.R. 1221. In that case, the plaintiff was injured on steps leading from the sidewalk to an apartment house where she had gone to inquire as to the rental of an apartment. There was in fact no vacancy and plaintiff had no information that there was. However, she was held to be an invitee. The court said, 24 Cal.2d at page 136, 148 P.2d at page 21: "Plaintiff came upon the premises as a prospective tenant—*a purpose connected with the business conducted thereon*, and she, therefore, was a business visitor." (Emphasis added.) Certainly, the two boys in the instant case did not go upon the plant premises for any "purpose connected with the business conducted thereon." And the cited case is not authority for the proposition that the stairway in the instant case constituted an "open invitation" to the sewage plant. The stairway thereto obviously was for the purpose of providing access to the sewage plant for those who had business to transact there, such as maintenance and repair.

[3] It must be kept in mind that, in determining whether the deceased child in this case was a trespasser, he is to be treated in the same manner as an adult. 19 Cal.Jur., Negligence, § 57, p. 624; Lake v. Ferrer, 139 Cal.App.2d 114, 117, 293 P.2d 104. The issue can be more clearly visualized by merely stating that an adult who went upon the premises of the sewage plant for the purpose of sightseeing or taking rocks from the rock filter beds and throwing them into the water pools could hardly claim that he was an invitee, either express or implied.

Finally, respondents contend that the judgment may be upheld under the doctrine of attractive nuisance, more appropriately expressed as "injuries to trespassing children." Marino v. Valenti, 118 Cal.App.2d 830, 842, 259 P.2d 84, 90. The doctrine, with the exception hereinafter discussed, has never been held in this state to apply to

pools of water, whether natural or artificial. Peters v. Bowman, 115 Cal. 345, 355, 47 P. 113, 598, pool of water accumulating by reason of embankment thrown up by city; Polk v. Laurel Hill Cemetery Ass'n, supra, 37 Cal.App. 624, 634, 174 P. 414, unguarded reservoir maintained in a cemetery; Reardon v. Spring Valley Water Co., 68 Cal. App. 13, 16, 228 P. 406, unguarded reservoir maintained in residential district; King v. Simons Brick Co., 52 Cal.App.2d 586, 589, 126 P.2d 627, unguarded pool of water accumulating in clay pit dug by defendant; Demmer v. City of Eureka, supra, 78 Cal.App.2d 708, 710, 178 P.2d 472, pool of water by reason of embankment thrown up by city; Betts v. City and County of San Francisco, supra, 108 Cal.App.2d 701, 703, 239 P.2d 456, reservoir maintained by city in playground area of park; Ward v. Oakley Co., supra, 125 Cal.App.2d 840, 845, 271 P.2d 536. As stated by Justice McComb in the case last cited, 125 Cal.App.2d at page 845, 271 P.2d at page 540: "It is settled that a body of water, natural or artificial, does not constitute an attractive nuisance which will subject the owner to liability for trespassing children who are attracted thereto and are drowned."

Two recent cases have affirmed this statement. In Lake v. Ferrer, supra, 1956, 139 Cal.App.2d 114, 293 P.2d 104, a 2½-year-old boy was drowned in the next-door-neighbor's swimming pool. A general demurrer to the complaint was sustained without leave to amend. The judgment thereupon entered was affirmed and a hearing denied by the Supreme Court. The complaint alleged that the decedent and a neighbor's 4-year-old child were playing in the former's back yard; that his parents did not know of the existence of the pool because of its position and the surrounding foliage but that at a point in their back yard some 30 feet distant from the pool, the children could see the top of a lustrous, metallic ladder located in one corner of the pool; that they were attracted by the ladder and went onto respondent's property and up to the pool; that decedent either climbed into the pool by means of the ladder or fell therein while playing about the pool; that at the time of the drowning and for four months prior thereto, respondent knew, or had reason to know of the presence next door of the decedent, of the unlikelihood that such a child would have reason to realize the danger of falling into the pond, of the ignorance of the appellants as to the existence of the danger and of the likelihood that decedent would be attracted to and fall into the pool; that in spite of such knowledge, the respondent took no steps whatsoever, not even so much as a neighborly warning, to prevent, or attempt to prevent the drowning. This case appears to be directly parallel to the one at bar. In the cited case, the plaintiffs relied upon the ladder as the object which attracted the child. In the instant case the plaintiffs rely upon the grass (unplanted) on the slope leading down to the plant and the rocks in the filter beds as being what attracted Philip. The plaintiffs in both cases stressed the child's extreme youth and the lack of knowledge by the parents of the existence of the pool.

In Wilford v. Little, 1956, 144 Cal.App. 2d 477, 301 P.2d 282, a 4½-year-old boy was drowned in a swimming pool. Judgment was entered against the plaintiffs (parents) after they declined to amend their complaint. The judgment was affirmed on appeal and the Supreme Court denied a hearing on November 14, 1956. Plaintiffs attempted to rely upon the "trap" theory in order to avoid the unbroken line of cases involving natural and artificial pools of water. The complaint alleged in substance: the pool had a diving board extending over the water; small children played on the adjacent property; the pool and diving board could be seen by the children from the adjacent property and defendants knew this; the deceased child and some other small children were attracted onto the defendants' property by the diving board and pool; the decedent and another small boy began to play upon the diving board, which was similar to a see-saw or teeter-board in that it had an "up-and-down" motion when jumped upon; the de-

cedent and his companion were too young to appreciate the danger involved in playing on the diving board and in the pool; in the course of play the decedent fell or jumped from the diving board and drowned; neither of the parents (plaintiffs) knew or had reason to know that there was a swimming pool in the neighborhood or that the property of the defendants was not fenced or enclosed in any manner to keep children or others away from the pool; that a fence or other enclosure could have been installed at a relatively small cost. The court held, in accord with the appellate decisions of this state, that the pool was not an attractive nuisance and that the diving board did not bring the case within the "trap" exception, as exemplified in Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 P. 1060. In that case a 5-year-old boy was drowned in an irrigation canal when he fell into it after trying to wet his handkerchief. He was sucked into a siphon which carried the water under a cross-stream and his body was found some 15 feet down in the syphon. The court held that defendant had created a concealed danger in the nature of a trap to those who lived close by. The pool in the instant case had no such concealed trap and the rocks which respondents herein claim attracted Philip to the plant did not, in combination with the pool, create an attractive nuisance any more than the diving board did in the Wilford case, supra.

Another illustration of a refusal to apply the trap theory is Reardon v. Spring Valley Water Co., supra, 68 Cal.App. 13, 228 P. 406, where a 5-year-old boy drowned after a fall from a rowboat which was allowed to remain unfastened in a negligently guarded reservoir.

[4, 5] We conclude that the attractive nuisance doctrine does not apply to the situation herein and that the respondents are not entitled to recover herein because the status of their son was that of a trespasser, or at best a licensee. The judgment and the order denying appellants' respective motions for judgment notwithstanding the verdict are and each is reversed, with directions to the court below to enter judgment in favor of appellants.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



149 Cal.App.2d 453

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Darrel Elden HAILEY, Daniel Grace McCarty, William J. Gildersleeve, Louis A. Belme, Defendants,

Louis A. Belme, Appellant.

Cr. 5734.

District Court of Appeal, Second District, Division 3, California.

March 26, 1957.

Rehearing Denied April 24, 1957.

Hearing Denied May 22, 1957.

Defendant was convicted of robbery and from a judgment of the Superior Court of Los Angeles County and from an order denying a motion for new trial, Thomas L. Ambrose, J., the defendant appealed. The District Court of Appeal, Parker Wood, J., held that the evidence sustained conviction.

Judgment affirmed.

1. Criminal Law ⇐407(1)

When a defendant under conditions fairly affording him an opportunity to reply stands mute in face of an accusation, silence may be taken against him as evidence indicating an admission of guilt.

2. Criminal Law ⇐407(2)

Evidence that defendant made no reply when an officer told him that officers knew that defendant drove car involved in robbery was not an admission of guilt, where defendant's attorney was present and defendant could assume that his attorney would make any statement nor was failure

of the attorney to reply any admission that defendant was guilty, since in view of the confidential relationship, the attorney was not required to reply. West's Ann.Pen. Code, § 31.

3. Robbery ⇐24(1)

Where defendant knew before he lent his automobile to codefendant that the automobile would be used for an illegal purpose and he received an amount wholly disproportionate to the reasonable rental, evidence established that defendant with guilty knowledge and intent united in a joint undertaking with the codefendant and aided and abetted in the commission of robbery so as to sustain conviction. West's Ann. Pen.Code, § 31.

Burch Donahue, Inglewood, for appellant.

Edmund G. Brown, Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant Belme, one Hailey, one McCarty and one Gildersleeve were charged by information with robbery. Trial by jury was waived. Hailey pleaded guilty. The case was dismissed as to Gildersleeve. McCarty and Belme were adjudged guilty. Belme appeals from the judgment and the order denying his motion for a new trial.

Appellant contends that the evidence was insufficient to support the judgment.

The robbery occurred on December 21, 1955, about 3:10 p. m. Mr. Wilmot, a cashier at the Western Union Telegraph Company, 734 South Flower Street, Los Angeles, was returning to his office after having been to a bank where he obtained $7,500 in currency for use in paying the employees. He was carrying the money in a bag. He entered an elevator in the Western Union building, and as he turned to face the elevator door defendant Hailey "dashed around the corner," grabbed the bag and tried to take it away from him. Defendant McCarty stood in the doorway of the elevator with a revolver in his hand. In the struggle for possession of the bag, Hailey pulled Mr. Wilmot out of the elevator and struck him on the hand with a revolver. As the revolver "came down" it was discharged and the bullet went through Mr. Wilmot's trouser leg. Hailey jerked the bag from Mr. Wilmot's hand. Then Hailey and McCarty ran down the hallway (a distance of approximately 150 feet) and out the front door. Mr. Wilmot identified Hailey as one of the robbers. The elevator operator identified Hailey and McCarty as the robbers who were in the building.

Miss Schneider testified that on said December 21, about 3:15 p. m., while she was at the front door of said building she heard a gunshot; then she saw two men run out of the building and one of them had a satchel in his hand and was putting a gun in his belt; the man with the satchel and gun was defendant Hailey; she saw the two men run out the front door, get into a 1947 or 1948 light blue automobile and take off; after they were in the automobile it stayed there just long enough for someone to start it; she did not notice whether someone else was in the automobile.

Mr. Novoa testified that at said time he was in a parked automobile in front of the Western Union office; about 30 feet in front of his automobile, and in front of the entrance of the building, there was a "parked" dark blue automobile that "was in motion back and forth" about 10 minutes; he saw one person in that automobile —the driver, a white person whose hair style was on the "bushy side"; the automobile "took off"; about 5 or 10 minutes after he saw the automobile he heard that there had been a robbery.

Mr. Williams, a taxicab driver, testified that on said December 21, about 5 p. m., two men entered his cab as passengers at Pico Boulevard and Vermont Avenue, and he took them to Grand Avenue and Pico Boulevard; at that place one of the men got out of the cab and went to the rear of the cab, and the other man stayed in the cab; the man who had gone to the rear returned to the cab; then the cab went to

97th and Prairie Streets in Inglewood, and when the cab stopped there a blue Dodge automobile pulled up behind the cab; another man was in that automobile; the two men who were in the cab paid the cab fare and got into the other automobile. Photographs of Hailey and McCarty were shown to the witness, Mr. Williams. He testified further that, to the best of his judgment, those photographs were photographs of the two men who were in the cab.

Officer Rafferty testified that he had a conversation with defendant Belme (appellant) on January 3, 1956, wherein Belme said that on the morning of December 21 Hailey came to Belme's house and asked if he could borrow Belme's car; Belme replied that he could borrow it; Hailey took the car, which was a 1942 blue Dodge sedan; he returned the car to Belme that afternoon about four or five o'clock at the Swing Time Bar in Inglewood; he (Hailey) came into the bar with another fellow and gave the car keys and $200 to Belme, and told him the car was parked in the back. The officer testified further that he asked Belme what the $200 was for, and he replied that it was for the use of the car; the officer asked him if he knew, before the car was taken, what Hailey was going to use it for; Belme replied that he knew it was going to be for something illegal but he did not know exactly what it was; the officer asked if he had any conversation with Hailey when the car was returned; Belme replied that Hailey mentioned the name "Western Union," and said everything went all right, that Belme did not have to worry, that Hailey had a scuffle with the guy in an elevator, and a shot was fired but no one was hurt.

Officer Rafferty testified further that he had another conversation with Belme on the day before the preliminary examination, in the hallway of the Hall of Justice, and in the presence of Belme's attorney, Mr. Donahue; at that conversation the officer said: "Louis [referring to Belme], you lied to us. * * * We know that you not only received a thousand dollars, we know that you received an additional $500.00. We know that you drove the car. That they got out, that they took a taxicab and met you at Frank Wiggins Trade School [Pico and Grand] and you later followed the cab out to Inglewood." The officer testified that Belme "looked at me and said nothing."

Belme testified that he did not participate in a robbery at the Western Union; on the morning of December 21, 1955, about 10 a. m., Hailey came to Belme's house and asked if he could use Belme's car; Belme said "Yes"; then Hailey, accompanied by Belme, drove the car to the Swing Time Cafe and left Belme there; Belme stayed there about 15 minutes and then went home; then he went to James Pollack's house in Torrance where Belme was going to build a chimney (Pollack was manager of the Swing Time Cafe); Belme stayed there about an hour fixing the foundation for the chimney; then he and Pollack went to a place on Hobart Street (distance about 12 miles) where Mr. Greminger was working and obtained some cement; they stayed there a few minutes, and Mr. Greminger went with them to Pollack's place, arriving there about 2:30 p. m.; the three of them worked on the chimney until approximately 4 p. m. when Pollack took Belme home; Belme went to the Swing Time Cafe where he waited for the return of his car; Hailey returned there with the car about 5 p. m. and gave Belme $200 and said that it was for the use of the car; Belme asked Hailey what they had done, and he replied that "they pulled a job down in L. A.," and he had "to take off some place" and would see Belme later; then Hailey left; Belme did not know that there was to be a robbery; the first knowledge he had that something was wrong was when Hailey told him at the cafe that they did something wrong; he did not tell Officer Rafferty that he knew "they" were going to use the car for an illegal purpose; Officer Rafferty did not say to him: "You shouldn't lie Louis. You know you received $500 more at or about the Frank Wiggins School"; the officer did not say anything like that to him.

James Pollack testified that on December 21, 1955, he first saw Belme about 11 a. m. at Pollack's house; he and Belme went to a place on Hobart Street where Mr. Greminger was working, obtained some cement, returned home and mixed and poured the cement; Mr. Greminger did the cement finishing; Belme stayed there until approximately 4:15 p. m., when Pollack took Belme home, arriving there about 4:40 p. m.

Mr. Greminger testified that on said December 21, about 1:30 p. m., he saw Belme and Pollack at a construction job on Hobart Street, and at that time nine sacks of cement were put on Greminger's truck; then Greminger drove the truck to Pollack's house, and Belme rode in the truck with him; the three men mixed and poured the cement at Pollack's house, and Greminger did the cement finishing; Greminger left that place about 3:45 p. m. and at that time Belme was at Pollack's house.

Mr. Donahue, counsel for Belme, testified that on January 17, 1956, the day before the preliminary examination, he and Officer Rafferty had a conversation in the Hall of Justice; at that time the officer said that Belme was lying to the witness (Mr. Donahue), that the officers knew that Belme was the driver of the car, that Belme drove to the Frank Wiggins School, and that Belme received $500 additional. Mr. Donahue testified further that the conversation was in the presence of himself and the officer, and at that time Belme and Belme's wife were at the far end of the hall.

Defendant Hailey, called as a witness (on rebuttal) by the People, testified in part that he gave some of the money to Belme; that he did not remember exactly how much he gave Belme, but it was "a little bit more or less" than $500.

There was evidence from which it could be found that a person other than Hailey or McCarty was the driver of the automobile which took Hailey and McCarty from the scene of the robbery. Mr. Novoa, who was in front of the Western Union building at the time of the robbery, saw a person in the driver's seat of a dark blue automobile which was in front of that building at the time of the robbery. Mr. Williams, the taxicab driver, saw a blue Dodge automobile pull up behind his cab when he stopped in Inglewood, and he saw a man in that automobile, and he saw the two passengers who were in the cab (Hailey and McCarty) get into the other automobile. It cannot be said, however, that the evidence was sufficient to justify a finding that appellant was the driver of the automobile.

[1, 2] There was evidence to the effect that appellant made no reply when Officer Rafferty told him that the officers knew that he drove the car. Respondent contends in effect that that accusatory statement and appellant's conduct with reference thereto may be considered as evidence indicating an admission that he was the driver. "[W]hen a defendant under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt." People v. Bisbines, 132 Cal.App. 239, 241–242, 22 P.2d 762, 763. In the present case there was a conflict in the evidence as to whether appellant was present with Officer Rafferty and Mr. Donahue, appellant's attorney, when Officer Rafferty said that the officers knew that appellant drove the car. Officer Rafferty testified that appellant and his attorney were present. Mr. Donahue testified that appellant was not present, but was at the other end of the hall. Even if it be assumed that appellant was present when Officer Rafferty made said statement, the statement was not made under conditions which required appellant to reply, or under conditions which fairly afforded appellant an opportunity to reply. Appellant's attorney was present and appellant would have been justified in assuming that his attorney would make any statement that was called for under the circumstances. The attorney was not required to instruct his client to reply to the officer, nor was the attorney required

to make a reply. The relationship of attorney and client, of course, existed between the attorney and appellant. Under the circumstances here the appellant, with proper regard for that relationship and for the fact that by reason of the relationship the attorney was his spokesman, was not required to reply. Likewise, the attorney, with proper regard for the confidential relationship existing between him and his client, was not required to reply. The failure of the appellant, or his attorney, to reply to the officer was not evidence indicating an admission that appellant did drive the car or was guilty of the offense charged.

Section 31 of the Penal Code defines principals in the commission of a crime as "persons concerned in the commission of a crime * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * *."

[3] There was evidence that appellant knew, before he lent his automobile to Hailey, that the automobile would be used for an illegal purpose. Officer Rafferty testified that appellant made such a statement to him. Hailey took the automobile, pursuant to such permission, about ten o'clock in the morning of December 21. About five o'clock in the afternoon of that day Hailey returned the automobile and gave appellant $200 for the use of it. Hailey testified that he gave appellant "a little bit more or less" than $500. Of course, the amount received for the use of the automobile for the seven hours ($200 or $500) was wholly disproportionate to the reasonable rental value of an automobile for ordinary use for a legitimate purpose. Appellant testified that when he received the $200 he asked Hailey what "they" had done, and Hailey replied that "they pulled a job down in L. A." and that he had "to take off some place" and would see appellant later. Officer Rafferty testified that, in a conversation with appellant as to what Hailey said when he returned the automobile, appellant said that Hailey mentioned the Western Union, and that Hailey said that everything went all right, appellant did not have to worry, Hailey had a scuffle with the guy in the elevator, and a shot was fired but no one was hurt. It could reasonably be inferred from the evidence that appellant lent his automobile to Hailey knowing that the automobile would be used for an illegal purpose, and that he knowingly received a share of the stolen money for the use of the automobile. It could reasonably be inferred from the evidence that appellant, with guilty knowledge and intent, united in a joint undertaking with Hailey and aided and abetted in the commission of the robbery. The evidence was sufficient to support the verdict.

The judgment, and the order denying the motion for a new trial, are affirmed.

VALLÉE, J., concurs.

SHINN, P. J., concurs in the judgment



149 Cal.App.2d 460

Lena R. BOLEN, a/k/a Lillian R. Bolen, Plaintiff and Appellant,

v.

Martha E. PARKS et al., Defendants and Respondents.

Civ. 21815.

District Court of Appeal, Second District, Division 2, California.

March 27, 1957.

Rehearing Denied April 17, 1957.

Hearing Denied May 22, 1957.

Action was brought for declaratory judgment that plaintiff had acquired the joint interest in garden product developed by defendants or in joint venture. The Superior Court of Los Angeles County,

Roy L. Herndon, J., entered judgment adverse to the plaintiff, and the plaintiff appealed. The District Court of Appeal, Fox, J., held that evidence sustained Superior Court's finding that plaintiff did not acquire such interest but merely acquired stock in corporation organized to distribute the product.

Judgment affirmed.

1. Declaratory Judgment ⇐345

In action for declaratory judgment that plaintiff had acquired a joint interest in garden products developed by defendants or in joint venture, evidence sustained trial court's finding that plaintiff did not acquire such interest but merely acquired stock in corporation organized to distribute the product.

2. Appeal and Error ⇐1011(1)

Resolution of conflict in evidence by trial court was binding on District Court of Appeal on appeal.

3. Appeal and Error ⇐989, 994(3), 996

A reviewing court is not at liberty to revalue credibility of witnesses, reweigh testimony, and draw inferences contrary to those drawn by trial court.

4. Contracts ⇐153

Rule of construction that when a contract is equally capable of two constructions, one of which will make it illegal and the other not, the latter is to be preferred and adopted, has no application where the intent of the parties is plain.

5. Contracts ⇐143

A court is not empowered to make for the parties to a transaction an agreement, which they did not see fit to make, and the function of the court is to ascertain and declare the nature of the transaction actually made.

6. Appeal and Error ⇐843(2)

If a judgment is supported by findings based on substantial evidence, questions relative to other findings may be disregarded on appeal as immaterial.

7. Appeal and Error ⇐854(2)

A judgment will not be reversed on appeal because a conclusion is not legally sound, if the judgment is in fact a proper one.

Chas. L. Nichols, Beverly Hills, Robert R. Mallicoat and Christopher Hall, Los Angeles, for appellant.

F. Millar Cloud, Lyndol L. Young, and H. Elliot Pownall, Jr., Los Angeles, for respondents.

FOX, Justice.

This is an action for declaratory relief. Plaintiff seeks a declaration that she is the owner of a 40 per cent proprietary interest in a garden product known as Black Magic, and in a joint venture with defendants for the manufacture and sale of such product. Defendants, on the other hand, deny that plaintiff has any interest in Black Magic or in any such venture and contend that plaintiff's investment was in the stock of Three Way Distributors, Inc., through which Black Magic was distributed. The trial court determined that plaintiff never acquired any interest in Black Magic or in any joint venture; that her investment was in the stock of Three Way Distributors, Inc. She appeals from the judgment.

For some years prior to the transaction here under review, plaintiff, in cooperation with her husband who was a retired doctor, operated a nursery on the rear of their property in North Hollywood.

Defendant Parks was a saleslady of nursery supplies. She called on the trade and, in that capacity, became well acquainted with Dr. and Mrs. Bolen.

Early in 1949 defendant Parks, with the assistance of defendant Barnes, developed this new gardening product. It was manufactured by Parks Manufacturing Company,

which was simply a fictitious name under which Miss Parks operated.[1] It was marketed through Three Way Distributors, Inc., which had 2,000 shares of stock issued and outstanding. Of these shares, Miss Parks owned 1,300. The remaining shares were owned by Mr. Cloud, attorney for the corporation, and Mr. and Mrs. Geary. All shares were held in escrow by Raymond J. Leaver, Esq., in accordance with the permit issued by the Corporation Commissioner. Three Way Distributors, Inc., did not own any interest in Black Magic.

In December, 1949, a discussion was had at the Bolen nursery between Miss Parks and Dr. and Mrs. Bolen regarding the acceptance of Black Magic by the public. Miss Parks reported that it had been well received and that she was convinced it had a great potential; she further stated that a franchise agreement was being worked out by which Three Way Distributors would be given the distribution of this commodity and would receive 5 per cent of the net sales price of all Black Magic products, whether sold through its agents or through representatives of Parks Manufacturing Company, the producer. This agreement was put in final form and executed under date of February 1, 1950.

During the course of conversations between Miss Parks and the Bolens the latter indicated they desired to invest $2,000 in this enterprise. Miss Parks stated to them that she had stock in Three Way Distributors, which was held in escrow, as above indicated, but which could be sold; and that she would be willing to sell 200 shares of this stock, at $10 a share, to the Bolens. The proposed deal was discussed by the parties a number of times. Before deciding to make the investment, Mrs. Bolen discussed the matter with her daughter, who had formerly owned and operated the nursery. After reaching a decision to make the investment, Dr. Bolen and Miss Parks consulted the Bolens' attorney, Wiley J. Shannon. As a result of this conference, Mr. Shannon prepared a promissory note for $2,000 dated January 27, 1950, payable to the order of Dr. Bolen. Miss Parks signed this note and also executed a mortgage securing it on certain vacant property that she owned in Hermosa Beach. In consummation of this phase of the transaction, the Bolens delivered to Miss Parks, on January 28, 1950, a cashier's check for $2,000.

On February 15, 1950, Mrs. Bolen delivered an additional $2,000 to Miss Parks in connection with this transaction. Whereupon, Mr. Shannon prepared a new promissory note and agreement which Miss Parks executed. This document was given the same date as the previous promissory note and mortgage. This last note and agreement was for $4,000 and intended to cover the initial investment of $2,000 as well as the additional advance of a like amount at that time. The second paragraph of this document reads as follows:

> "The consideration for this note is the payment of $4,000.00 as the total purchase price of 400 shares of the capital stock of Three-way Distributors, Inc., a California corporation in the name of Lillian R. Bolen, wife of the payee hereof, which said stock has heretofore been issued in her name[2] and is now held in escrow with Raymond J. Leaver, Attorney at Law, 6551 South Vermont Avenue, Los Angeles, California, under authority of the Corporation Commissioner of said State. Upon the delivery of said stock out of said escrow, it is understood and agreed that this note shall become null and void and delivered to the undersigned. Upon the delivery of said stock as aforesaid, it is further understood that no interest shall be due and payable upon this note."

1. It appears that Miss Barnes later acquired an interest in this company.

2. The reference here appears to be erroneous. Apparently, it should have stated that the stock had theretofore been issued in the name of Miss Parks rather than in the name of Mrs. Bolen. Mr. Shannon's testimony so indicates.

On February 27, 1950, an application was filed with the Commissioner of Corporations requesting authority to transfer in escrow 400 shares of the stock of Three Way Distributors from Miss Parks to Mrs. Bolen. This application was prepared by Mr. Cloud, attorney for Miss Parks, and sent by him to Mr. Shannon for his examination. Miss Parks acknowledged her execution of it before Mr. Shannon as a notary public. An order consenting to the requested transfer was issued by the Commissioner of Corporations on the following day.

On March 30, 1950, certificate No. 6 for 400 shares of stock in Three Way Distributors was issued transferring the same from Miss Parks to Mrs. Bolen. This certificate, together with the others, was held in escrow by Mr. Leaver.

On April 4, 1950, Mr. Shannon, apparently not knowing that the stock had been issued in the name of Mrs. Bolen, wrote Miss Parks requesting information as to when it would be issued. The pertinent portion of Mr. Shannon's letter reads as follows:

"Mr. and Mrs. Bolen called at the office the other day with reference to the issuance of the stock they purchased from you. Could you advise the undersigned when this stock will be issued to them. There is also some complaint, due to the fact that the additional $2000 was not incorporated in the mortgage issued by you as security for the stock. This last $2000, however, came up after the mortgage had been drawn. I presume you are now in position to issue the stock as agreed, upon which the mortgage will be satisfied. Would you kindly advise me when this may be done and the name of your Distributing Company by whom the stock is to be issued as I have forgotten the name."

On September 5, 1950, Shannon wrote [3] advising the Bolens that the stock had been transferred to Mrs. Bolen and was held in the escrow by Mr. Leaver.

On October 17, 1950, Mr. Shannon advised the Hermosa Beach Branch of the Bank of America that he was enclosing satisfaction of mortgage in the sum of $2,000, dated January 27, 1950, in favor of Jacob A. Bolen, together with the mortgage and note, marked "Paid." This was the first note that Miss Parks executed, which was secured by the mortgage on her Hermosa Beach property.

Doctor and Mrs. Bolen attended a stockholders' meeting of Three Way Distributors on April 5, 1951.[4]

The corporation began paying dividends on May 1, 1951. Between that date and December 31, 1953, checks totaling $3,040 for eight dividends were received by plaintiff. These checks were drawn on the bank account of Three Way Distributors, Inc., in

3. The letter in part reads:

"With reference to the purchase by Mrs. Bolen of certain stock in Three Way Distributors, Inc., from Martha E. Parks, will state that I examined the records in the office of the Corporation Commissioner and found that on the 28th of February, 1950, the Commissioner of Corporations consented to the transfer of 400 shares of Three Way Distributors, Inc., from Martha E. Parks to Lillian Bolen upon the condition that, when issued, the new certificates evidencing any of the shares therein authorized to be transferred, should be forthwith deposited with Raymond J. Leaver, Attorney-at-law, of Los Angeles, to be held in an escrow in accordance with the conditions of the permit issued to Three Way Distributors, Inc., on January 29th 1948, and upon the further condition that the old certificates representing a like number of shares in the name of the transferee be immediately cancelled. * * *

"On August 24th, 1950, I wrote to Raymond J. Leaver to ascertain whether or not the new certificates were issued as authorized and were held by him in said escrow for your benefit. I am in receipt of a letter from him under date of August 25th, 1950, a copy of which is enclosed and which is self-explanatory.

"I do not recall whether or not the 400 shares covers all of the shares you were to receive. If not, will you please advise me so that we may take such steps as may be necessary to procure the additional shares."

4. Dr. Bolen passed on prior to the trial of this action.

favor of plaintiff and each bears her endorsement. The checks indicated on their face that they were dividend checks.

In 1954, Three Way Distributors, Inc., was dissolved.[5] Plaintiff's proportionate interest in its assets, which consisted principally of its contract [6] for the distribution of Black Magic products, was assigned to her.

It appears that since the dissolution of Three Way Distributors, Inc., plaintiff has received checks totaling either $2,000 or $2,400 which, however, she has not cashed.

It was not until some five years after the Bolens made their deal with Miss Parks that plaintiff began to assert that she was the owner of a joint venture interest in the garden product known as Black Magic.

[1, 2] The basic question involved in this case is very simple: What was the deal that the Bolens and Miss Parks made? The answer is equally simple. It is provided by the factual determination of the trial court, namely, that the Bolens did not acquire any interest in Black Magic, or in any joint venture with Miss Parks for its manufacture and sale but rather that they acquired 400 shares of stock in Three Way Distributors, Inc. A résumé of the facts demonstrates that there is ample evidentiary support for the trial court's finding and judgment. There is a conflict in the evidence, but that conflict has been resolved by the trial court, which resolution is, of course, binding upon this court.

[3] There is, therefore, no merit in plaintiff's contention that the trial court erroneously found "that no venture agreement was made between appellant and respondents and that appellant never acquired any proprietary interest in Black Magic or the proceeds thereof." To reach this conclusion would require a reevaluation of the credibility of the witnesses, reweighing the testimony, and drawing inferences contrary to those drawn by the trial court. A reviewing court is not at liberty to do this.

These principles also adequately dispose of plaintiff's further contention that the trial court erred in failing to find "that the alleged agreement of sale and purchase of January 27, 1950, was a purported promissory note which had been fabricated some time after March 6 or March 30, 1950, and was fraudulent and void."

Plaintiff contends that the following findings and conclusions are erroneous: (1) "That on January 27, 1950, appellant and respondents made a valid agreement whereby respondents sold and appellant purchased 400 shares of Three Way Distributors, Inc., for $4,000"; and (2) "That pursuant to such agreement respondents caused such shares to be validly transferred or delivered to appellant through such escrow." The simple answer to these contentions is that the court did not so find. The pertinent findings on this aspect of the transaction are quoted below.[7]

5. Apparently this action was taken to effect an income tax saving.

6. In 1952 Parks-Barnes, Inc., was organized and acquired from Parks Manufacturing Company the ownership of Black Magic. In 1953, Parks-Barnes, Inc., made a new contract with Three Way Distributors for the distribution of Black Magic products.

7. "That prior to, and in the month of January, 1950, the defendant Martha E. Parks was the owner and holder of certain shares of stock of the Three Way Distributors, Inc., said shares of stock having been issued pursuant to authorization from the Corporation Commission of the State of California, and that during the month of January, 1950 said shares were impounded in an escrow with Ray J. Leaver, as escrow holder, and that prior to and during the month of January, 1950, the defendant Martha E. Parks did negotiate with the plaintiff herein and with plaintiff's husband Jacob A. Bolen for the sale to plaintiff of shares of the stock then owned by Martha E. Parks of said Three Way Distributors, Inc., That following negotiations with the plaintiff and her husband, plaintiff and her husband did offer to purchase from Martha E. Parks, and she agreed to sell, 400 shares of her

Upon reading these findings it is apparent that the court did not make any finding as to the validity of the agreement for the purchase and sale of the 400 shares of stock or as to the validity of the transfer of such stock in escrow. In this connection plaintiff asserts that the trial court erred in omitting to find that no permit was sought or obtained prior to the sale of shares. In declining to enlarge the scope of its findings, the trial court, in its conclusions, expressly stated that "Findings upon issues other than those embraced in [its] Findings, would be immaterial and are not made for that reason." This adequately explains and properly justifies the refusal of the trial court to make any finding on this subject. The principal, if not the only, question in controversy in this case was whether plaintiff had invested in a joint venture or had made a stock purchase. In this proceeding plaintiff sought a declaration of rights and duties in respect to her contention that she had a 40 per cent proprietary interest in Black Magic as a joint venturer. She did not elect to join herein any claim she might have had for rescission or damages based on a void stock transaction, as section 1060 of the Code of Civil Procedure permitted her to do. Defendants did not by their answer enlarge the issues, but merely joined issue as tendered, and alleged their version of the transaction. In this posture of the case the court's findings fully disposed of the controversy presented to the court. It was therefore unnecessary for the court to make any finding as to whether or not the stock transfer was made pursuant to a permit, and whether or not such transfer was valid.

Plaintiff's major thesis is that any agreement to sell or transfer Miss Parks' escrowed stock in Three Way Distributors, Inc., was criminal, fraudulent and void by reason of the fact that the consent of the Corporation Commissioner had not been first obtained. She then reasons that the parties must have contemplated a valid agreement. Therefore, she argues, her version of the transaction must be accepted as the agreement between the parties because this is the only way the taint of illegality may be avoided.

[4] In making this approach, plaintiff by-passes the real question before the court, viz., What was the transaction between the Bolens and Miss Parks. After listening to the testimony relative to the inception and consummation of this deal, examining the documents executed to implement it, and considering the subsequent conduct of the parties in terms of their business relationship over a period of years, the trial court found that the real transaction was a purchase and sale of stock in Three Way Distributors and that the Bolens did not purchase an interest in Black Magic or in any venture for its production and sale. The evidence overwhelmingly supports this finding. The trial court was not required, in the face of the

stock in Three Way Distributors, Inc., at $10.00 per share, making a total of $4000.00, said stock to be transferred to plaintiff's name, and that pursuant to said agreement plaintiff and her husband did pay to Martha E. Parks the sum of $4000.00, and Martha E. Parks did cause to be transferred and delivered to the plaintiff in said escrow 400 shares of her stock in Three Way Distributors, Inc. That at all times during said negotiations and in the purchase of said shares of stock, plaintiff and her husband were represented by legal counsel of their own selection, were fully advised and well knew that they were purchasing only shares of capital stock of Three Way Distributors, Inc., from the defendant Martha E. Parks. That at no time was there any understanding or agreement concerning a joint venture, or any other venture, or association between the defendant Martha E. Parks, or any of the other defendants, and the plaintiff or her husband; and at no time was there any agreement for a division of profit or profits between the defendant Martha E. Parks and the plaintiff, and no understanding other than that dividends might be received by the plaintiff, arising from her ownership of said shares of stock in Three Way Distributors, Inc."

welter of documentary proof and convincing testimony showing the transaction to be a purchase of stock, to adopt an interpretation which would transmute the agreement into a relationship other than that plainly intended by the parties themselves. General Motors Acceptance Corp. v. Codiga, 62 Cal.App. 117, 120, 216 P. 383. As stated in Martin v. Palmer Union Oil Co., 184 Cal. 386, 389, 193 P. 950, 951, "The rule, of course, is that when a contract is equally capable of two constructions, one of which will make it illegal and the other not, the latter is to be preferred and adopted. But this is a rule of construction and has no application to a case where the intent of the parties is plain * * *." This statement is here applicable.

[5] No court is empowered to make for the parties to a transaction an agreement which they did not see fit to make. Pauley v. Faucett, 124 Cal.App.2d 406, 410, 269 P.2d 89. Its function is to ascertain and declare the nature of the transaction actually made. This was what the court did in the instant matter.

[6, 7] Plaintiff argues that the finding and conclusion that she is "estopped from asserting any claim to any interest in Black Magic" is erroneous. Since the findings, on substantial evidence, that plaintiff did not acquire any interest in Black Magic and that no joint venture in respect to that product was entered upon by the parties, amply support the judgment, it becomes immaterial whether the challenged finding was justified by the evidence. It is fundamental that if a judgment is supported by findings based on substantial evidence, questions relative to other findings may be disregarded on appeal as immaterial. Logan v. Forster, 114 Cal.App.2d 587, 602, 250 P.2d 730; Bohn v. Watson, 130 Cal. App.2d 24, 41, 278 P.2d 454. Furthermore, "it has been consistently held that a judgment will not be reversed because a conclusion is not legally sound, if the judgment is in fact a proper one. [Citations.]" Bohn v. Watson, supra, 130 Cal. App.2d at page 42, 278 P.2d at page 465.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



149 Cal.App.2d 195

Helen BENDER, Plaintiff, Respondent & Appellant,

v.

Carl SCHNEIDER, Defendant, Appellant & Respondent.

1 Civ. 17216.

District Court of Appeal, First District, Division 1, California.

March 18, 1957.

Rehearing Denied April 17, 1957.

Hearing Denied May 15, 1957.

Action for personal injuries sustained when plaintiff, who was visiting tenant at tenant's request fell after stubbing toe of her right shoe on step-off of one to one and one quarter inches in driveway which was used as a pedestrian walkway as well as an automobile driveway against landlord. The Superior Court, County of Marin, Carlos R. Freitas, J., entered judgment for landlord, and granted plaintiff new trial and landlord appealed and plaintiff cross appealed. The District Court of Appeal, Agee, J. pro tem., held that where landlord was not guilty of negligence as a matter of law, the giving of instruction on unavoidable accident was not error.

Order granting new trial reversed and judgment entered upon jury's verdict affirmed.

1. Landlord and Tenant ⇐169(8)

In action against landlord for personal injuries sustained by plaintiff when she fell after stubbing toe of her right shoe

on step-off in driveway used as a pedestrian walkway while visiting tenant at request of tenant evidence was sufficient to support inference that landlord owned premises.

2. Landlord and Tenant ⇐169(10)

Where landlord is not guilty of negligence as a matter of law, giving of instruction on unavoidable accident is not error.

3. Landlord and Tenant ⇐169(11)

In action against landlord for personal injuries sustained by plaintiff when she fell after stubbing toe of her right shoe on step-off in driveway which was used as a pedestrian walkway while visiting tenant at request of tenant, question whether maintenance of driveway in condition shown by undisputed evidence amounted to negligence was for jury.

4. Appeal and Error ⇐978(1)
New Trial ⇐41(3)

Generally, determination as to whether an erroneous instruction was prejudicial and justified granting of a new trial is one which is left to trial court's discretion, and where a motion is granted upon that ground, the order will not be disturbed unless it appears that there has been an abuse of that discretion, however when no error has been committed, there is no basis for the exercise of discretion.

5. Landlord and Tenant ⇐169(10)

In action against landlord for personal injuries sustained by plaintiff when she fell after stubbing her toe on step-off in a driveway, which was used as a pedestrian walkway, while she was visiting tenant, evidence was sufficient to support finding of plaintiff's contributory negligence, and therefore it was proper to instruct on contributory negligence.

6. Appeal and Error ⇐854(6)

An appellate court must affirm an order granting a new trial if such order can be sustained for any cause included within grounds stated in notice of intention to move for new trial.

Lounibos & Lounibos, Petaluma, for appellant.

Carl B. Shapiro, Fairfax, for respondent.

AGEE, Justice pro tem.

This is an action for damages for personal injuries. The jury returned a verdict for defendant. Plaintiff's motion for a new trial was granted and defendant appeals from such order. Plaintiff then cross-appealed from the judgment entered upon the verdict.

Defendant is the owner of real property improved by a one-story duplex. Between the two units is a double garage. A cement driveway runs from the street to the garage. It serves as a pedestrian walkway as well as an automobile driveway. Each unit has a short walkway extending from the end of the driveway to the front door. The driveway is 16½ feet wide and 17 feet long. At a point 8 feet in from the street there is a step-off or drop in the level of the driveway of 1 inch to 1¼ inches. This runs in a straight line directly across the driveway for its entire width. This difference in levels had existed from the time of construction, which was six years before.

On Sunday, October 3, 1954, about 1:30 p.m., at the request of a tenant, plaintiff drove to the premises, parked her automobile on the street in front, got out and went in to see the tenant. The day was bright and sunny. The driveway was clean and unobstructed. Plaintiff walked down the driveway to the front door of the tenant's unit without incident. She did not notice the step-down or difference in levels previously described. After attending to her business with the tenant, plaintiff left by the same route. When she reached what would then be for her the step-up she stubbed the toe of her right shoe thereon and fell, sustaining injury to her left leg and left arm.

Plaintiff's complaint charged negligent maintenance of the driveway by reason of the condition herein described. Defendant's answer denied ownership of the

premises, denied negligence on his part, alleged contributory negligence by plaintiff, and that the accident was unavoidable in so far as he was concerned.

The trial court granted plaintiff a new trial after the jury verdict against her on the sole ground that it had erred in instructing the jury on "unavoidable accident."

[1] Defendant first contends that there is no evidence that he owned the property and that therefore the jury was required to return a verdict in his favor, regardless of anything else that occurred in the trial. The only evidence as to ownership was the testimony of defendant, who was called by plaintiff as an adverse witness under the provisions of section 2055 of the Code of Civil Procedure. He testified that he lived in one unit and the tenant who was visited by plaintiff lived in the other; that he had been living there for the past six years; that the driveway had been in the same condition as that complained of by plaintiff since construction. The record then shows as follows:

"Q. [By plaintiff's attorney] Mr. Schneider, is there any sidewalk other than this driveway that runs from the street to *your* house? A. No.

"Q. And does that cover both *your* house and the *tenant's* house? A. Yes.

"Q. And who were the *tenants* that day? A. Geller.

"Q. Geller? A. Yes.

"Q. Was there any other means of access from the street to the Geller's house without crossing lawn? A. No." (Emphasis added.) His own attorney asked defendant the following question and received the following answer: "Q. Is there a sidewalk in front of *your* place? A. No, there is—that's what I—this part that's level was primarily put there for a sidewalk." (Emphasis added.) This is all of the testimony as to ownership but we hold that it is sufficient to support an inference that defendant owned the premises.

This point might be termed a "sleeper." When plaintiff rested, defendant rested. There was no motion for nonsuit or directed verdict. The attorneys then argued the case to the jury. The court then instructed the jury and included the standard instructions on the duty of a landlord. Appellant was the sole defendant. The trial judge could not have been referring to anyone other than defendant when instructing on the duty owed by a landlord. Plaintiff's motion for a new trial was orally argued. Thereafter the trial judge wrote an opinion on the points raised in such argument and no mention was made of any issue as to ownership. It is quite evident that defendant is now raising this point for the first time. (See 3 Cal.Jur.2d, "Appeal and Error," § 140, as to waiver and estoppel on this ground.)

[2] The next question is whether it was error for the trial court to instruct on "unavoidable accident." The trial judge thought that it was and based his order granting a new trial upon this ground. Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823, is directly applicable and decisive as to this point. Where a defendant is not guilty of negligence as a matter of law the giving of an instruction on unavoidable accident is not error. In Parker v. Womack, supra, the trial court had granted a new trial because it gave an instruction on unavoidable accident when there was no evidence of causation other than through negligence of the parties. The Supreme Court reversed the order granting a new trial. In Driver v. Norman, 106 Cal.App. 2d 725, 236 P.2d 6, the trial court likewise granted plaintiff's motion for a new trial on the ground that it had erred in instructing on unavoidable accident. Plaintiff argued on appeal that defendant was guilty of negligence as a matter of law because he had violated a pedestrian's right of way, followed another vehicle too closely and failed to maintain a proper lookout. The appellate court reviewed the evidence and concluded that defendant's conduct was not such that it could say that reasonable men could and must draw only the inference of negligence. The order granting the new trial was therefore reversed.

[3] In this case it cannot be said that the maintenance of the driveway in the condition shown by the evidence amounts to negligence as a matter of law. It was therefore not error to instruct the jury on unavoidable accident and the granting of a new trial upon the ground stated was improper.

This Court is opposed to the giving of an instruction on unavoidable accident when the accident could not have happened except for the negligence of either party or both. See McMillen v. Southern Pac. Co., 146 Cal.App.2d 216, 303 P.2d 788, where this court felt bound to follow the majority opinion in Parker v. Womack, supra. In such a situation it is not error for a trial court to refuse to give such instruction. Lloyd v. Southern Pacific Co., 111 Cal.App.2d 626, 245 P.2d 583. Where the trial court does give the instruction, however, the majority and not the dissenting opinion in Parker v. Womack, supra, is controlling on us. Moreover, it must be noted that in the instant case it is completely reasonable to infer that plaintiff's accident happened without having been caused by negligence of either party. The difference in level of one inch to one and one-quarter inches is very little and the maintenance of the driveway in such condition could well be held not to be negligence. On the other hand, it also can reasonably be inferred that plaintiff was not herself negligent. Her failure to notice the condition that caused her fall does not necessarily make her so. Hence, the instruction does not appear to be subject to the criticism made in the dissenting opinion in Parker v. Womack, supra.

[4] Plaintiff suggests that the granting of a new trial is largely within the discretion of the trial court. The same point was made in Parker v. Womack, supra, and the Supreme Court said, 37 Cal.2d at page 123, 230 P.2d at page 827, "As a general proposition, the determination as to whether an erroneous instruction was prejudicial and justifies the granting of a new trial is one which is left to the trial court's discretion, and where a motion is granted upon that ground, the order will not be disturbed unless it appears that there has been an abuse of that discretion. However, when no error has been committed, there is no basis for the exercise of discretion."

By way of cross-appeal, plaintiff contends that she made out a prima facie case of negligence on defendant's part and defendant did not present any contradictory evidence. On this basis, plaintiff contends that the judgment entered upon the jury's verdict should be reversed. As we have already stated, reasonable minds could differ on this issue and the jury was not required to find defendant guilty of negligence even though the evidence as to the condition of the driveway was undisputed.

[5] Plaintiff also contends that the judgment should be reversed upon the ground that the trial court should not have instructed on contributory negligence. Her argument is that she was the only witness who testified as to the circumstances pertaining to the fall and that her testimony "was not such that it could give rise to any conclusion or implication of negligence on her part." This is something upon which reasonable minds could differ. Plaintiff admitted that she did not look down at any time or observe the surface of the driveway where she was walking. The day was bright and sunny and the condition complained of was plainly visible to anyone who looked. Plaintiff gave no explanation as to why she did not look. She was impeached in numerous ways by testimony given in her deposition which she admitted was not true. The record in this case does not present a situation where the jury was required to conclude that there was no contributory negligence. The evidence was sufficient to support such a finding. This being so, it was proper to instruct on contributory negligence.

[6] The two points raised by plaintiff on her cross-appeal are also pertinent to

the main appeal because an appellate court must affirm an order granting a new trial if such order can be sustained for any cause included within the grounds stated in the notice of intention to move for a new trial. Dynes v. Bekins Van & Storage Co., 175 Cal. 72, 73, 165 P. 12. However, we have found nothing in the record which would support the granting of a new trial.

The order granting a new trial is reversed and the judgment entered upon the jury's verdict is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.



In the Matter of SECURITY FINANCE COMPANY, a corporation, In the Process of Voluntary Winding Up.

Earl R. ROUDA, Petitioner and Respondent,

v.

George N. CROCKER and Herbert A. Crocker, Respondents and Appellants.*

Civ. 17079.

District Court of Appeal, First District, Division 2, California.

March 27, 1957.

Rehearing Denied April 26, 1957.

Hearing Granted May 24, 1957.

Proceeding in the matter of a personal loan company in the process of voluntary winding up, wherein stockholder owning 50% of the stock filed a petition for judicial supervision. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered an order for judicial supervision, and dissenting stockholders appealed. The District Court of Appeal, Anthony Brazil, Justice pro tem., held that evidence supported finding that all procedural steps required by statute were properly taken before trial court made its order for judicial supervision.

Affirmed.

* Opinion vacated 317 P.2d 1.

1. Corporations ⇐610(2)

Even if it were necessary to show disputes affecting operation of business of personal loan company before superior court's supervision over voluntary windup of the company could be invoked, evidence was sufficient to support implied finding of such dispute among the three stockholders. West's Ann.Corp.Code, §§ 4600, 4607.

2. Corporations ⇐610(2)

Generally, where statute confers power on a majority, or a certain percent, of the stockholders to dissolve, the right is absolute, so far as motives of the majority are concerned in absence of actual fraud, and not subject to judicial review.

3. Corporations ⇐610(2)

Stockholder owning 50% of stock of personal loan company did not have absolute right to judicial supervision of windingup proceedings in voluntary dissolution of the company by merely following procedural steps outlined in statute, but he had absolute right to such supervision if, after hearing on order to show cause, it appeared to court, in exercise of its legal discretion, it believed such supervision to be warranted. West's Ann.Corp.Code, §§ 4600, 4607, 4607–4619.

4. Corporations ⇐610(2)

Evidence failed to establish that stockholder owning 50% of stock of personal loan company acted in bad faith in filing application for judicial supervision of windingup proceedings in a voluntary dissolution of the company. West's Ann.Corp. Code, §§ 4600, 4607, 4607–4619.

5. Corporations ⇐610(2)

The statute relating to special notice of meeting of shareholders and statute requiring approval of all shareholders in lieu of a formal meeting were applicable to proceeding for voluntary windingup of a corporation by resolution of shareholders

or directors, but were not applicable to a proceeding for voluntary windingup of a corporation by written consent of shareholders owning 50% or more of the voting power. West's Ann.Corp.Code, §§ 2201(e), 2239, 4600, 4604, 4607–4619.

6. Corporations ⇐610(2)

Evidence supported finding that all procedural steps required by statute were properly taken before superior court made its order for judicial supervision of voluntary windup of personal loan company upon application of stockholder who owned 50% of the stock. West's Ann.Corp.Code, §§ 4600, 4607.

7. Corporations ⇐610(2)

Fact that stockholder owning 50% of stock of personal loan company who applied for judicial supervision of windup proceedings in voluntary dissolution of the company, had paid off his obligations to corporation and to the other two stockholders without letting the other two stockholders know that he had borrowed money to make the payment by pledging all of his stock, did not affect validity of the order of judicial supervision. West's Ann.Corp.Code, §§ 4600, 4607.

Brobeck, Phleger & Harrison, San Francisco, for appellant George N. Crocker.

Long & Levit, San Francisco, for appellant Herbert A. Crocker.

Young, Rabinowitz & Chouteau, San Francisco, for respondent.

ANTHONY BRAZIL, Justice pro tem.

This is an appeal from an order of the superior court for judicial supervision of winding up proceedings in a voluntary dissolution of a corporation, which order appointed a referee and directed the giving of notice to creditors. The order was entered after a hearing on an order to show cause issued pursuant to a shareholder's petition under the provisions of section 4607 of the Corporations Code.

The business of Security Finance Company and its six subsidiaries is making personal loans to individuals and buying conditional sale contracts from dealers. In general, the lending activities are carried on by the subsidiaries, while the parent corporation, in what is called the "contract department" purchases conditional sale contracts from dealers in furniture, appliances and the like. The 6,000 common shares of the corporation were issued 3,000 to respondent Rouda and 1,500 to each of the Crockers, the appellants. There never have been any other common shareholders. The board of directors of Security Finance Company consists of Rouda and the two Crockers. Its Articles, as well as its By-Laws, provide that no corporate action can be taken without unanimous consent of the directors.

The present business began in 1940 as a partnership on a fifty-fifty basis of Rouda and the two Crockers. Appellants put up $20,000 and use of their credit and respondent put up his knowledge and ability and active working management. In 1946 the three partners incorporated, and continued their operations in the finance business in much the same manner as before except to get bigger and more prosperous. In 1952 a proceeding to dissolve the corporation was begun by appellants; but shortly thereafter it was dropped. In settlement of a declaratory relief action begun in 1952 by respondent, a settlement agreement was worked out among them in 1954 by the terms of which Rouda continued active management of the company and agreed to pay to the corporation $45,000, and $15,000 to the Crockers. Payment was secured by pledge of all of Rouda's stock at the Crocker-Anglo Bank. Without letting the Crockers know anything about it, Rouda borrowed about $60,000 from the First Western Bank, paid off the amounts he had promised to pay, and put up the same stock with the First Western Bank to secure payment of his loan to that bank.

For the most of the last fifteen years, Rouda and the Crockers have disagreed on amount of his (manager's) salary and amounts to be declared as dividends. Further major disagreement in the last few

years centered around his desire to sell the company and their refusal to do so, or for that matter to even consider offers for its sale. Generally speaking Rouda operated the business with little or no interference from the Crockers. Presently Rouda receives a salary of $1,456 per month and each of the Crockers gets $500 per month, although they do little more active work in the business than to attend directors' meetings. Net profits from 1949 to 1954, inclusive, was $258,395 and dividends for the same period was $36,420. (No dividends were paid in 1953 as there was a loss for that year.) The first seven months of 1955 showed profits of $50,000 and dividends for the same period $4,200.

The only active business of the parent company, whose dissolution is sought, just before the petition was filed, was a contract department, which was shut down by Rouda without consent or knowledge of the Crockers shortly before such filing. Petitioner offered at a meeting of the Board of Directors, held after hearing on the order to show cause began but before conclusion of testimony thereon, to reopen the contract department but only pursuant to the provisions of Corporations Code, section 4801. The directors couldn't agree on this point so the department remained closed.

The 1954 settlement agreement in paragraph 13 thereof set forth: *"Future dissolution.* If at any time hereafter the parties become unable to reach unanimous consent with respect to the operations of the Security corporation, this shall entitle Rouda or either of the Crockers, if so advised, to require a dissolution or winding up of the affairs of said corporation * * * pursuant to the provisions of California law * * *"

On July 12, 1955, Rouda executed a written consent, Corporations Code, § 4600, to the dissolution of the company and three days later filed it with the corporation. He then executed and filed a Certificate of Election to Wind Up and Dissolve. There had been no meeting of shareholders at which the subject of dissolution was discussed, nor has any resolution been adopted by the shareholders to wind up and dissolve; no notice has ever been given to the shareholders of any meeting at which the subject of winding up and dissolution would be discussed. On the same day that Rouda filed in the County Clerk's office a certified copy of the Certificate of Election to Wind Up and Dissolve, he filed the petition for judicial supervision. Corporations Code, § 4607.

Appellants' position is disclosed in their opening brief under the heading "Nature of This Proceeding: The proceeding permitted by § 4607 requires that the corporation be 'in the process of winding up,' and that * * * the petition must be filed in good faith, and requires a showing that as to certain matters connected with the business of the corporation there is need for judicial supervision * * *"

Respondent claims, as a shareholder having 50 percent of the voting power, an absolute right to dissolve the corporation, in the absence of fraud, by reason of section 4600 of the Corporations Code, provided of course that he has complied with the procedure set down in the sections that follow. The procedural steps were all properly taken although appellants maintain that petitioner had no legal right to take them.

"Any corporation may elect to wind up its affairs and voluntarily dissolve by the vote or written consent of shareholders or members representing 50 percent or more of the voting power." Corporations Code, § 4600.

"If a corporation is in the process of voluntary winding up, the superior court of the county in which the principal office of the corporation is located, upon petition of * * * (b) the holders of 5 percent or more of the number of outstanding shares * * * and upon such notice to the corporation and to other persons interested in the corporation as shareholders or creditors as the court may order, may make orders and adjudge as to any and all matters concerning the winding up of the affairs of the corporation." Corporations Code, § 4607.

[1] Appellant first claims the court erred in assuming jurisdiction after a hearing on an order to show cause, issued pursuant to section 4607, in that the section being permissive, there is no evidence of any conflict in operation of the business and therefore no need for judicial supervision. They call attention to the fact that since the 1954 settlement agreement there has been no occasion when the parties were unable to reach unanimous consent with respect to the operations of the business and that the differences among the three at most extended only to dividend and salary policy and to matters pertaining to a sale of the entire business, which are purely personal matters having nothing to do with the operation of the business. The first point is meaningless for under the By-Laws the directors could act only by unanimous agreement. There were many arguments and disputes about salaries and dividends which never were settled by corporate action because all had to first agree. Assuming it be necessary to show disputes affecting operation of the business, before the court could make the orders from which this appeal is taken, there is ample evidence in the record to support such an implied finding. Even though Rouda may have on one occasion referred to the deadlock as being of a personal rather than a business relationship, the basic differences are in matters obviously affecting the conduct of the business as is disclosed in the extended examination of Rouda at the hearing. The trial judge observed "that there is an institution that is in such a state of friction that it needs superintendence in order to dissolve itself and should be dissolved. That is the whole feature."

Appellant next contends that the court should not have ordered judicial supervision, for Rouda was not acting in good faith; that before he can get an order under section 4607 there must be "a showing of good faith on his part." Nowhere in the long transcript do we find any definition of what appellants claim amounts to bad faith, but we are certain they do mean something less than actual fraud. The bad faith, which appellants say exists, evidently consists of his desire to sell the corporation even though a sale may be unwise and detrimental to the interest of the stockholders; that his desire to sell is prompted by the necessity of repaying a personal loan and because he does not want to do business with the Crockers any more.

Appellants read into the sections 4600 and 4607 something that just is not there, namely: personal motives of or presence or absence of bad faith on the part of shareholders representing 50 percent of the voting power.

[2] "Where a statute expressly authorizes a majority, or a certain per cent of the stock over one-half, to voluntarily dissolve the corporation, the question arises as to whether this power is absolute as against minority stockholders * * * The general rule is that where a statute confers power on a majority, or a certain per cent, of the stockholders to dissolve, the right is absolute, so far as the motives of the majority are concerned, in the absence of actual fraud, and not subject to judicial review * * *" (Fletcher, Cyclopedia Corporations, Vol. 16, p. 735.)

Corporations Code, sections 4607–4619, are a reenactment of former Civil Code, section 403. Speaking of former Civil Code, section 403, the court in In re San Joaquin Light & Power Corp., 52 Cal. App.2d 814, 824, 127 P.2d 29, 36, stated: "A petition was filed as authorized by section 403 of the Civil Code and the superior court then had 'power to order and adjudge as to any or all matters in and for the winding up of the affairs of the corporation,' including '(3) the determination of the rights of shareholders * * * in and to the assets of the corporation.' An absolute right to petition for such supervision and direction is impliedly given and we think it follows that the court not only has the power to order and adjudge as to all matters thus presented, but that the duty of so doing is imposed upon the court." In re Mayellen Apartments, 134 Cal.App.2d 298, 285 P.2d 943. Appellants' observation about the last two cited cases is as follows:

"We submit, however, that in both cases what was said was mere dictum, and not binding on this Court; that the dictum in the Mayellen case is clearly wrong; and that the dictum in the San Joaquin case, whether right or wrong, is of no value here since the adoption of the Corporations Code.

"In the Mayellen case, an order taking jurisdiction over winding-up proceedings became final * * * The quotation from the San Joaquin case was merely made in the course of a review of the authorities, and had no bearing on the problem before the court."

Appellants are correct that what was said in the Mayellen case on this problem is dictum, but not so in the San Joaquin case, which is the one from which the quotation is actually taken. In the latter case, a petition for judicial supervision was denied on an order sustaining a demurrer to the petition on the grounds that no cause of action was stated. The court there went on to say:

"We think, however, the trial court was in error in dismissing this proceeding * * * without hearing or determining the matters authorized and permitted to be raised in such a proceeding * * * In any event, a hearing on the merits was called for and the matter could not be disposed of by sustaining demurrers and denying all relief to the petitioner."

[3] It isn't that petitioner has an absolute right to judicial supervision by merely following procedural steps. He has an absolute right in that case to such supervision if, after a hearing on an order to show cause, it appears to the court, in exercise of its legal discretion, it believes such supervision to be warranted. The court found that judicial supervision was appropriate after a protracted four-day hearing.

[4] The court was not in error in sustaining an objection on the subject of bad faith because of known harm to the corporation. It is not contended that the "bad faith" referred to constituted fraud of any kind or that Rouda was intentionally destroying or lessening the value of the corporation stock without regard to his own best interest; but only that Rouda knew that his action would depreciate the value of the stock, the corporation would suffer loss during dissolution, and that Rouda was concerned only with his own private desires even though they might be contrary to the best interest of the corporation or other stockholders. There is a difference between intentional destruction of the rights of other shareholders, and the loss of those rights as an incident to the exercise of statutory rights by the petitioner. Despite the court's ruling in the one instance, the entire field of Rouda's conduct and state of mind was repetitiously explored in more than 170 pages of cross-examination. There was no offer of proof of anything beyond the foregoing summarization of what appellants claim is bad faith.

[5, 6] Finally appellants claim the court to be without jurisdiction because the corporation is not "in the process of voluntary dissolution." As they recognize, there are two ways provided in Corporations Code, §§ 4600, and defined in 4604, for a corporation to be in the process of voluntary winding up—the one by resolution of shareholders or directors, the other by written consent of shareholders owning 50 percent or more of the voting power. We are here concerned only with the latter method. Appellants assert that where reliance is placed on written consent, it must not only be executed in accordance with section 4600 but must comply with section 2201(e) (special notice of a meeting of shareholders) and section 2239 (requiring approval of all shareholders in lieu of a formal meeting). These two sections are applicable to the first of the two methods for voluntary dissolution provided in section 4600, but have nothing to do with the second (consent of 50 percent) method. The record amply discloses that all procedural steps required by the Corporations Code

were properly taken before the court made its order for judicial supervision.

[7] The fact that Rouda paid off his obligations of $45,000 to the corporation and $15,000 to the Crockers required by the settlement agreement of 1954, without letting appellants know that he borrowed from the First Western Bank by pledging all his stock to make the payments, can in no way affect the validity of the order of judicial supervision.

The petitioner-respondent acting for his own best interests, without fraud and without any wilful intention or desire to destroy the rights of other shareholders, has exercised the rights clearly given him by the applicable sections of the Corporations Code.

Order affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

48 Cal.2d 228

Claudine HERDA, Plaintiff and Appellant,

v.

Clarence HERDA, Defendant and Respondent.

S. F. 19342.

Supreme Court of California,

In Bank.

March 22, 1957.

Divorce action. Former husband moved for termination of support payments and wife moved for attorney's fees to resist husband's motion. The Superior Court, San Mateo County, Murray Draper, J., entered an order in favor of former husband, and disallowing wife's motion, and she appealed. The Supreme Court, Traynor, J., held, inter alia, that where a property settlement agreement provided in part that husband agreed to pay and indemnify wife for all expenses, costs and attorney's fees in resisting any motion brought by husband affecting the agreement, wife was entitled to attorney's fees for her resistance to such motion, notwithstanding fact she had not shown any inability to pay such fees herself.

Order reversed as to attorney's fees, and in all other respects affirmed.

Carter, Schauer and Shenk, JJ., dissented in part.

Opinion, 301 P.2d 877, vacated.

1. Divorce ⇐245(2)

Where parties to a property settlement agreement stated their intention to settle both their property and support and maintenance rights in such agreement and except as provided in such agreement wife released husband from all claims for support and maintenance, provision for support and maintenance was an integral and inseparable part of such property settlement agreement and was subject to modification only if so provided in the agreement, either expressly, or by implication.

2. Divorce ⇐309

Parties to a divorce action were entitled to agree to an amount of child support which could not be decreased during minority of the children or increased unless welfare of the children so required.

3. Husband and Wife ⇐279(1)

Where a property settlement agreement provided for certain support payments to wife, but contained no express provision that payments should terminate on wife's remarriage, and also contained no express provision that they should continue until her death, and community property involved in such agreement was insignificant, agreement, by necessary implication, would be deemed to mean that payments attributable to wife's support should terminate on remarriage, and that payments attributable to support of the children would terminate on their reaching majority.

4. Husband and Wife ⇐279(1)

Where a property settlement agreement dealt primarily with support rights, and payments were described as for support and maintenance, it would be inferred from such agreement that it was contemplated that such payments should not continue for wife's benefit after obligation to support children had terminated and obligation of wife's support had been assumed by a second husband.

5. Courts ⇐99(1)

Where, at time of former husband's motion to modify support provisions of a divorce decree, neither child involved had reached his majority, and it could not be determined from record whether denial of such motion was based on a determination that former wife's remarriage was immaterial, or was based on continuing need of full amount for support of children, denial of such motion would not be deemed res judicata as to issue of former husband's right to terminate support payments provided for in a property settlement agreement and decree of divorce, after children had reached their majority and wife had remarried.

6. Husband and Wife ⇐279(1)

Where property settlement agreement provided in part that husband agreed to pay and indemnify wife for all attorney's fees in resisting any motion brought by husband affecting agreement, wife was entitled to attorney's fees for her resistance to husband's motion to terminate support payments provided for in such agreement, notwithstanding fact she had not shown any inability to pay such fees herself.

Henry W. Schaldach, San Francisco, for appellant.

Chas. E. R. Fulcher, Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff and defendant were married in 1925 and separated in 1937. On March 1, 1938, they executed a property settlement agreement. It recited that owing to disputes and differences between them the parties had agreed to live separate and apart and that it was their "mutual wish and desire * * * that a full and final adjustment of all their property rights, interests and claims be had, settled and determined by said parties in this Agreement, including custody and maintenance of the [two] minor children of said parties." It provided:

"Now, Therefore, it is agreed in consideration of the mutual promises, agreements, and covenants contained herein, it is covenanted, agreed, and promised by each party hereto, to and with the other party hereto, as follows:

"First: That, except as hereinafter specified, each party hereto is hereby released and absolved from any and all obligations and liabilities for the future acts and duties of the other, and that each of said parties hereby releases the other from any and all liabilities, debts or obligations of any kind or character incurred by the other from and after this date, and from any and all claims and demands, including all claims of either party upon the other for support and maintenance as wife or husband or otherwise, it being understood that this instrument is intended to settle the rights of the parties hereto in all respects, except as hereinafter provided. * * *

"Fifth: [Plaintiff] does and shall accept the provisions herein made for her in full satisfaction of her right to the community property of the respective parties hereto, and in full satisfaction of her right to support and maintenance, and for the support and maintenance of said minor children as herein provided."

Provisions were then made for the division of the property. Plaintiff received household personal property and defendant received an automobile. A life insurance policy on defendant's life was assigned to plaintiff and defendant agreed to keep the policy in force. It was further agreed that plaintiff should have custody of the minor children and be entitled to take them out of the state.

Paragraph eight provided that "The husband agrees in consideration of the premises and mutual covenants and agreements herein contained to pay to the wife the sum of Two Hundred Fifty Dollars ($250.00) per month as and for the support and maintenance of herself and the minor children of said parties, said payments to commence on March 1, 1938 and to continue monthly thereafter on the first (1st) day of each and every month thereafter." It also provided that defendant should pay certain debts and plaintiff's moving expenses should she decide to leave the state.

On March 18, 1938, plaintiff filed an action for divorce on the grounds of extreme cruelty. She attached a copy of the agreement to the complaint and prayed that it be approved and made a part of the decree by reference. On April 18th she secured an interlocutory decree of divorce, which approved the agreement and incorporated it in its entirety by reference. It also provided that "It Is Further Ordered, Adjudged and Decreed that defendant be, and he hereby is, required to pay to plaintiff herein, as and for her support and the sup-

port, care and education of the minor children of said parties, the sum of Two Hundred Fifty Dollars ($250.00) per month, which said payments to commence March 1, 1938, and continue monthly thereafter on the 1st day of each and every month."

A final decree of divorce was entered in 1939, and plaintiff remarried in 1943. In 1944 defendant moved to have the payments reduced on the grounds that plaintiff had remarried and that one of the children was about to enter the armed services, but his motion was denied. In 1954 he moved to have the payments terminated on the ground that plaintiff had remarried and both the children had reached their majority. Plaintiff moved for attorney's fees to resist defendant's motion, and following a hearing the court ordered that the interlocutory and final decrees "be modified by terminating all payments for the support of the plaintiff and for the support, care and education of the minor children of the parties hereto forthwith." It also ordered that no counsel fees be allowed for plaintiff's counsel. Plaintiff appeals.

She contends that the provision for monthly payments was an integral and inseparable part of the property settlement agreement of the parties and that therefore the amount of the payments attributable to her cannot be reduced because of her remarriage. She also contends that the order denying modification in 1944 is res judicata in her favor. Defendant contends, however, that the provision for monthly payments was a provision for alimony subject to section 139 of the Civil Code and that even if it constitutes an integral and inseparable part of the property settlement agreement, his obligations thereunder terminated after plaintiff remarried and the children reached their majority. He also contends that the 1944 order is not res judicata on the ground that it may have been based on continuing need of the full amount for the support, care, and education of the children, who were then still minors.

[1, 2] In Messenger v. Messenger, 46 Cal.2d 619, 628, 297 P.2d 988, 993, we held that when "the parties have clearly expressed their 'purpose of fixing and adjusting their personal and property rights,' have provided that the provision for alimony is 'for and in consideration of the permanent and lasting division and settlement of all their property rights of every kind and nature,' and the wife has waived 'all right to future maintenance and support * *, except as herein otherwise expressly provided,' the conclusion is inescapable that they have made the provisions for support and maintenance an integral and inseparable part of their property settlement agreement. With such conclusive evidence of integration, the provisions for support and maintenance or alimony would be subject to modification only if the parties expressly so provided." Accord: Anderson v. Mart, 47 Cal.2d 274, 303 P.2d 539. It is clear from the provisions of the agreement quoted above, that the agreement in the present case falls squarely within the foregoing rule. The parties stated their intention to settle both their property and support and maintenance rights, and the fact that the amount of existing community property was small and the amount that might otherwise accrue before the termination of the marriage was speculative, in no way detracts from their clearly expressed intention, as between themselves, to fix and determine the amount of the payments thereafter. Similarly, it is not significant that the amount agreed upon was the same amount defendant had been paying plaintiff following their separation but before the agreement was executed. In the absence of the agreement, that amount might or might not have been accepted by the court as appropriate for alimony and child support and it could have been modified in the event of changed circumstances. The parties were entitled to agree to an amount that could not be decreased during the minority of the children or increased unless the welfare of the children so required. See, Dexter v. Dexter, 42 Cal.2d 36, 43, 265 P.2d 873; Messenger v. Messenger, supra, 46 Cal.2d 619, 627–628, 297 P.2d 988;

Anderson v. Mart, supra, 47 Cal.2d 274, 303 P.2d 539.

[3] The question remains whether the agreement may properly be interpreted as providing for payments for plaintiff's support following her remarriage. In Anderson v. Mart, supra, 47 Cal.2d 274, 303 P.2d 539, 543, we pointed out that in the case of integrated agreements executed and incorporated in decrees entered before the 1951 amendment to section 139, payments pursuant thereto do "not terminate on the death of the husband or the remarriage of the wife unless the agreement so provided. [Citations.]" See also, Taliaferro v. Taliaferro, 125 Cal.App.2d 419, 427, 270 P.2d 1036. In the present case there is no express provision that the payments attributable to plaintiff's support should terminate on her remarriage. There is also, however, no express provision that they should continue until her death. Under these circumstances we have concluded that the insignificant amount of the community property involved in the agreement justifies the conclusion that by necessary implication the payments attributable to plaintiff's support should terminate on her remarriage just as the payments attributable to the support of the children terminate on their reaching their majority.

[4] In Dexter v. Dexter, 42 Cal.2d 36, 41–42, 265 P.2d 873, 876, the court stated that when "the parties have made the provision for support and maintenance an integral part of their property settlement agreement, the monthly payments will ordinarily have a dual character. To the extent that they are designed to discharge the obligation of support and maintenance they will ordinarily reflect the characteristics of that obligation and thus have the indicia of alimony. [Citations.] On the other hand, to the extent that they represent a division of the community property itself, or constitute an inseparable part of the consideration for the property settlement, they are not alimony, and accordingly cannot be modified without changing the terms of the property settlement agreement of the parties." It was therefore held in the Dexter case that a provision that the payments should terminate on the remarriage of the wife did not indicate that the monthly payments provided in an integrated agreement were for alimony. It is thus clear that the conclusion that the payments should so terminate, based either on an express provision to that effect or inferred from the provisions of the agreement as a whole, does not conflict with the conclusion that it is an integrated bargain and that the payments are not otherwise subject to modification. Since the agreement in the present case dealt primarily with support rights and the payments were described as for support and maintenance, it would be unreasonable to conclude that the agreement contemplated that the payments should continue for plaintiff's benefit after the obligation to support the children had terminated, see, Anderson v. Mart, supra, 47 Cal.2d 274, 303 P.2d 539, and cases cited, and the obligation of plaintiff's support had been assumed by her second husband. Harnden v. Harnden, 102 Cal.App.2d 209, 227 P.2d 51; Lane v. Bradley, 124 Cal. App.2d 661, 268 P.2d 1092, and Taliaferro v. Taliaferro, 125 Cal.App.2d 419, 270 P.2d 1036, are not contrary to our conclusion herein since in those cases the agreements either expressly provided when the payments should terminate or involved the settlement of substantial property rights.

[5] At the time of the previous modification proceedings neither child had reached his majority and it cannot be determined from the record whether the trial court's denial of defendant's motion to reduce the payments was based on a determination that plaintiff's remarriage was immaterial or was based on continuing need of the full amount for the support, care, and education of the children. Since the children have now reached their majority, the circumstances have materially changed since the entry of that order, and plaintiff has failed to prove that it was based on a determination of the issue now before us. Accordingly, it is not res judicata. Hurd v. Albert, 214 Cal. 15, 26, 3 P.2d 545, 76

A.L.R. 1348; Horton v. Goodenough, 184 Cal. 451, 460, 194 P. 34; Emerson v. Yosemite Gold Min. & Mill. Co., 149 Cal. 50, 57, 85 P. 122; In re Estate of Miller, 104 Cal.App.2d 1, 18, 230 P.2d 667.

[6] Paragraph ten of the agreement provides in part that defendant agrees to "pay and indemnify the wife for all expenses, costs and attorney's fees in defending any suit, motion or proceeding brought by the husband or anyone in his behalf in any manner affecting this Agreement, and the wife's rights thereto in any respect whatsoever." Since this provision does not make plaintiff's right to attorney's fees dependent on her inability to pay them, the trial court erred in denying her prayer therefor on the ground that she had not shown such inability.

The order is reversed insofar as it denies plaintiff's motion for an award of attorney's fees. In all other respects it is affirmed.

GIBSON, C. J., and SPENCE and McCOMB, JJ., concur.

CARTER, Justice (concurring and dissenting).

I concur in the judgment of affirmance. I do not, however, agree with the majority in its reliance on the cases of Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873, Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988, and Anderson v. Mart, 47 Cal.2d 274, 303 P.2d 539. I express no approval of the law as set forth in the above mentioned cases. In the Dexter and Messenger cases the court was concerned chiefly with the character of the payments provided for in the property settlement agreement and whether or not such payments constituted such an integral part of the agreement as to prevent a subsequent modification thereof.

Anderson v. Mart, supra, has some analogy to the case at bar. In that case plaintiff's former husband died. The agreement there contained no provision that the monthly payments should cease on plaintiff's remarriage, or the attainment of majority by the parties' child, or the death of payor. In the case at bar, the agreement likewise contained no provision for termination of the monthly payments by remarriage of the payee, majority of the children, or death of the payor. Both the Anderson case and the case at bar involved agreements entered into prior to the 1951 amendment to section 139 of the Civil Code. The section as it read prior to the amendment provided that "Upon the remarriage of the wife, the husband shall no longer be obligated to provide for her support but such remarriage shall not affect his duty to provide for the maintenance of the children of his marriage." The 1951 amendment provided that "Except as otherwise agreed by the parties in writing, the obligation of any party in any decree, judgment or order for the support and maintenance of the other party shall terminate upon the death of the obligor or upon the remarriage of the other party."

The trial court in the Anderson case held that the payor's estate was indebted to plaintiff (his former wife) on the property settlement agreement and that the "agreement was incorporated in and made a part of the decree in the divorce action and that the provision for support therein was an inseparable part of an integrated property settlement agreement and therefore entered judgment for plaintiff for $14,190 to be paid out of the funds of the estate in due course of administration. That sum was fixed by the court as the present value of $50 per month for plaintiff's life expectancy." 47 Cal.2d 274, 303 P.2d 539, 541. A majority of this court held that the trial court properly allowed plaintiff to recover from her former husband's estate "the amount attributable to plaintiff's support for the remainder of her life expectancy." The conclusion was reached by reasoning that the support payments were not separable from the balance of the agreement and that the waiver provisions did not prevent plaintiff from enforcing the agreement as made. A majority also held that the agreement in the Anderson case fell "squarely within the * * * rule" of the Messenger case.

In the case at bar, where the majority reach an entirely different result, it is also held that the agreement "in the present case falls squarely within the * * * rule" of the Messenger case. That rule is that when "the parties have clearly expressed their 'purpose of fixing and adjusting their personal and property rights,' have provided that the provision for alimony is 'for and in consideration of the permanent and lasting division and settlement of all their property rights of every kind and nature,' and the wife has waived 'all right to future maintenance and support * * *, except as herein otherwise expressly provided,' the conclusion is inescapable that they have made the provisions for support and maintenance an integral and inseparable part of their property settlement agreement. With such conclusive evidence of integration, the provisions for support and maintenance or alimony would be subject to modification only if the parties expressly so provided." 46 Cal.2d 619, 628, 297 P.2d 988, 993. Despite the fact that the agreement here contained no provision of any kind for termination of the monthly payments the majority holds that such payments terminated upon the remarriage of the wife and the attainment of majority by the children. It is noted, inter alia, in the majority opinion that there was here "no express provision that they [the payments] should continue until her [plaintiff's] death." There was also no such provision in the Anderson case agreement.

The reasoning of the majority in the present case and the result reached by it appear to me to be inconsistent. In the first instance the Messenger rule is relied upon and it is also said that "The parties stated their intention to settle both their property and support and maintenance rights, and the fact that the amount of existing community property was small and the amount that might otherwise accrue before the termination of the marriage was speculative, in no way detracts from their clearly expressed intention, as between themselves, to fix and determine the amount of the payments thereafter. Similarly, it is not significant that the amount agreed upon was the same amount defendant had been paying plaintiff following their separation but before the agreement was executed. In the absence of the agreement, that amount might or might not have been accepted by the court as appropriate for alimony and child support and it could have been modified in the event of changed circumstances. The parties were entitled to agree to an amount that could not be decreased during the minority of the children or increased unless the welfare of the children so required." The majority, having concluded that this was an integrated, inseparable property settlement agreement, then stated: "The question remains whether the agreement may properly be interpreted as providing for payments for plaintiff's support following her remarriage. In Anderson v. Mart, supra, 47 Cal.2d 274, 303 P.2d 539, 543, we pointed out that in the case of integrated agreements executed and incorporated in decrees entered before the 1951 amendment to section 139, payments pursuant thereto do 'not terminate on the death of the husband or the remarriage of the wife unless the agreement so provided. [Citations.]' See also, Taliaferro v. Taliaferro, 125 Cal.App.2d 419, 427, 270 P.2d 1036. In the present case there is no express provision that the payments attributable to plaintiff's support should terminate on her remarriage. There is also, however, no express provision that they should continue until her death. *Under these circumstances we have concluded that the insignificant amount of the community property involved in the agreement justifies the conclusion that by necessary implication the payments attributable to plaintiff's support should terminate on her remarriage just as the payments attributable to the support of the children terminate on their reaching their majority.*" (Emphasis added.) On just what reasoning *this* conclusion is based escapes me. If the monthly payments are an integrated part of the property settlement agreement and the parties agreed that the wife would receive $250 per month without express provision for the termination thereof on her remarriage, how can it be

concluded that her remarriage terminated such payments in view of the reliance by the majority on the Anderson case? The Code draws no distinction between remarriage of the wife and the death of the payor.

The majority next quotes from the case of Dexter v. Dexter, 42 Cal.2d 36, 41, 42, 265 P.2d 873, to the effect that monthly payments in a property settlement agreement "will ordinarily have a dual character. To the extent that they are designed to discharge the obligation of support and maintenance they will ordinarily reflect the characteristics of that obligation and thus have the indicia of alimony. [Citations.] On the other hand, to the extent that they represent a division of the community property itself, or constitute an inseparable part of the consideration for the property settlement, they are not alimony, and accordingly cannot be modified without changing the terms of the property settlement agreement of the parties." The majority then notes: "It was therefore held in the Dexter case that a provision that the payments should terminate on the remarriage of the wife did not indicate that the monthly payments provided in an integrated agreement were for alimony. *It is thus clear that the conclusion that the payments should so terminate, based either on an express provision to that effect or inferred from the provisions of the agreement as a whole, does not conflict with the conclusion that it is an integrated bargain and that the payments are not otherwise subject to modification.*" (Emphasis added.) Then we come to the illogical summation that "Since the agreement in the present case dealt primarily with support rights and the payments were described as for support and maintenance, it would be *unreasonable* to conclude that the agreement contemplated that the payments should continue for plaintiff's benefit after the obligation to support the children had terminated, see, Anderson v. Mart, supra, 47 Cal.2d 274, 303 P.2d 539, and cases cited, and the obligation of plaintiff's support had been assumed by her second husband"! *In the Anderson case the provisions were also for support and maintenance,* and futhermore, a majority of this court has heretofore held that the labels adopted by the parties are not conclusive and that it is not controlling that the monthly payments for support have some of the indicia of alimony. Messenger v. Messenger, 46 Cal.2d 619, 625, 626, 297 P.2d 988; Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873, and Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881.

Much has been said by a majority of this court in earlier cases about the character of the payments in a property settlement agreement being one of fact for the trial court in a modification proceeding. However a majority has also held proper the action of a trial court refusing the admission of evidence on that point. Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873, and see my concurring and dissenting opinion at pages 44, 45, and at pages 878, 879 respectively. In the Anderson case the trial court determined that the monthly payments were an integrated and inseparable part of the property settlement agreement and that the obligation for such payments did not terminate on the death of the payor since no provision for termination had been agreed to by the parties. A majority of this court affirmed the judgment in that respect. Here the trial court found that the remarriage of the wife and majority of the children terminated the obligation for the monthly payments even though no provision for termination was to be found in the agreement entered into by the parties. A majority of this court affirms the action of the trial court but *not* on the theory that there was sufficient evidence to support the conclusion of the trial court on an issue of fact. The exact theory on which the majority conclusion is based is not stated. It would appear from reading the opinion that the opposite conclusion was to be reached since it is held that the monthly payments were an integrated, inseparable part of the property settlement agreement which contained no provision for termination on remarriage of the wife or death of the payor. It appears to me that the conclusion is inescapable that neither Anderson v. Mart nor Messenger v. Messenger is in "accord" with the holding here

as the majority assures us they are, but that they are directly contra to both the reasoning and conclusion of the majority here.

The majority seems to have seceded from its position that the character of the payments in a property settlement agreement is a question of fact for the *trier of fact*. It is apparent from the majority holdings in the recent cases of Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873; Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881; Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 863; Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988; Anderson v. Mart, 47 Cal.2d 274, 303 P.2d 539, and the case at bar that the character of the payments for support and maintenance in a property settlement agreement is a *question for this court to determine as it sees fit* without reference to either the determination of the trial court or other standard based upon logic or precedent. Until such time as a majority of this court sees fit to clarify its position with respect to the contractual rights of the parties and announces a standard based upon sound precedent, the statement in my concurring and dissenting opinion in the Flynn case that the law in this field constitutes an effective trap designed to catch both wary and unwary attorneys who are trying honestly and conscientiously to protect their clients' interests is more applicable now than it was then. The untold confusion existing in the law in this field as the result of the conflicting decisions of this court is also a trap for trial and appellate judges who are honestly endeavoring to do their duty in deciding cases of this character. This court could, by employing a simple process of logic and reason, so clarify the law in these cases that lawyers and trial judges would know how to dispose of them properly and thus relieve this court of at least a portion of its already tremendous work load.

I adhere to the views expressed in my concurring and dissenting opinions in the Fox, Dexter, Flynn, Messenger and Anderson cases, and it is my considered opinion that if and when the majority of this court adopts these views the confusion which now exists in this field of law will be obviated and the burden now cast upon the courts in disposing of these cases will be greatly reduced.

There may be cases where, in the settlement of property rights upon the dissolution of a marriage, that one spouse receives a larger share of the community property and agrees to pay the other cash in lieu thereof. In such a case the agreement should provide for the amount to be paid and the time of payment. It is obvious that such payments should not terminate upon the death of the payor or the remarriage of the payee. But in cases such as this and Anderson v. Mart, supra, where it appears that the payments are for support and maintenance, and no provision is made for their termination, they should, as a matter of law, terminate upon the death of the payor or the remarriage of the payee.

The trial court determined here that the provision for monthly payments was intended by the parties as support and maintenance for the wife and children and that such payments were intended to terminate upon the remarriage of the wife and the attainment of majority by the children. A reading of the record discloses ample evidence to sustain this determination and it should, therefore, be affirmed.

SCHAUER, Justice (concurring and dissenting).

I concur in the judgment insofar as it affirms the order of the trial court.

The evidence in this case, as I view it, supports and establishes legally tenable ground for all essential findings and conclusions of the trial court and for that reason I would affirm its order in all respects. Also I would prefer that the majority had expressly overruled rather than attempted to distinguish Messenger v. Messenger (1956), 46 Cal.2d 619, 297 P.2d 988, and Anderson v. Mart (1956), 47 Cal.2d 274, 303 P.2d 539, in the respects as to which each appears to assert and rely on a doctrine inconsistent with the holding of the majority today.

SHENK, J., concurs.

48 Cal.2d 141

LEWIS & QUEEN, a Partnership,

George W. Lewis and Paul C. Queen, Plaintiffs and Appellants,

v.

N. M. BALL SONS, a Partnership, et al., Defendants and Respondents.

S. F. 19563.

Supreme Court of California,

In Bank.

March 19, 1957.

Rehearing Denied April 17, 1957.

Action for breach of rental agreements to furnish equipment for performance of work under defendant's parkway construction contracts with state, wherein defendant filed a counterclaim. The Superior Court, Alameda County, Chris B. Fox, J., entered judgment for defendants, and from such judgment and order denying a new trial, plaintiff appealed. The Supreme Court, Traynor, J., held that the plaintiff, as subcontractor, had acted as a contractor without being licensed as such, as required by West's Ann.Bus. & Prof.Code, § 7028, and hence, under § 7031, could not maintain action against principal contractor or sureties on its bonds for breach of rental agreements.

Appeal from order denying motion for new trial dismissed and judgment affirmed.

Opinion, 297 P.2d 120, vacated

Carter and Schauer, JJ., dissented.

1. Highways ⇐110

In action for breach of equipment rental agreements by holder of parkway construction contracts with state, findings that plaintiff and defendant had entered into rental agreements for the purpose of circumventing requirement under state contracts that defendant must perform at least 50% of work embraced in state contracts and that real agreement between the parties was for plaintiff to perform more than 50% of work under state contracts as an integrated subcontract operation in violation of state contracts were supported by substantial evidence.

2. Appeal and Error ⇐110, 870(6)

Order denying a new trial is not appealable but may be reviewed on appeal from judgment. West's Ann.Code Civ. Proc., § 956.

3. Licenses ⇐39.44

In action against holder of parkway construction contracts with state and sureties on contractor's bonds for breach of equipment rental agreements, evidence established that, notwithstanding form of rental agreements, plaintiff actually undertook to and did in fact construct a highway for contractor and thereby acted as a contractor within meaning of statute making it unlawful to engage in the business or act in the capacity of a contractor without a license. West's Ann.Code Civ. Proc., § 1192.1; West's Ann.Gov.Code, § 4200; West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7031.

4. Contracts ⇐346(1)

Where evidence shows that plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, court, regardless of the pleadings, has the power and duty to ascertain the true facts in order that it may not lend its assistance to the consummation or encouragement of what public policy forbids.

5. Appeal and Error ⇐173(6)
Arbitration and Award ⇐85(1)
Contracts ⇐138(6)
New Trial ⇐26

The issue of illegality of contract sought to be enforced or of act for which recovery of compensation is sought may be raised for the first time on motion for new trial, in proceeding to enforce arbitration award, or on appeal, and, even though parties, whether by inadvertence or consent, do not raise the issue, court may do so on its own motion.

6. Evidence ⇐437

In action for breach of written agreements for rental of road construction equipment, though such agreements stated that they contained all provisions agreed to by the parties, parol evidence was ad-

missible to show true nature of agreement between the parties and that plaintiff had in fact acted as a contractor within statute making it unlawful to do so without a license. West's Ann.Code Civ.Proc., § 1856; West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7031.

7. Evidence ⇐437

Parol evidence rule does not exclude evidence showing that a written contract lawful on its face is in fact part of an illegal transaction. West's Ann.Code Civ. Proc., § 1856.

8. Contracts ⇐346(1)
Evidence ⇐437

The policy in favor of narrowing issues in dispute to those made by the pleadings, and the policy of parol evidence rule favoring the conclusiveness of integrated written agreements give way before the importance of discouraging illegal conduct, and trial court, notwithstanding such policies, must be free to search out illegality lying behind the form in which the parties have cast transaction to conceal such illegality.

9. Licenses ⇐11(5)

Statutes regulating the contracting business and providing for the licensing of contractors were intended to protect the public against dishonesty and incompetency in the administration of contracting business as well as in the actual performance of contract. West's Ann.Bus. & Prof. Code, §§ 7025, 7026, 7028–7031, 7068, 7069, 7120.

10. Licenses ⇐20

Where contractor is a partnership, the experience, knowledge, and integrity of each partner is a vital consideration in determining whether to issue contractor's license. West's Ann.Bus. & Prof.Code, §§ 7025, 7026, 7028–7031, 7067, 7069, 7071.

11. Licenses ⇐39.43

That one of two members of partnership which acted as a contractor held a contractor's license did not constitute substantial compliance with statutory licensing requirements and did not enable partnership to maintain action for breach of contract. West's Ann.Bus. & Prof.Code, §§ 7025, 7026, 7028–7031, 7067–7069, 7071, 7120.

12. Contracts ⇐138(1)

Generally, courts will not enforce an illegal bargain or lend their assistance to a person who seeks compensation for an illegal act regardless of consequent injustice between the parties.

13. Contracts ⇐138(1)

How the policy of deterring illegal contracts can best be achieved depends on the kind of illegality and the particular facts involved.

14. Licenses ⇐39.43

Where highway subcontractor acted as contractor without a license, fact that principal contractor had been paid in full for all work done under highway construction contract and should in justice be required to turn over to subcontractor proceeds from principal contract attributable to subcontractor's work did not enable subcontractor to maintain action against principal contractor for breach of subcontract, in view of statutory provision prohibiting maintenance of action for compensation for performance of any act or contract for which a license is required without allegation and proof that party bringing action was a licensed contractor during performance of act or contract. West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7031.

15. Contracts ⇐139

Where statute is enacted for the purpose of protecting one class of persons from the activities of another, a member of protected class, though he has shared in illegal transaction, is said not to be in pari delicto and may maintain action against a member of the class primarily to be deterred.

16. Licenses ⇐39.43

The class protected by statute providing for the licensing of contractors includes those who deal with a person required by statute to have a license, and where the person required to have a license but having none is himself a subcontractor,

he is not to be protected from his own unlicensed activities. West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7031.

17. Licenses ⇐39.43

Subcontractor, having acted as contractor without being licensed as such, as required by statute, could not maintain action against principal contractor for breach of subcontract on theory that principal contractor was not a member of the class to be protected by licensing statute. West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7031.

18. Licenses ⇐39.43

Subcontractor, having acted as contractor without being licensed as such, as required by statute, could not maintain action against principal contractor for breach of subcontract on theory that principal contractor was a licensed member of same profession as subcontractor and not the owner for whose ultimate benefit work was done. West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7031.

19. Licenses ⇐39.44

Action to enforce arbitration award or foreclose mechanic's lien is an action within meaning of statutory provision prohibiting maintenance of any action on a contract for which contractor's license is required without allegation and proof that party bringing action was a licensed contractor during performance of contract. West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7031.

20. Principal and Surety ⇐143

Defense of illegality of contract is available to surety, if it is available to his principal.

21. Licenses ⇐39.43

The obligation of sureties on labor and material bonds and stop notice bonds posted by holder of parkway construction contract with state was to pay only if a legal and valid claim for compensation was established against principal contractor without reference to bonds, and hence, since subcontractor, having acted as contractor without being licensed as such, as required by statute, could not maintain action against principal contractor for breach of subcontract, such action could not be maintained against sureties on principal contractor's bonds. West's Ann.Code Civ.Proc., § 1192.-1; West's Ann.Civ.Code, § 2810; West's Ann.Gov.Code, § 4200; West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7031.

Howard B. Crittenden, Jr., San Francisco, for appellants.

Thelen, Marrin, Johnson & Bridges, Gordon Johnson and Dario De Benedictis, San Francisco, for respondents.

TRAYNOR, Justice.

Plaintiffs George W. Lewis and Paul C. Queen are engaged in the contracting business as the partnership of Lewis and Queen, hereinafter referred to as plaintiff. Defendant Ball Sons, hereinafter referred to as defendant, is also in the contracting business.

In June, 1949, defendant was awarded two contracts by the state, each contract for the construction of a separate section of the Hollywood Parkway. Defendant then entered into four contracts with plaintiff. With respect to the work to be done on each section of the parkway, there were two contracts between plaintiff and defendant. The first was entitled a "subcontract," and under it plaintiff agreed to remove concrete encountered during excavation of the roadway and apply water needed in the process of compacting the ground. The second was entitled an "equipment rental agreement," and under it plaintiff agreed to provide defendant with construction equipment for road excavation, "overhaul," and compacting.

Plaintiff brought this action for damages for breach of the equipment rental agreements and for the reasonable rental value of equipment alleged to have been held beyond the agreed rental term. Plaintiff also sought to recover against sureties on labor and material bonds posted by defendant in compliance with Government Code section 4200 before commencing work on the parkway, and stop notice bonds posted by de-

fendant pursuant to Code of Civil Procedure section 1184e (now section 1192.1) after the present dispute arose. Defendant answered denying that it had breached the rental agreements, and filed a cross-complaint in which it alleged a breach of the agreements by plaintiff and sought to recover overpayments made to plaintiff.

The trial court found that before the execution of the rental agreements plaintiff and defendant had entered into an oral agreement that plaintiff would undertake as a single subcontract the removal of concrete, application of water, excavation, overhaul, and compacting of original ground. Defendant then discovered that if it subcontracted all of this work, it would violate provisions in its contracts with the state that required it to perform with its own organization work of a value of not less than fifty per cent of the value of all the work embraced in the state contracts. The parties agreed therefore, with the intention of circumventing the provisions in the state contracts, to divide the five items of work under each state contract between two writings, a subcontract and an equipment rental agreement. Notwithstanding the form of these writings, it remained the agreement of the parties that plaintiff would perform all five items of work as an integrated subcontract operation.

[1] There was substantial evidence to support these findings. The rental agreements themselves provided for compensation based on the number of cubic yards of earth moved or square yards compacted rather than on the period of time during which defendant had use of the equipment, and the rental term was the time required to do the work called for by the state contracts. Testimony indicated that plaintiff furnished and retained control over both operating and supervisory employees, that it moved equipment to and from other jobs without defendant's consent, and that it carried on the work under both subcontracts and rental agreements with the same personnel, equipment, and accounting. Defendant paid wages, payroll taxes, and compensation insurance for employees operating the machines, but these costs were charged against amounts owing plaintiff under the rental agreements and so ultimately were borne by it. Monthly progress reports from defendant to plaintiff were on a single form and made no segregation between charges attributable to work under the rental agreements and charges attributable to work under the subcontracts. The evidence, especially the testimony of Stanley Ball, tended to show that for all practical purposes the work was conducted by plaintiff, and that defendant exercised only such control as was necessary to coordinate the various subcontractors working on the parkway.

[2] The trial court concluded that plaintiff had agreed to act and had in fact acted as a contractor within the meaning of section 7026 of the Business and Professions Code, and that because it had done so without the license required by section 7028, it was barred by section 7031 from maintaining any action for compensation. Lewis had an individual license, but neither Queen nor the partnership of Lewis and Queen had licenses. The court held, in the alternative, that the rental agreements were unenforceable because they violated the provisions in the state contracts against subcontracting more than a certain amount of the total work. Since we have concluded that plaintiff's failure to obtain a license prevented it from maintaining any action for compensation, we have no cause to consider this alternative ground. The court entered judgment for defendant on the complaint and for plaintiff on the cross-complaint. Plaintiff appeals from the judgment against it.[1]

Section 7028 of the Business and Professions Code makes it unlawful for "any person to engage in the business or act in the capacity of a contractor within this

1. It also purports to appeal from an order denying a new trial. Such an order is not appealable, but may be reviewed on an appeal from a judgment. Code Civ.Proc. § 956.

State without having a license therefor * * *." Section 7026 defines a contractor as "any person, who * * * does himself or by or through others construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road * * * or improvement * * *." "The term contractor includes subcontractor * * *." Section 7030 makes it a misdemeanor for any person to act in the capacity of a contractor without a license. Section 7031 provides that, "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

Furthermore, section 7025 states that the "person" required to have a license by section 7028 includes a partnership, and section 7029 makes it unlawful for two individuals, "each of whom has been issued a license to engage separately in the business * * * of a contractor * * * to jointly * * * act in the capacity of a contractor * * * without first having secured an additional license for acting in the capacity of such a joint venture or combination * * *."

[3] The evidence shows that in spite of the form of the rental agreements plaintiff actually undertook to and did in fact "construct a highway" for defendant, and thereby acted as a contractor within the meaning of section 7026. See Albaugh v. Moss Const. Co., 125 Cal.App.2d 126, 132–133, 269 P.2d 936; Phillips v. McIntosh, 51 Cal. App.2d 340, 343, 124 P.2d 835; cf. Harrison v. Shamalian, 110 Cal.App.2d 500, 243 P.2d 82; Andrew v. Conner, 101 Cal.App.2d 621, 225 P.2d 943.

[4, 5] Plaintiff contends, however, that because defendant admitted in its answer that equipment had been furnished under the written rental agreements, the trial court was precluded from finding that the actual agreements were subcontracts because it should have restricted its findings to the issues made by the pleadings. There is no merit in this contention. Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, the court has both the power and duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids. Wells v. Comstock, 46 Cal.2d 528, 532, 297 P.2d 961; Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 629, 204 P.2d 37; Fewel & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 92, 109 P.2d 650; Endicott v. Rosenthal, 216 Cal. 721, 728, 16 P.2d 673; Tevis v. Blanchard, 122 Cal.App.2d 731, 732–734, 266 P.2d 85; see Owens v. Haslett, 98 Cal.App.2d 829, 835–836, 221 P.2d 252. It is immaterial that the parties, whether by inadvertence or consent, even at the trial do not raise the issue. The court may do so of its own motion when the testimony produces evidence of illegality. Norwood v. Judd, 93 Cal.App.2d 276, 277–278, 282, 209 P.2d 24. It is not too late to raise the issue on motion for new trial, Pacific Wharf & Storage Co. v. Standard American Dredging Co., 184 Cal. 21, 23–24, 192 P. 847, in a proceeding to enforce an arbitration award, Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 629, 204 P.2d 37, or even on appeal. Morey v. Paladini, 187 Cal. 727, 733–734, 203 P. 760. In the present case the issue was in fact raised during the trial.

[6–8] Equally without merit is plaintiff's contention that because the rental agreements stated that they contained all provisions agreed to by the parties, the parol evidence rule precluded the admission of other evidence showing the true nature of the agreement between the parties and that plaintiff had in fact acted as a contractor. The parol evidence rule does not exclude evidence showing that a contract lawful on its face is in fact part of an illegal transaction. Code Civ.Proc. § 1856; Endicott

v. Rosenthal, 216 Cal. 721, 728, 16 P.2d 673; May v. Herron, 127 Cal.App.2d 707, 710–711, 274 P.2d 484; Kennerson v. Salih Brothers, 123 Cal.App.2d 371, 374, 266 P.2d 871; De Armas v. Dickerman, 108 Cal.App. 2d 548, 551–552, 239 P.2d 65. The policy in favor of narrowing the issues in dispute, which normally confines the court to those made by the pleadings, and the policy of the parol evidence rule favoring the conclusiveness of integrated written agreements, both give way before the importance of discouraging illegal conduct. To this end, the trial court must be free to search out illegality lying behind the forms in which the parties have cast the transaction to conceal such illegality.

Plaintiff contends that even if it acted as a contractor under section 7026, it substantially complied with the requirement of section 7028, since Lewis held an individual license. The "person" that did the contracting work, and was required by section 7028 to have a license, however, was the partnership of Lewis and Queen, and it had no license. Nor did Queen individually. Section 7029, furthermore, expressly requires individual licensees who engage jointly in the contracting business to obtain an additional joint license. Cf. Joeph v. Drew, 36 Cal.2d 575, 578, 225 P.2d 504; Wise v. Radis, 74 Cal.App. 765, 773, 242 P. 90.

Undoubtedly there are situations in which substantial compliance with the licensing requirements satisfies the policy of the statute. See Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 689–691, 166 P.2d 265; Citizens State Bank of Long Beach v. Gentry, 20 Cal.App.2d 415, 419–420, 67 P.2d 364; cf. Oddo v. Hedde, 101 Cal.App. 2d 375, 225 P.2d 929. The facts of the present case, however, with one partner licensed individually and no partnership license, are precisely those in Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23, 25, and in that case we said, "There can be no question but that this case presents a clear violation of the statutes regulating the contracting business." 33 Cal.2d at page 607, 204 P.2d at page 25; see also Kirman v. Borzage, 65 Cal.App.2d 156, 158–159, 150 P.2d 3; Holm v. Bramwell, 20 Cal.App.2d 332, 335–336, 67 P.2d 114. We distinguished Gatti v. Highland Park Builders, Inc., supra, on the ground that there both partners held individual licenses and during the performance of the contract a joint license was issued to them and a third person, and Citizens State Bank of Long Beach v. Gentry, supra, on the ground that in that case, although the plaintiff's license expired while the work was in progress, it was renewed in the name of a corporation controlled by him.

[9–11] In both the Gatti and Gentry cases, any matter that might have formed the subject of inquiry by the licensing board in determining whether to issue an additional license was necessarily considered in connection with the licenses actually issued. In the present case, however, the board has never determined the qualifications of Queen. Plaintiff claims that this makes no difference, because it was Lewis who supervised the actual construction work and Queen merely kept the books and sought out new business for the partnership. But the statutory provisions setting forth the qualifications for a license, and the causes for disciplinary action against licensees, show that the Legislature was as much concerned to protect the public from dishonesty and incompetence in the administration of the contracting business as in the actual use of bricks, mortar, and earth-moving equipment. E.g., §§ 7068, 7069, 7120. Plaintiff's insistence that Queen knew nothing about actual construction simply emphasizes the importance of the board's passing on his qualifications to engage in any aspect of the contracting business. The statute makes it clear, furthermore that if the contractor is a partnership, the experience, knowledge, and integrity of each partner is a vital consideration in determining whether to issue a license. E.g., §§ 7067, 7069, 7071. Finally, it is not clear that Queen's activities were in fact confined to bookkeeping and the search for new business. He participated with Lewis in the negotiations that led to the

execution of the contracts, and he "walked the job," apparently to determine what problems would be encountered if the work was undertaken. The conclusion is inescapable that plaintiff did not substantially comply with the licensing requirements.

Since plaintiff did not comply with the statute, it cannot "bring or maintain any action in any court of this State for the collection of compensation * * *." § 7031; Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23. Plaintiff contends, nevertheless, that because defendant has been paid in full by the state for all work done on the parkway, justice requires that it be compelled to turn over to plaintiff the proceeds from the state contracts attributable to plaintiff's labor.

[12] One answer to this contention is that, even in the absence of a provision such as section 7031, the courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act. The reason for this refusal is not that the courts are unaware of possible injustice between the parties, and that the defendant may be left in possession of some benefit he should in good conscience turn over to the plaintiff, but that this consideration is outweighed by the importance of deterring illegal conduct. Knowing that they will receive no help from the courts and must trust completely to each other's good faith, the parties are less likely to enter an illegal arrangement in the first place. See Takeuchi v. Schmuck, 206 Cal. 782, 786–787, 276 P. 345; May v. Herron, 127 Cal. App.2d 707, 712, 274 P.2d 484; Orlinoff v. Campbell, 91 Cal.App.2d 382, 388, 205 P.2d 67; Wise v. Radis, 74 Cal.App. 765, 778, 242 P. 90; Grodecki, In Pari Delicto Potior Est Conditio Defendentis, 71 L.Q. Rev. 254, 266–268.

[13, 14] In some cases, on the other hand, the statute making the conduct illegal, in providing for a fine or administrative discipline excludes by implication the additional penalty involved in holding the illegal contract unenforceable; or effective deterrence is best realized by enforcing the plaintiff's claim rather than leaving the defendant in possession of the benefit; or the forfeiture resulting from unenforceability is disproportionately harsh considering the nature of the illegality. In each such case, how the aims of policy can best be achieved depends on the kind of illegality and the particular facts involved. See Wilson v. Stearns, 123 Cal. App.2d 472, 481–482, 267 P.2d 59; John E. Rosasco Creameries, Inc., v. Cohen, 276 N.Y. 274, 278–280, 11 N.E.2d 908, 118 A.L.R. 641; 6 Corbin, Contracts 964–967 (1951); 2 Pomeroy Equity Jurisprudence 137 (5th ed. 1941); Grodecki, In Pari Delicto Potior Est Conditio Defendentis, 71 L.Q.Rev. 254, 268. But we are not free to weigh these considerations in the present case. Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of the state. Kirman v. Borzage, 65 Cal.App.2d 156, 158, 150 P.2d 3. Moreover, even if we could take into account unjust enrichment of defendant, it is not at all clear that, had it reached the issue, the trial court would have found defendant indebted to plaintiff beyond what it had already paid.

Norwood v. Judd, 93 Cal.App.2d 276, 209 P.2d 24, Galich v. Brkich, 103 Cal.App. 2d 187, 229 P.2d 89, and Wold v. Luigi Consentino & Sons, 109 Cal.App.2d 854, 241 P.2d 1032, do not support plaintiff's right to recover. Each of those cases involved an action by a partner or joint venturer to recover a share of profits arising from an illegal enterprise. It was held that, since the enterprise was terminated, since it was not illegal as such but only for want of a license, and since the action was not against a third person for whose protection the statute had been primarily

enacted but against a partner or joint venturer, the purpose of the law would not be served by denying relief. We need not decide at this time whether an action for an accounting against a partner or joint venturer is "an action * * * for the collection of compensation" within section 7031, cf. Wise v. Radis, 74 Cal. App. 765, 775, 242 P. 90, or, even if it is not, whether the indirect encouragement of an illegal enterprise resulting from the allowance of such an action is sufficient to outweigh the evil of unjust enrichment. See Hooper v. Barranti, 81 Cal.App.2d 570, 575–578, 184 P.2d 688; 32 A.L.R.2d 1345, 1387; Wade, Restitution of Benefits Acquired Through Illegal Transactions, 95 U.Pa.L.Rev. 261, 294–296; but see Denning v. Taber, 70 Cal.App.2d 253, 257–260, 160 P.2d 900. The present action is against a third party, and is to enforce directly an illegal contract, not merely to obtain an accounting for profits arising from one. As Norwood v. Judd itself recognizes, this situation falls squarely within section 7031. 93 Cal.App.2d 276, 283, 209 P.2d 24.

Plaintiff next contends that, by virtue of the fact that it is a subcontractor suing a general contractor rather than a general contractor suing an owner, neither section 7031 nor the general rule that illegal contracts are unenforceable bars its action. Matchett v. Gould, 131 Cal.App.2d 821, 281 P.2d 524, appears to make this distinction decisive. In that case the Crane Service Company and the defendants, all unlicensed contractors, decided to undertake the demolition of buildings for a school district. The understanding between Crane and the defendants was that Crane would make the bid and defendants supply the funds to pay the school district; that the defendants would then do the actual work of taking down the bricks, using for this purpose Crane's machines, for which a reasonable rental would be paid; the defendants would pay Crane for removing concrete and rough-grading the site, and all salvageable material would belong to the defendants. After the job was completed and the defendants had received all the revenues from the sale of salvage, they refused to pay Crane. Crane's assignee sued to enforce the contract.

The district court of appeal held that the plaintiff could recover in spite of section 7031. The first ground of its decision appears to be that, unless the plaintiff was allowed to recover the defendants would be unjustly enriched. As we have already pointed out, the courts may not resort to equitable considerations in defiance of section 7031. As an alternative ground, the court reasoned that Crane had in effect assigned the school district contract to defendants and then become their subcontractor; that subcontractors are in a class for whose protection the licensing statute was enacted (relying on our statement in Fraenkel v. Bank of America, 40 Cal.2d 845, 848, 256 P.2d 569, that the statute was designed "for the prevention of fraudulent acts by contractors resulting in loss to subcontractors, materialmen, employees, and owners of structures"); and that therefore a subcontractor can maintain an action on a contract with a general contractor, even though it is an illegal contract, because the subcontractor is not considered in pari delicto. 131 Cal. App.2d at page 829, 281 P.2d at page 526.

[15] It is true that when the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction. The protective purpose of the legislation is realized by allowing the plaintiff to maintain his action against a defendant within the class primarily to be deterred. In this situation it is said that the plaintiff is not in pari delicto. Carter v. Seaboard Finance Co., 33 Cal.2d 564, 574, 203 P.2d 758; McAllister v. Drapeau, 14 Cal.2d 102, 112, 92 P.2d 911, 125 A.L.R. 800; Pollak v. Staunton, 210 Cal. 656, 662–663, 293 P. 26; Elmers v. Shapiro, 91 Cal. App.2d 741, 754, 205 P.2d 1052; see Grodecki, In Pari Delicto Potior Est Conditio

Defendentis, 71 L.Q.Rev. 254, 265; Wade, Restitution of Benefits Acquired Through Illegal Transactions, 95 U.Pa.L.Rev. 261, 268–270.

[16, 17] But subcontractors are not always in the class to be protected simply because they are subcontractors, and we did not suggest otherwise in Fraenkel v. Bank of America, 40 Cal.2d 845, 848, 256 P.2d 569. See Albaugh v. Moss Const. Co., 125 Cal.App.2d 126, 132, 269 P.2d 936; Holm v. Bramwell, 20 Cal.App.2d 332, 67 P.2d 114. The class protected by the statute includes those who deal with a person required by the statute to have a license. When the person required to have a license is a general contractor, then the protected class includes subcontractors, materialmen, employees, and owners dealing with the general contractor. However, when the person who was required to have a license but did not have one is himself a subcontractor, such as plaintiff in the present case, he of course is not to be protected from his own unlicensed activities. To allow him to recover would in fact destroy the protection of those who dealt with him, and they are in the class the Legislature intended to protect whether they are owners or general contractors. Cf. Hedlund v. Sutter Medical Service Co., 51 Cal.App.2d 327, 333, 124 P.2d 878; 2 Pomeroy, Equity Jurisprudence 142 (5th ed. 1941). To the extent that it is contrary, the reasoning of Matchett v. Gould, 131 Cal.App.2d 821, 281 P.2d 524, is erroneous and is disapproved. Under the facts of the present case plaintiff is not in the class to be protected, and therefore, is not relieved from the imputation of being in pari delicto. Its failure to obtain a license, and not any fault of defendant in this regard, made the transaction illegal.

[18] There is no merit in plaintiff's further contention that it may maintain this action simply because it is an action against a licensed member of plaintiff's own profession, rather than against the owner for whose ultimate benefit the work was done. General contractors as much as owners are entitled to raise the defense of lack of a license in the subcontractor. If they were not, section 7031 would be no deterrent to subcontractors, since they generally do look to the general contractor for compensation. Yet section 7026, stating that "the term contractor includes subcontractor," clearly imposes on unlicensed subcontractors the same disabilities as on unlicensed general contractors. Cases from other jurisdictions cited by plaintiff, e. g., Dow v. United States, for Use and Benefit of Holley, 10 Cir., 154 F.2d 707, 710, do not involve statutory prohibitions like section 7031.

[19] Plaintiff's final contention is that, even if it cannot recover on the rental agreements from defendant, the defense of lack of a license is not available to the sureties on the bonds. Section 7031 provides, however, that no person who acts as a contractor "may bring or maintain *any* action * * * for the collection of compensation for the performance of any act * * *" for which a license is required, without alleging and proving that he was licensed. (Italics added.) We have already held that an action to enforce an arbitration award is an action within the meaning of this provision, Loving & Evans v. Blick, 33 Cal.2d 603, 613, 204 P.2d 23; Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 631–633, 204 P.2d 37, and it is clear that an action to foreclose a mechanic's lien is also. Albaugh v. Moss Const. Co., 125 Cal.App.2d 126, 132, 269 P.2d 936; Cash v. Blackett, 87 Cal.App.2d 233, 237, 196 P.2d 585; Siemens v. Meconi, 44 Cal.App.2d 641, 112 P.2d 904; Holm v. Bramwell, 20 Cal.App.2d 332, 334, 67 P.2d 114. In view of the purpose of section 7031, we can see no reason to distinguish an action on a bond. In all of these cases the object of the plaintiff is to obtain, more or less directly, compensation for unlicensed work. The deterrent purpose behind section 7031 would be frustrated if the plaintiff, prevented from obtaining compensation directly by an action on his contract, could obtain it indirectly by an action on a bond.

[20, 21] Moreover, even in the absence of section 7031, the defense of illegality is available to the surety if it is available to his principal. Wells v. Comstock, 46 Cal. 2d 528, 529, 533, 297 P.2d 961; Restatement, Security § 117, comment d. Lewis & Queen v. S. Edmondson & Sons, 113 Cal.App.2d 705, 707–708, 248 P.2d 973, and Pneucrete Corp. v. United States Fidelity & Guaranty Co., 7 Cal.App.2d 733, 736–740, 46 P.2d 1000, which are cited by plaintiff, in spite of broad language in the opinions do not hold otherwise. The obligation of the sureties on defendant's bonds was not to pay for labor merely by virtue of the fact that it had been expended on the parkway. It was an obligation to pay only if plaintiff established, without reference to the bond, a legal and valid claim for compensation. See Civil Code, § 2810; Flickinger v. Swedlow Engineering Co., 45 Cal.2d 388, 393–394, 289 P.2d 214; Restatement, Security § 117, comment c. This plaintiff has not done.

Appeal from order denying motion for new trial dismissed. Judgment affirmed.

SHENK, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

In my opinion, the strict construction placed upon Business and Professions Code sections, particularly section 7031, by the majority is unwarranted. Section 7031 is but a statutory declaration of the common law rule that a contract which violates a statute designated for the protection of the public is void and unenforceable. Levinson v. Boas, 150 Cal. 185, 88 P. 825, 12 L.R.A., N.S., 575; Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420; 12 Am.Jur., Contracts, § 158, p. 652. This rule, however, is not applied where to do so does not serve the intended purpose of the statute. Wilson v. Stearns, 123 Cal.App.2d 472, 478, 267 P.2d 59, citing Harris v. Runnels, 12 How. 79, 13 L.Ed. 901; 12 Am.Jur., Contracts, § 162, p. 657. At one time in this state, statutes, such as section 7031, which expressly deny the enforcement of contracts which violate a particular law, were strictly construed to prevent recovery. See, e. g., Wise v. Radis, 74 Cal.App. 765, 242 P. 90, involving a statute which prevented the enforcement of certain contracts by unlicensed real estate brokers. More recently, however, section 7031, although literally applicable, has not been applied where enforcement of the contract was considered not to be adverse to the public interest sought to be protected by the pertinent Business and Professions Code sections. Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265; Citizens State Bank v. Gentry, 20 Cal.App.2d 415, 67 P.2d 364; Norwood v. Judd, 93 Cal.App.2d 276, 209 P.2d 24; Galich v. Brkich, 103 Cal.App.2d 187, 229 P.2d 89; Wold v. Luigi Consentino & Sons, 109 Cal.App.2d 854, 241 P.2d 1032; Matchett v. Gould, 131 Cal.App.2d 821, 281 P.2d 524. The effect of these cases is that the common law exceptions to the rule are recognized as being preferable to a strict, literal construction of the statutory language. Accordingly, the conclusion of the majority—that because plaintiff is within the statutory definition (subcontractor) and seeks recovery of his share of the proceeds arising from the work, it necessarily follows that recovery must be denied—is based upon an incomplete analysis of the question presented. Rather, an examination should be made to determine whether the intended statutory purpose requires the denial of enforcement of this particular contract. Such an examination, it is submitted, demonstrates that the statute was not so intended.

The facts of this case are quite similar to those in Norwood v. Judd, supra. There, plaintiff and defendant had formed a partnership to conduct a contracting business. Defendant was a duly licensed contractor but neither plaintiff nor the partnership was. Plaintiff brought an action to recover his share of the business proceeds from his partner. Literally, Business and Professions Code, section 7031, would have barred plaintiff's action as it provides, in part, that: "No person engaged in the

business or acting in the capacity of a contractor, may bring or maintain any action * * * for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract." However, recovery was allowed and the court declared, 93 Cal.App. 2d at page 286, 209 P.2d at page 30 that "It must be remembered that these licensing statutes are passed primarily for the protection and safety of the public. They are not passed for the benefit of a greedy partner who seeks to keep for himself all of the fruits of the partnership enterprise to the exclusion of another partner entitled to share therein. Where the illegal transaction has been terminated, public policy is not protected or served by denying one partner relief against the other." It was further noted, 93 Cal.App.2d at page 288, 209 P.2d 24, that Wise v. Radis, supra, (applying the strict rule of construction) had been overruled in legal effect. Defendant's petition for a hearing in the Norwood case was denied by this court.

A similar problem was presented in Galich v. Brkich, supra, 103 Cal.App.2d 187, 229 P.2d 89. Plaintiff, apparently an unlicensed contractor, entered into a joint venture or partnership agreement with defendant. No license was obtained for the enterprise as required by Business and Professions Code, section 7029. In allowing recovery by plaintiff of the money due him for the contracting work performed by the venture, the court declared 103 Cal.App.2d at page 191, 229 P.2d at page 91, that "The contract in question was not *per se* contrary to any statute; public welfare and safety were not threatened, and public policy would not be protected or served by denying one partner relief against the other." Applying the reasoning of the Norwood case, supra, the court observed that "* * * the rule that courts will not lend their aid to the enforcement of an illegal agreement should not be 'blindly' extended 'to every case where illegality appears somewhere in the transaction.'" Defendant's petition for a hearing in this court was denied.

In Wold v. Luigi Consentino & Sons, supra, 109 Cal.App.2d 854, 241 P.2d 1032, the same problem was again presented. The application of the statute was rejected, the court declaring 109 Cal.App.2d at page 857, 241 P.2d 1032, that its main purpose was protection of *owners*.

Recovery was allowed in these cases because the actions were not against those whom the statute was intended to protect, that is, an owner or other member of the general public who is without knowledge of or experience in contracting affairs, and hence, is wholly dependent upon the competence of the contractor. Accordingly, the statute was not applied to allow an associate of an unlicensed individual to retain the proceeds rightfully owing to the latter. It seems clear that this principle is applicable here, despite the absence of a partnership or joint venture relationship, for in practical effect, the circumstances are identical. Two parties agreed to perform work for a third party and one of the two has withheld the other's share of the proceeds. Upon facts identical to those in the present case, the Second District Court of Appeal in Matchett v. Gould, supra, 131 Cal.App.2d 821, 281 P.2d 524, applied the principle of the partnership cases and allowed recovery. In that case, neither plaintiff, a subcontractor, nor defendant, a general contractor, was licensed. Upon completion of a contracting job for a third party, plaintiff sought the amount owing to him for the work performed. Analogizing to Norwood v. Judd, supra, the court allowed recovery and declared that the precise relationship between the parties, that is, whether partners or contractor and subcontractor, was not determinative and that the statute was not intended to prevent recovery where the unlicensed contractor has completed the job, where there is no serious moral turpi-

tude involved and where a denial of recovery would permit unjust enrichment of one not intended to be protected, namely, the general contractor. Citing Gatti v. Highland Park Builders, Inc., supra, 27 Cal. 2d 687, 166 P.2d 265, the court observed 131 Cal.App.2d at page 829, 281 P.2d at page 529, that the statute was not intended as an " 'unwarranted shield for the avoidance of a just obligation.' "

Here, the majority, to sustain their decision that plaintiff is precluded from enforcing his contract, concludes that the reasoning of Matchett v. Gould, supra, is erroneous, although a petition for hearing in that case was denied by this court. The majority opinion further declares that "To allow him [plaintiff] to recover would in fact destroy the protection of those who dealt with him, and they are, in the class the Legislature intended to protect whether they are owners or general contractors." What protection is to be afforded a general contractor? He is not in the position of a member of the public who desires contracting work performed and because of the disparity of knowledge and experience is extended statutory protection. Rather, his position is equal to that of the subcontractor and he is, therefore, able to judge the nature and quality of the subcontractor's performance for himself. If the statute was intended to "protect" a general contractor as a member of the public, as undeniably he is, then it should be applied to "protect," from one another, members of partnership which has illegally undertaken contracting work. It has been seen, however, that the statute is not construed in such a fashion. In the interests of just and consistent application, it should not be so construed here. For this reason, I would reverse the judgment and remand the case for a determination of the cause on its merits.

SCHAUER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

GIBSON, C. J., not participating.

48 Cal.2d 166

Felix BARRERA and Dolores Barrera, his wife, Plaintiffs and Appellants,

v.

Armondo A. DE LA TORRE, Defendant and Respondent.

L. A. 23875.

Supreme Court of California,

In Bank.

March 22, 1957.

Action by dwelling owners against motorist for injuries to person and property resulting when motorist's automobile struck dwelling. The Superior Court, Los Angeles County, Ellsworth Meyer, J., entered judgment on verdict for defendant, and owners appealed. The Supreme Court, Spence, J., held that question of motorist's negligence was for jury.

Judgment affirmed.

Carter, J., dissented.

Opinion, 300 P.2d 100, vacated.

1. Negligence ⇐121(2)

For doctrine of res ipsa loquitur to be applicable, the accident must be of kind which ordinarily does not occur in absence of negligence, must have been caused by an agency or instrumentality within defendant's exclusive control, and must not have been due to any voluntary action or contribution on part of plaintiff.

2. Appeal and Error ⇐216(1)
Automobiles ⇐246(60)

In action by dwelling owners against motorist for injuries to person and property resulting when motorist's automobile struck dwelling, evidence would have warranted instruction on doctrine of res ipsa loquitur, but owners, who had not requested such instruction, could not argue on appeal that trial court erred in failing to give a specific instruction thereon.

3. Appeal and Error ⇐230

Upon appeal from judgment for defendant, plaintiffs, who had not complained

of charge at time it was given, could question correctness of the charge on appeal. West's Ann.Code Civ.Proc., § 647.

4. Negligence ⇐121(2)

Doctrine of res ipsa loquitur concerns a type of circumstantial evidence upon which plaintiff may rely to make out a prima facie case of negligence against defendant.

5. Appeal and Error ⇐216(1)

In action by dwelling owners against motorist for injuries to person and property resulting when motorist's automobile struck dwelling, owners, who had failed to request instructions on doctrine of res ipsa loquitur, would not be heard to contend that giving of instruction that mere fact and accident has happened, considered alone, would not give rise to legal inference that it was caused by negligence precluded jury from considering application of the res ipsa loquitur doctrine and that, therefore, the giving of the instruction was error.

6. Automobiles ⇐245(4)

In action by dwelling owners against motorist for injuries to person and property resulting when motorist's automobile struck dwelling, question of motorist's negligence was for jury.

7. Appeal and Error ⇐171(1)

Ordinarily, party may not, for first time on appeal, change theory of his cause of action.

8. Appeal and Error ⇐171(2)

Where, in action by dwelling owners against motorist for injuries to person and property resulting when motorist's automobile struck dwelling, owners based action in trial court on theory of negligence, owners, who disputed motorist's version of the facts, would not be permitted to advance, for first time on appeal, alleged action based on theory of trespass as ground for reversal of judgment for motorist.

Ernest V. Shockley and Edward Raiden, Los Angeles, for appellants.

Schell, Delamer & Loring and Fred B. Belanger, Los Angeles, for respondent.

SPENCE, Justice.

Plaintiffs, husband and wife, appeal from a judgment for defendant entered on a jury verdict in an action brought to recover damages allegedly resulting from defendant's negligent running of his automobile against plaintiffs' house. They contend that the trial court committed prejdicial error in the instructions to the jury, but we have concluded that this contention cannot be sustained. Furthermore, we have concluded that there is no merit in the suggestion of either plaintiffs or defendant that the question of whether defendant was or was not negligent was a question to be determined as a matter of law by the court rather than as a matter of fact by the jury.

On November 7, 1953, about midnight, defendant was driving his automobile westerly on Third Street in Los Angeles. Beyond the intersection of that street with Arizona Street his automobile went over the curb, across the sidewalk, through a chain-link fence, and crashed against plaintiffs' house. Third Street runs east and west and is about seventy-five feet wide. Arizona Street runs north and south and is about fifty feet wide. There was a boulevard stop sign on Arizona Street at the south entrance of the intersection.

Defendant was the only eye-witness to the accident. He testified that when he was about twenty feet east of the intersection and traveling west at a speed of approximately twenty miles per hour, he saw an automobile on Arizona Street traveling north; that it was then about fifty feet south of the intersection, which was "back from the boulevard stop" and to his left; that he glanced to his right, and then again to his left, at which time he saw the other automobile about eight to ten feet from him, traveling at an estimated speed of fifty miles per hour; that as he passed the center of the intersection, the other automobile struck the left rear fender of his automobile, knocking him off the driver's

seat and to the floorboard; that he then "must have touched the accelerator, as [his] car gathered speed," and veered to the left, going "completely out of control," jumping over the south curb of Third Street, and striking plaintiffs' house, which was about one hundred feet west of the intersection. Defendant further testified that after the accident, the driver of the other automobile "turned off his lights and * * * sped away," with its "front bumper * * * dragging on the ground"; that the other automobile was a 1941 Chevrolet because he went back to the corner and found there "part of a bumper and a piece of [its] skirt" so indicating, which articles the police later examined and took as evidence; that he saw a "brush mark" about fifteen feet long at the intersection, which was well lighted.

One of the investigating officers, as a witness for defendant, testified that he arrived at the scene of the accident about 12:25 a. m.; that defendant was sober; that defendant told him that he had been struck by another automobile, when it "failed to stop at Third Street and drove into his left rear," causing "him to slide to the right-hand side of [his] car," so that he "ran into the building and fence before he could get to the pedals"; and that defendant further stated that the other automobile's "front bumper was dragging on the ground as it left the scene."

[1–3] The parties first are in dispute as to whether or not the doctrine of res ipsa loquitur is applicable here. They agree that the doctrine has these three conditions: (1) the accident must be of a kind which ordinarily does not occur in the absence of some one's negligence; (2) it must have been caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. Seneris v. Haas, 45 Cal.2d 811, 823, 291 P.2d 915; Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258; Prosser on Torts, Second Ed. 1955 (Hornbook Series), p. 201. Obviously in this case conditions (1) and (3) were met. Defendant claims that condition (2) was not met because when the other automobile struck his automobile in the intersection, his automobile went out of his control, jumped the curb and crashed into plaintiffs' house. The car then being out of his control, defendant contends that he cannot be held responsible for plaintiffs' damages under that doctrine. McDonald v. Cantley, 214 Cal. 40, 45, 3 P.2d 552; Staples v. L. W. Blinn Lumber Co., 97 Cal.App. 387, 392, 275 P. 813. This argument assumes that the jury was required to find that the accident happened exactly as defendant testified. On the other hand, plaintiffs claim that defendant's explanation was highly improbable, being based upon an alleged collision between his and a "phantom car" with the consequent wresting of his car from his control and its striking plaintiffs' house. So far as they are concerned, plaintiffs claim their damages were occasioned by but one car, which was that of the defendant, and therefore the res ipsa loquitur doctrine was applicable. Druzanich v. Criley, 19 Cal.2d 439, 444, 122 P.2d 53. But regardless of whether there was or was not a two-car collision in line with defendant's account, it could not be said as a matter of law that defendant thereby lost control of his automobile so as to render the doctrine inapplicable. Rather these were all matters for the jury to weigh in the light of the required conditions, and an appropriate instruction concerning the doctrine would have been proper. Seneris v. Haas, supra, 45 Cal.2d 811, 823, 291 P.2d 915.

However, plaintiffs did not request an instruction on the doctrine of res ipsa loquitur. Under such circumstances they may not argue on appeal that the court erred in failing to give a specific instruction. Lahti v. McMenamin, 204 Cal. 415, 421, 268 P. 644; Mills v. Los Angeles Junk Co., 3 Cal.App.2d 546, 547–548, 40 P.2d 285; Comstock v. Morse, 107 Cal.App. 71, 75, 290 P. 108. But, of course, they may question the correctness of the charge

to the jury though they made no complaint at the time of its occurrence. Code Civ. Proc., § 647; Cook v. Los Angeles Ry. Corp., 13 Cal.2d 591, 594, 91 P.2d 118.

Plaintiffs contend that the court erred in giving the following instruction: "The mere fact that an accident happened, considered alone, does not give rise to a legal inference that it was caused by negligence or that any party to this accident was negligent." (BAJI 131.) Of course, as a general comment on this instruction, the single fact of a car crashing into a house, without more, does suggest negligence on the part of someone although the factor of responsibility of any particular person may still remain to be determined. But without emphasis on this portion of the instruction, plaintiffs claim that the instruction precluded the jury from considering the application of the res ipsa loquitur doctrine in its possible relation to defendant. It has been held that the challenged instruction should not be given where the undisputed evidence showed that but one dangerous instrumentality was involved in the happening of the accident and such instrumentality was in the exclusive control of the defendant. In such case where "it was conceded that the fatal bullet was fired by defendant, * * * though instructions on the doctrine of res ipsa loquitur were not requested, the jury should not have been foreclosed from considering the evidence provided by the happening of the accident itself in determining whether defendant was negligent." Jensen v. Minard, 44 Cal.2d 325, 329, 282 P.2d 7, 9.

However, in this case there was evidence that two instrumentalities were involved in the accident, and it was questionable whether the conditions of the res ipsa loquitur doctrine were satisfied. A somewhat similar situation was presented in Middleton v. Post Transportation Co., 106 Cal.App.2d 703, 235 P.2d 855, where an instruction substantially the same as the one here criticized was given along with an instruction concerning the doctrine of res ipsa loquitur. In holding that no error was committed, the court said in 106 Cal.App.2d at page 705, 235 P.2d at page 856: "The fact that the doctrine of res ipsa loquitur is applicable in an action for personal injury does not deprive a defendant of his right to an instruction that the mere fact of injury is no evidence of his negligence or liability. * * * such instruction called the attention of the jury to the rule of law that the mere happening of an accident, that is, separated from everything else shown by the evidence, will not support an inference of negligence on the part of defendant. This instruction does not conflict with the res ipsa loquitur instruction, for such instruction does not become applicable to a case unless several factors concur in addition to the mere happening of the accident: * * * In the present case the jury were entitled to find that certain elements of the doctrine of res ipsa loquitur were not present; therefore such doctrine became inapplicable and the jury were properly advised that they could not draw an inference of negligence on the part of defendant merely because an accident had happened." See, also, Silva v. Pacific Greyhound Lines, 119 Cal.App.2d 284, 287–288, 259 P.2d 743; Bazzoli v. Nance's Sanitarium, Inc., 109 Cal.App.2d 232, 241, 240 P.2d 672; Seedborg v. Lakewood Gardens, etc., Ass'n, 105 Cal.App.2d 449, 455–456, 233 P.2d 943.

[4–6] It thus appears that the criticized instruction would permit the application of the doctrine of res ipsa loquitur if the elements of that doctrine were found to be present. Since such an instruction would be proper when accompanied by an instruction on the res ipsa loquitur doctrine, the same reasoning would likewise indicate its propriety when not so accompanied, if given in a case in which it cannot be said as a matter of law that the res ipsa loquitur doctrine was applicable and in which no instruction with respect to that doctrine was requested. The doctrine of res ipsa loquitur concerns a type of circumstantial evidence upon which the plaintiff may rely to make out a prima facie case of negligence against the defendant. There was sufficient evidence in the present case from

which the jury, whether instructed or not upon the matter, could have drawn the inference that defendant had been negligent, if it had chosen to do so. Rose v. Melody Lane, 39 Cal.2d 481, 488, 247 P.2d 335; Fedler v. Hygelund, 106 Cal.App.2d 480, 487, 235 P.2d 247. Had the jury done so, it could not be said that the evidence would not have supported its verdict; but, on the other hand, the jury here apparently found that defendant had not been negligent and there is ample evidence to support that finding. We conclude that in the absence of any request for instructions on the doctrine of res ipsa loquitur, plaintiffs cannot prevail in their objections to the instructions given under the circumstances presented by the record. Furthermore, it appears from the foregoing discussion that the question of whether defendant was or was not negligent was essentially a question of fact for the jury's determination.

[7, 8] As a final point, plaintiffs suggest that they had a cause of action against defendant not only upon the theory of negligence but also upon the theory of trespass. They admit that this latter theory of liability was not presented either in the trial court or on appeal prior to the time of filing their supplemental brief in this court. They recognize the general rule that ordinarily a party may not, for the first time on appeal, change the theory of his cause of action, Ernst v. Searle, 218 Cal. 233, 240, 22 P.2d 715; Gray v. Janss Investment Co., 186 Cal. 634, 641, 200 P. 401, but they suggest that this case should be an exception, relying upon Panopulos v. Maderis, 47 Cal.2d 728, 303 P.2d 738. However, the new legal theory in the Panopulos case presented only a question of law on undisputed facts, and it was deemed appropriate to pass upon its merits as a further basis for affirmance of the judgment. Here plaintiffs not only dispute defendant's version of the facts but, in addition, they advance this new theory of trespass as ground for reversal of the judgment for defendant. Such change of theory by an appellant cannot be permitted. See Anderson v. Derrick, 220 Cal. 770, 777, 32 P. 2d 1078; Townsend v. Wingler, 114 Cal. App.2d 64, 68, 249 P.2d 613.

The judgment is affirmed.

SHENK, TRAYNOR, SCHAUER and McCOMB, JJ., concur.

GIBSON, C. J., concurs in the judgment.

CARTER, Justice.

I dissent.

The majority holds that the doctrine of res ipsa loquitur could not be invoked to establish defendant's negligence as a matter of law; that the jury instruction contrary to the application of the doctrine was not error; and that plaintiffs were not entitled to a reversal on the theory of trespass because it was not presented in the trial court. None of these positions is sound.

The case presents a situation squarely and typically calling for the application of res ipsa loquitur. Not considering defendant's purported "explanation" of the accident for the moment, the evidence shows without dispute that defendant while driving his car along a city street drove it off the street, across the sidewalk, through a fence and into plaintiffs' yard and struck their home, causing the damage of which complaint is made; it is conceded that plaintiffs did not have, could not have had, anything whatsoever to do with the accident since houses, needless to say, cannot be moved about at the will of the owner to dodge cars which leave the street in front of a house. Defendant concedes he was the sole driver and operator of his car. In Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53, a car being driven by defendant left the highway and upset, injuring passengers in the car who had nothing to do with its operation; res ipsa loquitur was held applicable. To the same effect see Fiske v. Wilkie, 67 Cal.App.2d 440, 154 P.2d 725, and cases there cited. In Godfrey v. Brown, 220 Cal. 57, 29 P.2d 165, 93 A.L.R. 1092, the court held res ipsa loquitur available to a guest (before the change in the law as to the liability for injuries to

guests) who was injured when the *defendant driver-host collided at an intersection with another car driven by the other defendant* (cited with approval in Ybarra v. Spangard, 25 Cal.2d 486, 493, 154 P.2d 687, 162 A.L.R. 1258). Harlow v. Standard Improvement Co., 145 Cal. 477, 78 P. 1045, held the doctrine applicable where an operator of a steam roller in a street ran it against and damaged plaintiff's house. Merry v. Knudsen Creamery Co., 94 Cal.App.2d 715, 211 P.2d 905, and cases there cited, applied the doctrine where a car ran into the rear of a stopped car. Price v. McDonald, 7 Cal.App.2d 77, 45 P.2d 425, involved an unattended parked car moving and colliding with plaintiff's house. Defendant's car left the highway and went onto the sidewalk, injuring plaintiff who was on the sidewalk in Brandes v. Rucker-Fuller Desk Co., 102 Cal.App. 221, 282 P. 1009, and Smith v. Hollander, 85 Cal.App. 535, 259 P. 958. See, also, Ireland v. Marsden, 108 Cal.App. 632, 291 P. 912; Brown v. Davis, 84 Cal.App. 180, 257 P. 877.

There cannot be any doubt therefore that the doctrine was applicable in the instant case and the inference of negligence is very strong. It should also be observed that the jury cannot disregard the inference of negligence arising from res ipsa loquitur and if there is no showing of lack of negligence, it must find for the plaintiff. Meyer v. Tobin, 214 Cal. 135, 4 P.2d 542; Dierman v. Providence Hospital, 31 Cal.2d 290, 188 P.2d 12; Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041; Talbert v. Ostergaard, 129 Cal.App.2d 222, 276 P.2d 880; Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63; Williams v. City of Long Beach, 42 Cal.2d 716, 268 P. 2d 1061; Ward v. Silveria, 102 Cal.App. 2d 114, 226 P.2d 732. Such showing *must eliminate any possibility of negligence on the part of the defendant;* if it fails to do so a verdict for defendant must be reversed. Dierman v. Providence Hospital, supra, 31 Cal.2d 290, 188 P.2d 12; Druzanich v. Criley, supra, 19 Cal.2d 439, 122 P.2d 53; Burr v. Sherwin Williams Co., supra, 42 Cal.2d 682, 268 P.2d 1041, and cases there cited; Talbert v. Ostergaard, supra, 129 Cal.App.2d 222, 276 P.2d 880; James v. American Buslines, 111 Cal.App.2d 273, 244 P.2d 503. As said in Dierman v. Providence Hospital, supra, 31 Cal.2d 290, 295, 188 P.2d 12, 14: "This is not to say that a defendant in a res ipsa loquitur case has the burden of proving himself free from negligence. * * * [But] [t]he general principle is, as stated by this court in 1919 (in denying a hearing in Bourguignon v. Peninsular Ry. Co., 40 Cal.App. 689, 694, 695, 181 P. 669, 671) 'that where the accident is of such a character that it speaks for itself, as it did in this case, * * * the *defendant will not be held blameless,* except upon a showing either (1) of a satisfactory explanation of the accident; that is, *an affirmative showing of a definite cause for the accident, in which cause no element of negligence* on the part of the defendant inheres; or (2) of *such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care,* but must have been due to some unpreventable cause, although the exact cause is unknown.'" (Emphasis added.) And in James v. American Buslines, supra, 111 Cal.App.2d 273, 276, 244 P.2d 503, 504: "Where an accident is of such a character that the doctrine of res ipsa loquitur applies, *defendant cannot escape responsibility* except upon a showing either (a) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause *no element of negligence* on the part of the defendant inheres, or (b) of such care *in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care,* but must have been due to some unpreventable cause although the exact cause is unknown." (Emphasis added.)

In the instant case defendant did not eliminate all elements of negligence on his part in rebutting the res ipsa loquitur inference of negligence. The majority opinion discusses this matter from the standpoint of whether defendant showed that

he did not have exclusive control of his car (an element of the res ipsa loquitur doctrine) but the *real issue* is whether he has rebutted the inference of negligence because *at the time* the defendant's negligence would have occurred, when he was approaching and crossing the intersection, he was, without dispute, in full control of his car.[1] As I have said, defendant did not show due care in all respects at that time. He said he was traveling only 20 miles per hour west on Third Street when he approached the intersection with Arizona Street and he saw an automobile traveling north on Arizona 50 feet south of the intersection when he was 20 feet east of the intersection; that he did not see defendant's car again until it was 8 to 10 feet from him and he was in the intersection and it was traveling at 50 miles per hour. Obviously through lack of attention or deliberately, he drove into the path of a vehicle traveling 50 miles an hour when he had ample time to stop. At that speed he must have known that the car could not stop at the intersection, yet he proceeded across the intersection and into its path. He thus has not, as a matter of law, eliminated all negligence on his part and shown the exercise of due care in every respect. It must be remembered that we are not considering the liability as between the other car and defendant but between defendant and plaintiffs who had nothing whatsoever to do with the accident. Certainly, the evidence shows some negligence on defendant's part rather than a total absence thereof. Moreover, even if we speak of control by defendant at the time of the collision with plaintiffs' house, the most defendant testified to was that he "must" have put his foot on the accelerator after the impact, that was merely his deduction from the facts, not evidence as to them. I would hold therefore that defendant failed as a matter of law to rebut the inference of his negligence and the judgment must be reversed, but there is more.

At least we have a case where defendant's negligence has been established both by reason of the doctrine of res ipsa loquitur *and defendant's own testimony*. In such case it cannot be doubted that the instruction given was error and prejudicial to plaintiffs.[2] It is true that plaintiffs did not request a res ipsa loquitur instruction but the jury is entitled to draw the inference even though not so instructed. Rogers v. Los Angeles Transit Lines, 45 Cal. 2d 414, 289 P.2d 226, and cases cited. The instruction given, *supra*, flies squarely in the teeth of the res ipsa loquitur doctrine. The very essence of that doctrine, where applicable, is that the happening of the accident does give rise to an inference of negligence; the instruction says it does not. It is fallacious to reason that plaintiffs did not show the applicability of the doctrine for, as seen, it was clearly applicable, and even though, as shown by defendant's testimony, he lost control of his car when he collided with plaintiffs' house, he unquestionably *had control at the legally important time* when he entered and crossed the intersection—when his negligence occurred (see authorities cited *supra*). It has been held that the instruction here given is *inconsistent* with one on res ipsa loquitur, and ground for granting a new trial. Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 143 P.2d 929; England v. Hospital of Good Samaritan, 22 Cal.App. 2d 226, 70 P.2d 692; see, Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 P. 164. Indeed, it is held that it tells the jury the doctrine does not apply. Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 207 P.2d 378, 22 A.L.R. 1462. This court said in Brown v. George Pepperdine Foundation, 23 Cal. 2d 256, 261, 143 P.2d 929, 931: "The court,

1. The exclusive control in res ipsa loquitur is at the time of the negligence rather than at the time of the injury. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522; Escola v. Coca-Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436.

2. The instruction given reads: "The mere fact that an accident happened, considered alone, *does not* give rise to a *legal inference* that it was caused by negligence or that *any party* to this accident *was negligent*." (Emphasis added.)

at the request of appellant, instructed the jury * * * that 'The mere fact that an accident happened, considered alone, does not support an inference that some party or any party to this action was negligent.' * * * Under appellant's theory of how the accident occurred the instruction is not erroneous when considered with certain other instructions. It may have *confused* the jury, however, in view of instruction No. 30 which states that 'The inference of the negligence which you may draw in this case *from the fact of the happening of the accident itself* shows the burden to the defendants of explaining the manner in which the accident happened. * * *' (Italics added.) *These two instructions contain inconsistent ideas and the jury may have been confused thereby.*" (Emphasis added.) The cases relied upon by the majority are either distinguishable or plainly wrong and contrary to the Pepperdine and England cases. In Middleton v. Post Transportation Co., 106 Cal.App.2d 703, 235 P.2d 855, the court cites no authority except a Missouri case for its holding. It does not refer to the Pepperdine and England cases. The reasoning in that case contained in the quotation therefrom that the instruction is a correct statement of the law because the jury might find that certain elements of res ipsa loquitur were not present is of no help because they are told that this is not a case of res ipsa loquitur—there is no inference of negligence from the happening of the accident; they were told flatly in one breath that there was no such inference and in the next by the res ipsa loquitur instruction that there might be if certain other conditions were present such as exclusive control and defendant must be better able to explain the accident. The latter factor is not a necessary prerequisite to res ipsa loquitur. Burr v. Sherwin Williams Co., supra, 42 Cal.2d 682, 268 P.2d 1041; Seneris v. Haas, 45 Cal.2d 811, 291 P.2d 915, and the argument in the majority opinion that this case is different because two cars driven independently were involved, is not pertinent. See Godfrey v. Brown, supra, 220 Cal. 57, 29 P.2d 165, 93 A.L.R. 1092. This case is more like those in which "because of the nature of the particular accident, an inference of negligence * * * may be [is] so strong that no reasonable man could fail to accept it * *." Burr v. Sherwin Williams Co., supra, 42 Cal.2d 682, 689, 268 P.2d 1041, 1045. In Silva v. Pacific Greyhound Lines, 119 Cal. App.2d 284, 259 P.2d 743, 745, two vehicles were involved and the instruction in question was held not prejudicial because it was closely "tied into the instruction which relates to the negligence of the operator of another vehicle." Here we have no such tying in with the car with which defendant said he collided; the driver of the other car was not a party and the instruction says there is no inference of negligence as to a *party* to *this* accident. The instruction in Bazzoli v. Nance's Sanitarium, Inc., 109 Cal.App.2d 232, 240 P.2d 672, was not the same as the one here given. In Seedborg v. Lakewood Gardens, etc., Ass'n, 105 Cal.App.2d 449, 233 P.2d 943, the jury were in effect told that the instruction given in the instant case did not prevent the inference said to arise under the res ipsa loquitur doctrine.

The reasoning of the majority that, as when the instant instruction and those on res ipsa loquitur are both given, there is no prejudicial error, there can be none where only the instant one is given, is not tenable. That does not follow for where both are given the jury is at least told there is an inference although they are also advised to the contrary. But where they are told, as here, that there is *no* inference, there is nothing left for the jury to do except find no liability. Any jury would naturally infer that the driver of the car which crashed into a man's home was negligent but when they are specifically told, as they were here, that they could not so infer, there was nothing left for them to do except find for defendant. Unquestionably the instruction was erroneous and highly prejudicial. The jury was instructed that there could be no recovery unless it was proved that defendant was negligent and that there was no inference of negli-

gence. Plaintiffs were given no opportunity to recover inasmuch as the nature of the accident was such that they could not prove negligent conduct on the part of defendant except by inference.

The majority holds that plaintiffs cannot rely on the theory of trespass because it was not urged in the trial court. Even assuming that defendant lost control of his car because of its collision with the other car, and, as a result it ran into plaintiffs' home, yet he would be liable for trespass if his negligence contributed to his loss of control (Rest. Torts, §§ 165, 166, 164, 158), and as we have seen, defendant was negligent as a matter of law. Plaintiffs' complaint and proof contained all of the elements of an action for negligent trespass; that theory was therefore presented in the case although no instructions were offered thereon. The jury was instructed that plaintiffs could not recover unless defendant was negligent. Those instructions were not framed on the theory of trespass and were for that reason erroneous. The mere fact that the theory of trespass as such was not mentioned can make no difference.

I would reverse the judgment.



48 Cal.2d 208

FARMLAND IRRIGATION CO., Inc., Plaintiff and Respondent,

v.

George DOPPLMAIER, Defendant and Appellant.

Sac. 6581.

Supreme Court of California, In Bank.

March 22, 1957.

Action for a declaratory judgment asking that plaintiff be adjudged a successor of the patent licensee and for a declaration of duties in respect to royalty provisions of a license agreement. From a judgment for plaintiff in the Superior Court, Sacramento County, James H. Oakley, J., the defendant appeals. The Supreme Court, Traynor, J., held that the trial court did not abuse its discretion in denying a motion for stay of proceedings because of an Oregon action; that state court had jurisdiction; that the license agreement was assignable; and that the royalties under the agreement were payable as indicated in the opinion.

Judgment affirmed.

Vacating opinion 299 P.2d 1033.

1. Action ⇐69(4)

When an action is brought in courts of California involving the same parties and same subject matter as an action already pending in a court of another jurisdiction, a stay of the California proceedings is not a matter of right, but within the sound discretion of the trial court.

2. Action ⇐69(2)

In exercising its discretion to stay California proceedings because of a pending action in courts of another jurisdiction, courts should consider importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with courts of other jurisdictions, and whether rights of parties can best be determined by court of the other jurisdiction because of nature of the subject matter, availability of witnesses or stage to which the proceedings in the other court have already advanced.

3. Judgment ⇐829(3)

In deciding whether representation of plaintiff in an Oregon federal court action was an adequate substitution for present determination of its rights in a California court, the trial court was not bound by Federal Court's determination that the representation in Oregon was adequate to prevent intervention.

4. Action ⇐69(5)

In action for declaration of rights and duties under royalty provisions of a patent license agreement, motion by defendant for

stay of proceedings pending final judgment in an Oregon Federal Court action was properly denied, where the parties were not identical, plaintiff had not brought the present action to harass defendant with multiple litigations and all the issues involved in the present action were not involved in the Oregon action.

5. Patents ⇐220

Every action involving, no matter how incidentally, a United States patent is not for that reason governed exclusively by federal law, in view of the police power of the states to include reasonable regulations for manufacture and sale of patented articles dangerous to public safety, and the regulation of the transfer of patent rights to prevent fraud.

6. Patents ⇐220

A patent is not granted without reference to the general powers the states possess over their domestic affairs.

7. Courts ⇐489(3)

An action to set aside, specifically enforce or recover royalties on a patent license contract is not an action "arising under the patent laws of the United States" for the purpose of determining exclusive jurisdiction of federal courts, and state courts have jurisdiction over such actions, and in the absence of diversity of citizenship, it is exclusive of federal courts. 35 U.S.C.A. § 261.

See publication Words and Phrases, for other judicial constructions and definitions of "Arising Under the Patent Laws of the United States".

8. Courts ⇐489(3)

A suit for a declaratory judgment of the right to manufacture and sell irrigation equipment under a patent license agreement and declaration of duties under royalty provisions thereof was not "action arising under the patent laws of the United States" within the exclusive jurisdiction of federal courts, since plaintiff's cause of action was governed by the general common law of the contracts. 35 U.S.C.A. § 261.

See publication Words and Phrases, for other judicial constructions and definitions of "Action Arising Under the Patent Laws of the United States".

9. Patents ⇐213

In action for a declaratory judgment respecting rights to manufacture and sell patented equipment under a license agreement, and right to royalties, fact that state law governed the basic element of the cause of action for royalties did not establish that the assignability of the license was governed by state law, since if the policy of the patent laws or some other federal statute required it, state law must give way.

10. Patents ⇐206

In suit for a declaratory judgment respecting right to manufacture and sell irrigation equipment under a patent license agreement and declaration of rights and duties under royalty provisions thereof, absence of any specific statutory provision governing the issue of right to recover royalties did not establish that federal law did not control, since if the policy of the federal statute or the federal system require a uniform rule of decision, the federal courts have paramount power to fashion such rule.

11. Patents ⇐206

Patent licenses have no statutory basis and rights under them arise from contract, rather than from the fact that patent rights are involved.

12. Patents ⇐1

Purpose in granting a patent monopoly is to promote progress in science and the useful arts by stimulating invention and encouraging disclosure.

13. Patents ⇐213

In action for declaratory judgment respecting right to manufacture and sell irrigation equipment under a patent license agreement and respecting royalties, state court was free to make its own determination whether the assignability of the license contract required express consent in the contract, in absence of con-

gressional intent to oust state law on the subject. 35 U.S.C.A. § 261.

14. Courts ⇐97(5)

Although question respecting assignability of patent license contract was one for determination by state law, federal cases were persuasive authority.

15. Assignments ⇐19

Where duties imposed upon one party may be of such a personal nature that their performance by someone else would in effect deprive the other of that for which he bargained, the duties cannot be delegated.

16. Assignments ⇐18

Rights under a contract cannot be assigned if assignment would materially impair the nonassigning party's chance of obtaining the performance he expected. West's Ann.Civ.Code, §§ 954, 1044, 1458.

17. Patents ⇐213

Where patent owner granted corporation right to make, sell and lease and right to license sublessees of the patented device, failure of inventor to provide in contract that control of corporation by particular person was essential to assure an advantageous return of royalties on the device and to provide against the possibility of that person's selling his interest with a strong indication that the inventor did not consider personal control by the corporation essential, as respects assignability of the agreement without the inventor's consent.

18. Patents ⇐213

Where inventor granted to corporation the right to make, sell, lease and right to license sublicensees of a patented invention, but there was no express provision in the contract against assignment, nor anything to show that the rights under the contract were intended to be nonassignable and the inventor did not testify, circumstances did not indicate that the contract was not to be assigned.

19. Patents ⇐213

Provision in contract for corporation to make, sell and lease patented invention that if corporation made any improvements on the invention, the inventor was entitled to use them during the life of the contract did not indicate that the contract was not to be nonassignable on the ground that the corporation's interest in making improvements was destroyed by assigning its rights, where the corporation did not under the contract obligate itself to make improvements.

20. Patents ⇐218(1)

Where agreement licensing corporation to manufacture and sell patented irrigation equipment provided that licensee would pay inventor 3 per cent of all sums received from licensed sales which were defined, agreement did not impose a royalty on the sale of all parts of a sprinkling system if the sale of any one part would infringe the patent.

21. Patents ⇐26(1)

Improvement in one element of a combination, although in a sense it makes the combination a new thing, does not produce a patentable combination.

22. Patents ⇐26(2)

For a combination to be patentable it must perform a new and different function, and it is not enough that the improvement merely increases the efficiency or convenience of the old combination.

23. Patents ⇐218(1)

Where license agreement for sale of patented irrigation agreement provided that a licensee would pay the inventor 3 per cent of all sums received from licensed sales and inventor's only invention consisted of an improved coupling, and it was included only in the wheel and coupling units sold by plaintiff, all other parts on the published price list could be sold without infringing the inventor's patent, and the assignee of the licensee was bound to pay royalties only on the sums received from sales of wheel and coupling units.

24. Declaratory Judgment ⇐344

In action for declaratory judgment construing a patent license agreement for manufacture and sale of irrigation equip-

ment and rights to royalties thereunder, permitting witness to testify that before entering into the contract, he had asked counsel to determine if mounting pipes on wheels was patentable and that counsel had reported the existence of a prior patent was proper to show that at time of execution of the contract, the licensee knew that mounting pipes on wheels were not new, and to show his understanding of the nature of the invention, and the meaning of the royalty provisions of the contract.

25. Appeal and Error ⇐206(1)

Where defendant did not request that probative force of evidence be confined to a single issue, he could not complain on appeal that other inferences could possibly be drawn from it.

26. Declaratory Judgment ⇐344

In action for declaratory judgment of right to manufacture and sell irrigation equipment under a patent license agreement and rights to royalty thereunder, permitting witness to testify that certain features of the inventor's apparatus had been used by the licensee for some years and other apparatus was not error as in aid of the court's determination of the issue where the witness did not give an opinion on what part of the inventor's apparatus was new art which was the ultimate question of law.

Wilke, Fleury & Sapunor and Sherman C. Wilke, Sacramento, for appellant.

Theodore H. Lassagne and Naylor & Lassagne, Glendale, for respondent.

TRAYNOR, Justice.

Plaintiff in this action seeks a declaratory judgment that it is entitled to manufacture and sell irrigation equipment under a patent license agreement and a declaration of its duties under the royalty provisions of the license agreement.

Darrell C. Mansur invented certain improvements in agricultural sprinkling apparatus. He applied for a patent on his invention, and in the autumn of 1949, while his application was still pending, entered into negotiations with the Stout Irrigation Company, an Oregon corporation (hereinafter referred to as Stout), for the purpose of licensing Stout to manufacture and sell apparatus embodying the invention. Stout was represented in these negotiations by William H. Stout, its president and controlling shareholder, a man of considerable experience in the irrigation equipment business. Mansur, William H. Stout, and defendant Dopplmaier were all present at a demonstration of apparatus embodying the invention held near Fresno in September.

On December 5, 1949, Mansur and Stout entered into the license agreement that is the subject of this action. By this agreement Stout was given the right to make or have made and to sell apparatus embodying Mansur's invention, in return for which it promised to pay Mansur a royalty of three per cent of sums received from licensed sales. Stout was permitted to grant sublicenses on condition that it assume responsibility for the payment of all royalties due on sales by its sublicensees. Mansur retained the right to make and sell apparatus embodying the invention himself and to license others to do so, except that he agreed not to sell to manufacturers or distributors who were in business on December 5, 1949. Improvements in the invention made by either Stout or Mansur could be used by the other during the life of the agreement.

Stout manufactured and sold irrigation apparatus under the license until January 31, 1952. On that date the corporation was dissolved and its assets passed to its shareholders. On February 2, 1952, the shareholders sold the assets, including choses in action, to plaintiff, a California corporation, which proceeded to manufacture and sell under the license. Meanwhile Mansur had obtained his patent and assigned it to defendant together with his rights under the license. First Stout, and later plaintiff, tendered royalties under the license to Mansur and defendant, Mansur's assignee. The first royalty payment was accepted

without protest, but defendant rejected later payments on the ground that they were computed on the basis of sums received only from sales of wheel and coupling units, whereas the license called for a royalty based on sums received from sales of the entire irrigation apparatus or any of its parts.

In June, 1951, defendant commenced an action against Stout in the United States district court for the district of Oregon for an accounting of royalties allegedly due under the license. Plaintiff sought to intervene on the ground that it had bound itself to pay any liability adjudged against Stout, and that its interests were inadequately represented. It also counterclaimed for a declaration of its rights under the license as Stout's successor or assignee. The district court denied the motion to intervene, and its order was later affirmed by the court of appeals on the ground that there was no showing that plaintiff was inadequately represented on the accounting issue, and that the issue made by the counter-claim was not involved in the action. Farmland Irrigation Co. v. Dopplmaier, 9 Cir., 220 F.2d 247.

Plaintiff then commenced the present action. A motion by defendant for a stay of proceedings pending final judgment in the Oregon action was denied. After trial on the merits, the court adjudged that the rights granted Stout under the license were assignable and had been assigned, through the shareholders, to plaintiff, and that under the license plaintiff was bound to pay royalties only on sums received from sales of wheel and coupling units and not on sums received from sales of any other parts of the apparatus. From this judgment defendant appeals.

[1, 2] We are confronted at the threshold with defendant's contention that the trial court abused its discretion in denying his motion for a stay of proceedings. When an action is brought in a court of this state involving the same parties and the same subject matter as an action already pending in a court of another jurisdiction, a stay of the California proceedings is not a matter of right, but within the sound discretion of the trial court. In exercising its discretion the court should consider the importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with the courts of other jurisdictions. It should also consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced. See Simmons v. Superior Court, 96 Cal.App.2d 119, 123–131, 214 P.2d 844, 19 A.L.R.2d 288; Pesquera Del Pacifico, S. De R. L., v. Superior Court, 89 Cal.App.2d 738, 740–741, 201 P.2d 553.

[3, 4] The parties to the present action are not identical with those in the Oregon action. Plaintiff is not a party to the Oregon action; it attempted to intervene as a party defendant, but was successfully prevented from doing so by defendant. Plaintiff brought the present action, not to harass defendant with multiple litigation, but to assert interests it claimed would not be adequately represented in the Oregon action. Defendant contends that nevertheless plaintiff should be compelled to await and be bound by the outcome of the Oregon action. In deciding whether the representation of plaintiff in the Oregon action was an adequate substitute for a present determination of its rights in a California court, the trial court was not bound by the federal court's determination that the representation was adequate to prevent intervention.

Moreover, all the issues in the present action are not involved in the Oregon action. Cf. Pesquera Del Pacifico, S. De R. L., v. Superior Court, 89 Cal.App.2d 738, 741, 201 P.2d 553. Although the complaint in the Oregon action calls for an adjudication of the licensee's obligations under the royalty provisions, the issue raised by plaintiff's second cause of action in the present case, it does not call for an adjudication of the assignability of

the license and plaintiff's rights thereunder, the issues raised by plaintiff's first cause of action. Plaintiff sought to present these issues to the federal court in its counter-claim, but because the motion to intervene was denied, they will not be adjudicated in that court. A stay of the present proceedings would therefore not only bring these issues no closer to determination, but would compel plaintiff to await a judgment that cannot respond to its needs. The trial court did not abuse its discretion in denying a stay that would have such an effect.

Defendant contends that the trial court erred in finding that Stout's rights under the license were assignable and had been assigned to plaintiff. Rights under a patent license, defendant argues, are not assignable unless express consent to assignment is contained in the license contract, and in the absence of such consent the contract must be construed as conferring purely personal, nontransferable rights. This rule of construction appears to be set forth in a line of federal cases of which the principal case is Hapgood v. Hewitt, 119 U.S. 226, 7 S.Ct. 193, 30 L.Ed. 369.

It is contended that because a United States patent is the creature of a federal statute and can be assigned only in the manner provided by federal law, the assignability of rights under a patent license is also a federal question and in the absence of statutory provision is to be determined by the decisional law of the federal courts. This reasoning fails to distinguish patent rights, whose assignability is admittedly governed by a specific statutory provision, 35 U.S.C. § 261, and rights created by a contract whose subject is exemption from a patent monopoly. It misconceives the policy of the federal patent statute and the relation between federal and state law in the area of patent rights.

[5, 6] Every action that involves, no matter how incidentally, a United States patent is not for that reason governed exclusively by federal law. The police power of the states, for example, has long been held to include reasonable regulation of the manufacture and sale of patented articles dangerous to public safety, Patterson v. State of Kentucky, 97 U.S. 501, 503–509, 24 L.Ed. 1115, and regulation of the transfer of patent rights to prevent fraud. Allen v. Riley, 203 U.S. 347, 355–357, 27 S.Ct. 95, 51 L.Ed. 216. A patent is not granted without reference to the general powers the states possess over their domestic affairs.

[7] It has been established by a long line of cases, moreover, that an action to set aside, specifically enforce, or recover royalties on a patent license contract is not an action arising under the patent laws of the United States for the purpose of determining the exclusive jurisdiction of the federal courts. Wilson v. Sandford, 10 How. 99, 51 U.S. 99, 101, 13 L.Ed. 344; Albright v. Teas, 106 U.S. 613, 616–620, 1 S.Ct. 550, 27 L.Ed. 295; Dale Tile Mfg. Co. v. Hyatt, 125 U.S. 46, 51–54, 8 S.Ct. 756, 31 L.Ed. 683; Pratt v. Paris Gaslight & Coke Co., 168 U.S. 255, 257–260, 18 S.Ct. 62, 42 L.Ed. 458; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U.S. 282, 285–287, 22 S.Ct. 681, 46 L.Ed. 910; New Marshall Engine Co. v. Marshall Engine Co., 223 U.S. 473, 32 S.Ct. 238, 56 L.Ed. 513; Luckett v. Delpark, Inc., 270 U.S. 496, 502–511, 46 S.Ct. 397, 70 L.Ed. 703; Becher v. Contoure Laboratories, Inc., 279 U.S. 388, 391, 49 S.Ct. 356, 73 L.Ed. 752; Pendleton v. Ferguson, 15 Cal.2d 319, 326–327, 101 P.2d 81, 688. State courts have jurisdiction over such actions, and in the absence of diversity of citizenship it is exclusive of the federal courts. See Henry v. A. B. Dick Co., 224 U.S. 1, 14–15, 32 S.Ct. 364, 56 L.Ed. 645; Dale Tile Mfg. Co. v. Hyatt, 125 U.S. 46, 53, 8 S.Ct. 756, 31 L.Ed. 683.

These authorities were concerned with whether a case was one "arising under the patent laws" within the meaning of the federal jurisdictional statutes and the federal policy apportioning business between state and federal courts. Nevertheless, since the jurisdictional test they established was tied to the law that created the cause of action stated in the complaint and made the source

of that law its operative fact, see American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 259–260, 36 S.Ct. 585, 60 L.Ed. 987; Albright v. Teas, 106 U.S. 613, 616–618, 1 S.Ct. 550, 27 L.Ed. 295, in holding that federal jurisdiction did not exist, they necessarily held that the patent statutes did not govern the elements of the plaintiff's case.

Nor were the elements of the plaintiff's case governed by federal decisional law evolved to implement the patent statutes, for a case founded on such law would have arisen under the patent laws for jurisdictional purposes as much as an action for infringement. As stated in Wilson v. Sandford, 10 How. 99, 51 U.S. 99, 101–102, 13 L.Ed. 344, "the dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles." The absence of any elements of distinctively federal law, statutory or decisional, in the plaintiff's case was emphasized by cases holding that, absent a question of the validity or scope of the patent itself, there was no jurisdiction in the United States Supreme Court to review state court decisions on patent licenses. Marsh v. Nichols, Shepard & Co., 140 U.S. 344, 354–357, 11 S.Ct. 798, 35 L.Ed. 413; Dale Tile Mfg. Co. v. Hyatt, 125 U.S. 46, 53, 8 S.Ct. 756, 31 L.Ed. 683.

[8] The plaintiff's cause of action arose under and was governed by the general common law of contracts. If the action was in a federal court, the court applied its view of the common law independent of state court determinations. The question was not posed whether the governing law was specifically state law and whether the law of a particular state should be applied. In this judicial climate, the decisions were rendered that defendant relies on as establishing a federal rule in respect to assignments of licenses. In the light of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, the law governing the elements of the plaintiff's cause of action is state law—state law acting of its own force and not merely by incorporation into federal law. The language of Mr. Justice Holmes in American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987, a case involving an action for libel and slander of the plaintiff's title to a machine the defendant claimed infringed his patent, is appropriate: "But whether it is a wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state. A suit arises under the law that creates the cause of action. * * * The state is master of the whole matter, and if it saw fit to do away with actions of this type altogether, no one, we imagine, would suppose that they still could be maintained under the patent laws of the United States." See also Sunnen v. Commissioner of Internal Revenue, 8 Cir., 161 F.2d 171, 175, reversed on other grounds, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898; American Machine & Metals, Inc., v. De Bothezat Impeller Co., D.C.S.D.N.Y., 82 F.Supp. 556, 558, affirmed, 2 Cir., 180 F.2d 342, 348, certiorari denied 339 U.S. 979, 70 S.Ct. 1025, 94 L.Ed. 1383.

[9, 10] This conclusion does not, however, completely dispose of the problem. Even if state law governs the basic elements of the plaintiff's case in an action to recover royalties on a license, it does not follow that every issue in the case, including the assignability of the license, is governed by state law. See Pratt v. Paris Gaslight & Coke Co., 168 U.S. 255, 259–260, 18 S.Ct. 62, 42 L.Ed. 458; Albright v. Teas, 106 U.S. 613, 616–618, 1 S.Ct. 550, 27 L.Ed. 295. If the policy of the patent laws or some other federal statute requires it, state law must of course give way. Cf. Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249, 254–257, 66 S.Ct. 101, 90 L.Ed. 47; Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 175, 63 S.Ct. 172, 87 L.Ed. 165. Moreover, the absence of any specific statutory provision governing the issue does

not in itself mean that federal law does not control, for if the policy of the federal statute or the implications of the federal system require a uniform rule of decision, the federal courts have paramount power to fashion such a rule. See D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 456–458, 62 S.Ct. 676, 86 L.Ed. 956, and see Mr. Justice Jackson concurring 315 U.S. at pages 469–475, 62 S.Ct. at pages 684, 687; Interaction of National and State-Created Interest in Non-Diversity Fields, 47 Colum.L.Rev. 629.

[11] On the other hand, the existence of a line of federal cases establishing a rule of construction on the assignability of licenses is no indication of a federal policy excluding state law. These cases came, for the most part, before Erie R. Co. v. Tompkins, and therefore involved no conscious choice between state and federal law. The federal cases since Erie R. Co. v. Tompkins do not state what law governs the issue, e. g., Rock-Ola Mfg. Corp. v. Filben Mfg. Co., 8 Cir., 168 F.2d 919, 922, certiorari denied 335 U.S. 892, 69 S.Ct. 249, 93 L.Ed. 430, and decisions from the state courts have been equally unenlightening on the applicable law. Schlesinger v. Regenstreif, Sup., 135 N.Y.S.2d 858, 862–863; Paper Products Machine Co. v. Safepack Mills, 239 Mass. 114, 131 N.E. 288. The fact that Congress has expressly provided for the assignment of patents themselves, 35 U.S.C. § 261, and thereby made some aspects of the validity of such assignments questions of federal law, see Crown Die & Tool Co. v. Nye Tool & Machine Works, 261 U.S. 24, 43 S.Ct. 254, 67 L.Ed. 516; McClaskey v. Harbison-Walker Refractories Co., 3 Cir., 138 F.2d 493, also does not show that any federal policy exists to control the assignment of rights under a license. Licenses have no statutory basis, and rights under them arise from contract rather than from the fact that patent rights are involved. (See Ellis, Patent Assignments and Licenses 229 (1936).)

[12] We can find no policy underlying the federal patent statutes that requires a uniform federal rule of construction of license contracts to determine their assignability. The purpose in granting a patent monopoly is to promote progress in science and the useful arts by stimulating invention and encouraging disclosure. So long as state law does not destroy the advantages of the monopoly, it respects the federal purpose, and there is no reason why it should not govern, as with any other property, the incidents attached to the ownership of the patent. As was said in Patterson v. State of Kentucky, 97 U.S. 501, 508–509, 24 L.Ed. 1115, "There is no need of giving this power [of monopoly] any broader construction in order to attain the end for which it was granted, which was to reward the beneficent efforts of genius, and to encourage the useful arts."

The value of the patent is not affected by subjecting the patentee to state rules of construction on assignability of licenses. Since it is clear that the patentee must in any event look to state law to determine most of his rights under the license, no great inconvenience will be involved in also ascertaining what the state law is on assignability. Also, the value of the patent is not significantly affected if the state applies a rule of construction favoring assignability. Such a rule would not hamper the patentee's right to profit from his monopoly by licensing under it.

[13] It may be that Congress could legislate on this subject and thereby oust state law see Allen v. Riley, 203 U.S. 347, 356, 27 S.Ct. 95, 51 L.Ed. 216, but in the absence of such action we will not postulate a policy we cannot find in the existing federal statutes. If any federal interest exists, it is to remote and speculative to justify displacing state law. See Bank of America Nat. Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 77 S.Ct. 119, 121, 1 L.Ed.2d 93. We conclude, therefore, that we are free to make our own determination whether the assignability of a license contract requires express consent in the contract.

[14] Although the question is one for determination by the law of this state, federal cases are of course persuasive au-

thority because of the experience of the federal courts in the area of patents and patent licenses. The authoritative federal statement that a patent license is not assignable unless made expressly so is contained in Hapgood v. Hewitt, 119 U.S. 226, 233–234, 7 S.Ct. 193, 30 L.Ed. 369. The court stated that the license was purely personal and was extinguished with the dissolution of the corporate licensee, although it pointed to no peculiarly personal rights involved. The court relied on the earlier cases of Troy Iron & Nail Factory v. Corning, 14 How. 193, 55 U.S. 193, 216, 14 L.Ed. 383, and Oliver v. Rumford Chemical Works, 109 U.S. 75, 82, 3 S.Ct. 61, 27 L.Ed. 862. The statement in the Troy case, however, was not necessary to the decision, and in Oliver v. Rumford Chemical Works there were provisions in the license calling for the exercise of the personal skill of the licensee that would have restricted transfer of rights under the license even under ordinary rules of construction. In Rubber Co. v. Goodyear, 9 Wall. 788, 76 U.S. 788, 799, 19 L.Ed. 566, another case before Hapgood v. Hewitt, the court found the licensee's rights personal and nonassignable only after examining the terms of the instrument and the testimony in the record to ascertain the true meaning and purpose of the contract. See also Putnam v. Hollender, C.C.S.D.N.Y., 6 F. 882, 890–892.

Many of the cases since Hapgood v. Hewitt can be explained on the ground that language in the instrument or the purposes of the contract clearly excluded assignability, e. g., Rock-Ola Mfg. Corp. v. Filben Mfg. Co., 8 Cir., 168 F.2d 919, 922, certiorari denied 335 U.S. 892, 69 S.Ct. 249, 93 L.Ed. 430; Reynolds Spring Co. v. L. A. Young Industries, Inc., 6 Cir., 101 F.2d 257, 260; Lanahan v. Clark Car Co., 3 Cir., 11 F.2d 820, 823; Niagara Fire Extinguisher Co. v. Hibbard, 7 Cir., 179 F. 844, 845, but nevertheless the rule of Hapgood v. Hewitt appears to have been consistently adhered to by the federal courts, although without any satisfactory explanation of the reasons underlying it. See Lane & Bodley Co. v. Locke, 150 U.S. 193, 195–196, 14 S.Ct. 78, 37 L.Ed. 1049; Kenyon v. Automatic Instr. Co., D.C.W.D.Mich., 63 F.Supp. 591, 593, reversed on other grounds, 6 Cir., 160 F.2d 878; Neon Signal Devices, Inc., v. Alpha-Claude Neon Corp., D.C.W.D.Pa., 54 F.2d 793, 796; Bowers v. Lake Superior Contracting & Dredging Co., 8 Cir., 149 F. 983, 986. The only exception is when the transferee succeeds to the entire business of the licensee, and assumes all its assets and liabilities. Lane & Bodley Co. v. Locke, 150 U.S. 193, 196, 14 S.Ct. 78, 37 L.Ed. 1049.

We are not persuaded that the United States Supreme Court would, in view of the modern tendency in favor of assignability, adhere today to the rule it laid down in Hapgood v. Hewitt. Furthermore, we do not find it necessary or wise to establish a fixed rule, peculiar to patent licenses, that such contracts are not assignable unless made expressly so. There is no reason to exempt these contracts from a general rule adapted to facilitate the freest possible transfer of valuable contract rights, while at the same time respecting the parties' intentions. The federal cases have relied on the flat statement that a license creates a merely personal right. This statement should follow as a conclusion from an examination of the purposes and provisions of the particular license, rather than stand as a self-evident first principle. Nothing in the nature of patent licenses makes the rights conferred by them necessarily so personal that the parties must have intended that they be nonassignable.

[15, 16] The statutes in this state clearly manifest a policy in favor of the free transferability of all types of property, including rights under contracts. Civ.Code, §§ 954, 1044, 1458. The terms and purpose of a contract may show, however, that it was intended to be nonassignable. Thus the duties imposed upon one party may be of such a personal nature that their performance by someone else would in effect deprive the other party of that for which he bargained. The duties in such a situation cannot be delegated. See La Rue v. Groe-

zinger, 84 Cal. 281, 283–285, 24 P. 42. Rights likewise cannot be assigned if the assignment would materially impair the nonassigning party's chance of obtaining the performance he expected. (See 2 Williston, Contracts 1177–1182 (rev. ed. 1936); 1 Restatement, Contracts § 151 (1932).)

Defendant contends that if these principles are applied to the license in the present case, the licensee's rights were not assignable. His argument is that Mansur bargained for William H. Stout's experience in manufacturing and selling irrigation equipment, and intended that rights under the license should be exercised only by a corporation controlled by him; that if these rights may be exercised by another, the value of defendant's right to receive royalties will be less than was bargained for.

[17, 18] There is no express provision in the contract against assignment. Furthermore, nothing in the contract or the surrounding circumstances shows that rights under it were intended to be nonassignable. As the trial court pointed out, since Mansur did not testify and since apart from the instrument there was no evidence of his intentions, it was the barest speculation to say that personal performance by William H. Stout was an important inducement for him. The provision in the contract permitting the corporation to sublicense shows that Mansur did not intend to restrict enjoyment of rights under the contract to an organization controlled personally by William H. Stout. It is true that at the time the contract was entered into William H. Stout owned a controlling interest in Stout. The contract was made, however, with a corporation, and a corporation by nature may change both in ownership and the agents through whom it acts. If William H. Stout had simply sold his stock in the corporation, defendant could surely not contend that the corporation's rights under the license would be extinguished. Since Mansur dealt with a corporation, if he thought that control of the corporation by a particular person was essential to assure an advantageous return of royalties, he would have provided against the possibility of that person's selling his interest. Mansur's failure to do so is a strong indication that he did not consider personal control by William H. Stout essential. See Haldor, Inc., v. Beebe, 72 Cal.App.2d 357, 365, 164 P.2d 568.

[19] Defendant points to the provision in the contract that if Stout makes any improvements on the invention, Mansur may use them during the life of the contract, and argues that Stout's interest in making such improvements is destroyed by assigning its rights. Stout did not, however, obligate itself to make improvements, see Fenn v. Pickwick Corp., 117 Cal.App. 236, 240, 4 P.2d 215, and, furthermore, if this provision invalidates Stout's assignment to plaintiff, the similar provision that Stout may use Mansur's improvements invalidates Mansur's assignment to defendant. Finally, Mansur was not assured of any definite royalty from Stout, for Stout did not bind itself to produce and sell a certain number of sprinkler systems, and plaintiff as assignee is not bound to sell a certain number. If defendant finds the royalty returns under the license unsatisfactory, under the contract he is free, within limits, to license other producers. The assignment did not impair materially defendant's chance of obtaining the performance for which Mansur bargained, and therefore it was effective to transfer Stout's rights to plaintiff.

[20] Defendant next contends that the trial court erred in its determination of the method of computing royalties under the license. The license provided that Stout would pay Mansur three per cent of all "sums received from licensed sales." "Sums received from licensed sales" was defined as—

> sums received by Stout or any sublicensee of Stout hereunder, from sales or leases of apparatus and parts thereof, the manufacture or sale or lease of which apparatus would infringe any patent right of Mansur in a subject invention if this agreement were not in force. * * *

"Subject inventions" was defined as—

> inventions relating to the adaptation of irrigation pipe lines for movement upon wheels secured to irrigation pipe couplings and provided with a driving means, which inventions are disclosed and claimed in a patent or a pending application now or hereafter filed by or in behalf of Mansur and based upon a sole or joint invention of Mansur, or as to which patent or pending application Mansur has or may acquire any right to grant a license during the existence of this agreement.

Defendant's contention is that these provisions require the payment of a royalty of three per cent of all sums received from the sale of sprinkling systems embodying Mansur's invention, or any part of such systems, even if the invention consists only in the improvement of one part of the apparatus and not in the whole combination. Stout's published price list of the parts it sold includes wheel and coupling units, aluminum pipes, sprinklers, driving devices for rolling the apparatus, hoses, and many other parts that make up an entire sprinkling system. Defendant contends that a royalty is due on sums received from sales of any of these parts for use in a system embodying Mansur's invention, and not, as the trial court held, only on sums received from sales of wheel and coupling units.

The contract is not a model of clarity, but we think it is evident that what Stout was interested in and willing to pay for was the right to use Mansur's invention, that is, the right to use what was new and constituted progress over apparatus already known to the trade. The first paragraphs in the agreement state that Stout desires to manufacture apparatus embodying certain improvements, that these improvements were embodied in apparatus demonstrated to the parties, and that Mansur is the inventor of these improvements. It seems highly improbable that Stout would agree to pay royalties on parts long known, and which it had until the time of the license sold royalty free. The provision defining sums received from licensed sales provides in effect that a royalty is due on sums received from sales that would, in the absence of the license, infringe Mansur's patent. The computation of royalties is tied directly to the test of infringement, and to the determination of what was in fact Mansur's invention.

Defendant places great emphasis on the phrase: "sums received * * * from sales * * * of apparatus *and parts thereof*. * * *" This phrase does not remove the necessity of determining whether the sale of specific apparatus would in fact infringe the patent; if it would infringe it, then a royalty is due on the sale of that piece of apparatus, or any part of it. It is not a reasonable interpretation of this phrase that it imposes a royalty on the sale of all parts of a sprinkling system if the sale of any one part would infringe the patent.

It becomes necessary, therefore, in order to determine what sales would "infringe any patent right of Mansur in a subject invention," to know what Mansur invented, and the extent to which he advanced over prior art.

Mansur's claims describe an apparatus in which sections of pipe are arranged end to end, each section of pipe joined to the next one by a coupling. The coupling is secured to the end of one section of pipe, and the end of the abutting section of pipe is then inserted into the coupling through an opening considerably larger than the diameter of the pipe so inserted, and also through a flexible, water-tight seal inside the coupling. Because of the size of the opening and the flexibility of the water-tight seal, the sections of pipe so coupled can assume angles relative to each other. Furthermore, a collar mounted on the inserted pipe section carries two projecting arms that fit between ribs on the outside of the coupling. These arms do not interfere with the pipe sections' assuming angles relative to each other, but assure that rotational force applied to one pipe section

will be transmitted through the coupling to a connected pipe section, and then to the whole series of connected pipe sections. A wheel is mounted on each coupling; since the wheel is rigidly mounted and uses the sleeve of the coupling and the pipe as its hub, rotation of the pipe causes rotation of the wheel. Thus an entire line of pipes can be rolled from place to place with little effort, and without regard to unevenness in the terrain. Water is pumped into one end of the line of pipes and discharged through sprinklers set in the tops of the pipe sections onto the crops to be irrigated.

As early as 1868, Abbott (British Patent No. 3,416) invented a sprinkling apparatus composed of a series of connected perforated tubes mounted on wheels. The wheels, however, were not rigidly mounted on the tubes, but instead used them as axles, so that the tubes did not themselves rotate, and there was no need to transmit rotational force from one tube to the next. Meyer went a step further. (British Patent No. 157,727 (1921).) He patented an apparatus in which wheels were mounted rigidly pipes caused rotation of the wheels, and, because the sections of pipe were rigidly coupled, rotational force applied to any one section of pipe was transmitted to all. It does not appear, however, that the coupling between the pipe sections permitted them to assume angles relative to each other. Iverson's apparatus (United States Patent No. 1,373,660 (1921)) was similar to Meyer's, and like it made no provision for a coupling that would permit pipe sections to assume angles relative to each other. Lanninger's apparatus (German Patent No. 425,774 (1924)) did include a coupling that permitted the pipe sections to assume angles relative to each other, so that a line of pipe sections could roll easily over uneven terrain, but because the pipes did not rotate with the wheels, no provision was made for transmitting rotational force through the couplings.

An examination of these earlier patents shows that for some time before Mansur's invention, irrigation pipes had been equipped with sprinklers, coupled together, and mounted on wheels. Moreover, couplings had been devised that permitted the pipe sections to assume angles relative to each other, and other couplings had been devised that transmitted rotational force from one pipe section to all others. It remained for Mansur to invent a coupling that performed both these functions, and in this innovation, rather than in any combination of coupled pipes mounted on wheels, he advanced over prior art. Agren (United States Patent No. 2,148,975 (1939)) had also devised a coupling that transmitted rotational force and yet permitted connected shafts to move out of straight alignment, but the coupling was not adapted for irrigation purposes and was significantly different in design from Mansur's.

[21–23] Improvement in one element of a combination, although in a sense it makes the combination a new thing, does not produce a patentable combination. For the combination to be a patentable invention, it must perform a new and different function, and it is not enough that the improvement merely increases the efficiency or convenience of the old combination. General Motors Corp. v. Estate Stove Co., 6 Cir., 203 F.2d 912, 917, certiorari denied 346 U.S. 822, 74 S.Ct. 37, 98 L.Ed. 348. Since Mansur's only invention consisted in an improved coupling, and since this coupling is included only in the wheel and coupling units sold by plaintiff, all other parts on the published price list can be sold without infringing Mansur's patent. The trial court was correct in concluding that plaintiff was bound to pay royalties only on sums received from sales of wheel and coupling units.

Defendant's final contention is that the court committed errors in admitting certain evidence. We need not consider the assignments of error concerning the admission of evidence to show that plaintiff is the successor in business of Stout.

Since we have concluded that plaintiff took its rights under the license by assignment, it is unnecessary to decide whether it also took as a successor to Stout.

[24, 25] Defendant contends that is was error to permit William H. Stout to testify that before entering into the contract he had asked counsel to make a search to determine if mounting pipes on wheels was patentable and that counsel had reported the existence of the Iverson patent. Defendant claims that this testimony was immaterial, hearsay, and opinion evidence. The evidence was relevant and competent to show that at the time of the execution of the contract William H. Stout probably knew that mounting pipes on wheels was not new and thereby to show his understanding of the nature of Mansur's invention and the meaning of the royalty provisions. Defendant did not request that the probative force of the evidence be confined to this issue and cannot now complain that other inferences could possibly be drawn from it.

[26] William H. Stout was also allowed, over defendant's objection, to testify that certain features of Mansur's apparatus had been used by Stout for some years in other apparatus. There was no error here. Stout was admittedly familiar with irrigation equipment, in particular with his own firm's equipment, and he was in a position to testify as to what features of Mansur's apparatus had been used before Mansur applied for a patent. He did not give an opinion on what part of Mansur's apparatus was new art, the ultimate question of law, and his testimony was proper in aid of the court's determination of this issue. See Smith v. Thompson, D.C.S.D.Cal., 43 F. Supp. 848, 849.

Judgment affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

* Opinion vacated 316 P.2d 952.

T. A. MINARDI, Plaintiff, Respondent and Appellant,

v.

E. A. COLLOPY and Stella Collopy, Defendants,

A. L. CASTLE, Inc., a corporation, Third-Party Claimant, Appellant and Respondent,

John L. STEVENSON, Third-Party Claimant and Respondent.*

Civ. 17086.

District Court of Appeal, First District, Division 2, California.

March 29, 1957.

Rehearing Denied April 26, 1957.

Hearing Granted May 24, 1957.

Action on note and for accounting. Funds due defendant were levied on. Two third-party claims to such funds were filed. Written order dismissing third-party claims on merits was amended to conform to minute order dismissing claims without determining the merits, and plaintiff appealed. From an order of the Superior Court, County of Santa Clara, Leonard R. Avilla, J., denying one of the third-party claimants a hearing on the merits of the title contest, such third-party claimant appealed. The District Court of Appeal held that even though one third-party claimant made a settlement with plaintiff and dismissed his petition for hearing to determine title, the second claimant who did not consent to such dismissal could obtain a determination of title.

Amending order affirmed; dismissing order reversed and cause remanded with directions.

1. Execution ⇐195

Where trial judge did not intend to make a decision different from the minute order when he signed the written order, the signing of the different written order was an inadvertence, and consequently written order dismissing on the merits the third-party claims to funds levied on, was properly amended to conform to minute order dismissing third-party claims without deter-

mining their validity. Wests' Ann.Code Civ.Proc., § 689.

2. Judgment ⇐306
Motions ⇐58

Trial judge has inherent power to correct his mistake in inadvertently signing order or decision different from that which he intended.

3. Judgment ⇐304

The correction of errors of judicial judgment in decision rendered are not within trial judge's power.

4. Judgment ⇐306

Trial judge must determine whether decision so misstated his real intention as to be subject to correction.

5. Appeal and Error ⇐1024(4)

Trial judge's conclusion that decision so misstated his real intention as to be subject to correction is binding on appeal.

6. Motions ⇐58

A correction to make an order conform to decision actually made, may be made by court on its own motion without notice regardless of lapse of time.

7. Execution ⇐192

Where third party claiming personal property levied on, dismissed his petition for hearing to determine title, the dismissal statute was not literally applicable on the question whether such dismissal terminated the proceeding as to the plaintiff or another third party, in that the statute regulates right of plaintiff to dismiss an action and refers to affirmative relief sought by cross-complaint or answer of defendant. West's Ann.Code Civ.Proc., §§ 581, subd. 1, 689.

8. Execution ⇐192

Under statute, third person claiming personal property levied on, has no right independently to dismiss his petition for determination of title without consent of another third person claiming the property. West's Ann.Code Civ.Proc., § 689.

9. Execution ⇐192

Where funds due defendant were levied on and two third-party claims to such funds were filed and one claimant made a settlement with plaintiff and dismissed his petition for determination of title without consent of second claimant, the second claimant could nevertheless obtain a determination of title. West's Ann.Code Civ.Proc., § 689.

10. Execution ⇐195

Where trial judge entered order striking third-party claimant's petition to determine title to property levied on, on the erroneous assumption that another judge's written order, as stated therein, dismissed, on the merits, the third-party claims, whereas no such decision was intended by the other judge, who thereafter corrected the order to show that validity of claims was not determined, trial court had inherent power to vacate the first mentioned order.

11. Judgment ⇐363

A court has inherent power to vacate a judgment entered because of court's mistake or misapprehension as to state of record or as to existence of extrinsic fact upon which the court's action is based.

12. Judgment ⇐386(6)

The court's inherent power to vacate judgment entered because of court's mistake or misapprehension as to state of record or as to existence of extrinsic facts upon which the court's action is based was independent from the time for any regular remedy and could be exercised almost three years after the judgment was rendered.

13. Appeal and Error ⇐1177(6)

Where there is no determination on the merits due to erroneous assumption that trial court, because of attempted dismissal, has lost jurisdiction, the appellate court will reverse the decision for the purpose of decision on the merits by the trial court, unless it appears as a matter of law that appellant cannot be entitled to relief.

14. Appeal and Error ⇐460(1)

An appeal from correcting order which is self executing in that it does not require any process of the court to carry it into effect does not stay the effectiveness of such an order.

15. Equity ⇐84

Laches is a question of fact, to be decided primarily by the trial court considering all the facts and surrounding circumstances of the particular case.

16. Motions ⇐59(2)

The power to set aside order for mistake rests particularly in the court in which the mistake was made.

Hession, Robb & Creedon, San Mateo, Ross E. Hamlin, Jr., David W. Brown, San Mateo, of counsel, for appellant A. L. Castle, Inc.

Rankin, Oneal, Luckhardt, Center & Hall, J. E. Longinotti, San Jose, for appellant and respondent T. A. Minardi.

LeRoy A. Broun, Centerville, for respondent John L. Stevenson.

PER CURIAM.

These are cross-appeals from two orders relating to certain third party claims filed respectively by John L. Stevenson, hereinafter called Stevenson, and A. L. Castle, Inc., a corporation, hereinafter called Castle, after plaintiff had caused the Sheriff of Santa Clara County to levy an attachment or garnishment of all funds belonging or due to defendant from Frostcraft Packing Company, hereinafter called Frostcraft, the purchaser of a bean crop grown by defendants. The appellants are plaintiff and Castle. Stevenson, having reached a settlement with plaintiff, is not a party to the appeal. The procedural facts are complicated but substantially undisputed.

The main action was in two counts, one on a promissory note in the amount of $11,870.43, the other for an accounting of one-half of the proceeds of the sale of the bean crop grown by defendants and sold to Frostcraft, which one-half had allegedly been assigned by defendants to plaintiff by a written contract of October 29, 1953. The attachment was levied on August 3, 1954. On August 25th Stevenson filed with the Sheriff his third party claim to the cash credits attached in the sum of $4,377.84 based on an alleged crop mortgage and an assignment of the proceeds of the sale of the bean crop by defendants to Stevenson, notice of which was given to Frostcraft. On or about September 23, 1954 Castle filed with the Sheriff his third party claim to all sums which would come into the Sheriff's possession from the garnished debts or credits in the sum of $4,377.84, based on a partial assignment of the proceeds of the sale of said bean crop by defendants to Castle on March 19, 1954, guaranteed to be the first assignment and accepted as such by Frostcraft on April 19, 1954. Within the statutory period after the filing of each of said third party claims plaintiff filed the required undertaking. On November 10, 1954, Stevenson filed a petition to determine title, stating the filing of its third party claim on August 25, and of the one of Castle's on September 23rd and praying to set a day for the hearing. On the same day the court made an order reciting the garnishment and the two third party claims and setting the hearing of all parties interested for December 9, 1954. On November 24, 1954 judgment for plaintiff in the main action was entered for $12,334.36 and attorney's fees. On December 1, 1954 plaintiff levied execution on the garnished assets and Frostcraft delivered to the Sheriff the sum of $4,377.84. The hearing set for December 9th was by agreement of the parties continued to December 14th and again to December 20, 1954. Pursuant to a letter of Stevenson's counsel requesting that the matter be placed off calendar on the ground that the third party claims of Stevenson and Castle had been prematurely filed at a time when no funds were in the hands of the Sheriff, a minute entry was made on December 14th, placing the third party claims off calendar. Castle received notice of this fact, plaintiff does not seem to have received notice. On or about the same day, December 14th, Stevenson filed a new third party claim with the Sheriff, similar to the first one except that the "cash credits" were now described as being held by the Sheriff. On or about December 17th Castle filed a new third party claim with the Sheriff,

similar to the first one except that the amount of $4,337.84 was described as now in the possession of the Sheriff. When on December 20, 1954, plaintiff and his attorney appeared before the court, Judge Del Mutolo presiding, for the agreed hearing, the Clerk informed them that the matter was placed off calendar pursuant to the letter received from Stevenson's attorney. Although the other parties were not represented, counsel for plaintiff urged that he had no knowledge of the request to place the matter off calendar, that the parties had stipulated to a hearing at that time, and that the hearing should be had. When the court consented to hear him he made an oral motion to dismiss the petition of third party claim, which the court granted. The minute entry reads: "December 20, 1954 Cause before the court on oral motion of Mr. J. E. Loginotti, Esq., counsel, the motion to dismiss the petition of Third Party Claim is presented and submitted to the Court. Whereupon the court made its order dismissing the Petition for Third Party Claim." On the same day the court signed a written order prepared by plaintiff's counsel, which recited that the petition came regularly on for hearing, the request made to place it off calendar with the ground given therefor, and the fact that the claimant did not appear and present evidence, which not only ordered the petition of Stevenson dismissed but also adjudged that the claims were of no force and effect and that claimants were not entitled to the property involved.

On December 22nd Stevenson again filed a petition for hearing to determine title, now alleging that the funds were in the hands of the Sheriff, and the filing of his own (2nd) third party claim on December 13th and also the filing of a claim by Castle. The same day Judge Del Mutolo made an order reciting the funds held in possession by the Sheriff and the two third party claims and setting the hearing of all parties claiming an interest for January 11, 1955. On December 27, 1954, the Sheriff filed the second claims of both Stevenson and Castle with the court. On the same date plaintiff moved to strike said petition of Stevenson and the two third party claims to which it related, asserting that the invalidity of the claims of Stevenson and Castle had been decided by the decision of December 20th and that there was no authority for relitigating the matter in the same acton. On January 11, 1955 the court, Judge Avilla presiding, granted the motion to strike. At the end of the hearing Judge Avilla stated: "Without passing on the merits of your position or your position with regard to what the Court has before it, and what the Court should have done at that time, I don't think this is your proper remedy. I certainly am not going to set aside the judgment of another department or court. I think you may have a remedy, but I don't think this is it."

On or about January 16, 1955 the Sheriff delivered to plaintiff the funds obtained from Frostcraft. Plaintiff offered to divide the funds between himself and the two claimants in proportion to the claims of each against the defendants. Stevenson accepted said offer and was paid his proportionate share, but Castle rejected it and instituted a separate ordinary action against Frostcraft on the guaranteed assignment and acceptance on which its third party claims had been based. In said action, which is not directly involved in this appeal, the answer of Frostcraft set up a defense of res judicata on the basis of the above orders. Thereupon on April 6, 1955, Castle filed a notice of motion to correct the judgment of December 20th to conform to decision. After a hearing before Judge Del Mutolo on April 15th, in which counsel for plaintiff conceded the possibility that the written order might be considered a decision on the merits and that that might be more than the court had intended, the court on May 3, 1955 filed an order amending the written order of December 20, 1954 so as to read like the minute order of that day only, thereby eliminating any decision on the merits.

On May 6, 1955, Stevenson filed a dismissal of his petition of December 22, 1955 (the second petition for a hearing to determine title). On May 20th Castle filed

a notice of motion, in form to *correct* the order of January 11, 1955, striking the second petition for hearing to determine title and third party claims, but actually to vacate said order and grant a hearing on the merits of the title contest. Castle urged that the order of January 11th was based on an incorrect statement of the decision of Judge Del Mutolo of December 20, 1954 then contained in the record which had now been corrected. Hearing was set for June 10, 1955. On June 9, 1955 plaintiff filed a notice of appeal from the order of Judge Del Mutolo of May 3, 1955 correcting his order of December 20, 1954. At the hearing of June 10th before Judge Avilla plaintiff opposed the motion of Castle because Stevenson's dismissal of his petition to determine title had terminated the proceedings, because of his own appeal from the correcting order of Judge Del Mutolo, because of laches of Castle, and because the order of January 11th had not been caused by clerical mistake which could be corrected by the court. The court by minute order of June 16th denied the motion to set aside, reciting only that petitioner Stevenson had abandoned the petition for hearing to determine title by written dismissal. The written order filed June 17, 1955 does not contain the ground for the dismissal. On June 22, 1955 Castle filed notice of appeal from the order denying correction of the order of January 11, 1955.

[1–6] I. Appeal by plaintiff from the order of Judge Del Mutolo of May 3, 1955. This appeal is wholly without merit. It is settled that when the trial judge through inadvertence signs an order or decision different from that which he intended, he has inherent power to correct such mistake, although he has no power to correct errors of judicial judgment in a decision rendered. It is primarily for the trial judge to determine whether the decision misstated his real intention, and in the absence of a clear showing to the contrary his conclusion to that effect is binding on appeal. Bastajiian v. Brown, 19 Cal.2d 209, 120 P.2d 9; Raines v. Damon, 89 Cal.App.2d 812, 815–816, 201 P.2d 886; Meyer v. Porath, 113 Cal.App.2d 808, 811–812, 248 P.2d 984. Here, the order appealed from states that Castle requested the court to correct clerical errors and recitations and good cause appearing therefor a correction is ordered which causes the written order to read exactly like the minute order entered. There is no evidence whatever except the signing of the written order indicating that the court intended to make a decision differing from its minute order. We must then accept that the signing of the different written order was an inadvertence. Appellant's contention that the order appealed from constituted an abuse of discretion because of laches of Castle is without merit because a correction to make an order conform to the decision actually made, may be made by the court on its own motion without notice regardless of lapse of time. Meyer v. Porath, supra; La Mar v. Superior Court, 87 Cal.App.2d 126, 129–130, 196 P.2d 98. The order of May 3, 1955, correcting the order of December 20, 1954 will be affirmed.

II. The appeal by Castle from the order of Judge Avilla of June 16th or 17, 1955.

[7] The first question to be decided on this appeal is whether the written dismissal of the petition for hearing to determine title filed with the clerk under section 581, subdivision 1 of the Code of Civil Procedure effectively terminated said proceedings as to all three parties involved. The question seems not to have been decided before. Section 581, subdivision 1, supra, cannot be literally applicable here because it regulates the right of a *plaintiff* to dismiss an action, whereas Stevenson, who sought to dismiss the proceedings, was a third party claimant in a summary special proceeding of a distinctive nature. Neither can the proviso, "that a counter claim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant" be literally applicable because in said special proceeding there are no such pleadings. However, according to the rationale of section 581, subdivision 1, supra, the third party claimant had no right independently to dismiss his petition if there was duly

before the court another party or other parties entitled to affirmative relief in the proceedings. Such is the case in a third party claim procedure under section 689, supra, whoever actually files the petition for a hearing. The procedure provided for in said section in so far as here involved is as follows. A third person who claims that personal property levied on is his property delivers a verified written claim setting out his title and right of possession to the officer making the levy. Within 10 days after the delivery the third party claimant or the person in whose behalf the levy was made may petition the court from which the writ issued for a hearing to determine title to the property in question. Such hearing must be had within 20 days unless continued for good cause. Ten days notice specifying that the hearing is for the purpose of determining title to the property in question must be given to the officer making the levy and to the party who did not file the petition. At the hearing the third party claimant has the burden of proof. The third party claim delivered to the officer must be filed by him with the court and shall constitute the pleading of the third party claimant and shall be deemed controverted by the person for whom the levy was made. At the conclusion of the hearing the court shall give judgment determining the title to the property in question, which shall be conclusive of the rights under the levy of the person in whose behalf the levy was made.

[8, 9] The above statutory provisions show that the proceedings can be brought into the court by either of the parties and that the relief granted by the judgment to determine title is as affirmative in character with respect to the party for whom the levy was made as to the third party claimant. Neither party may then be entitled one-sidedly to prevent the determination of title once the court has obtained jurisdiction by the petition of either one of them. In our case the dismissal by Stevenson alone, without written consent of the plaintiff or court order was ineffective. A contrary decision woud lead to the absurd result that if the plaintiff wished to be certain to obtain the hearing and determination of title expressly accorded him by section 689 he must file a petition of his own even when the third party claimant has already filed one, although the second petition would be a mere duplication.

Section 689 does not contain any provision for the case of more than one third party claim regarding the same levy. Nevertheless, a procedure which brings all such claims at the same time before the court by one petition seems desirable and unobjectionable. Such is immediately clear when the person in whose behalf the levy took place is the petitioner. But also each claimant must have the possibility to have all claims heard at the same time in the manner here used by Stevenson. But when, pursuant to a petition mentioning all claims, the hearing of all claimants has been ordered by the court and the claims of all claimants have been filed by the Sheriff with the court, the claimant who has not filed a petition is as much before the court for affirmative relief as the claimant or plaintiff who has filed the petition. His consent will also be required for a dismissal without court order effective to terminate the whole proceeding. Compare as illustrating the proposition that a person who has initiated proceedings in which other parties also have an affirmative interest cannot withdraw his interest in such manner as to cause the proceedings to fail for the other interested parties. In re Estate of Raymond, 38 Cal.App.2d 305, 308, 100 P.2d 1085; In re Guardianship of Lyle, 77 Cal. App.2d 153, 157, 174 P.2d 906; Voyce v. Superior Court, 20 Cal.2d 479, 127 P.2d 536. Also for this reason the attempted dismissal by Stevenson could not prevent Castle from pursuing his motion to set aside the order of January 11, 1955 and to have the determination of title set for hearing.

[10–12] The trial court had power to vacate the order of January 11, 1955, under the rule recognized in Key System Transit Lines v. Superior Court, 36 Cal.2d 184, 187–188, 222 P.2d 867, that a court has inherent

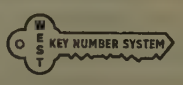
power to vacate a judgment entered because of the court's mistake or misapprehension as to the state of the record or as to the existence of extrinsic facts upon which the court's action is based. Judge Avilla mistakenly assumed that the order of Judge Del Mutolo of December 20, 1954 in the record actually was what it on its face stated, to wit, a decision on the merits of the third party claims being litigated, whereas no such decision was intended or actually made by Judge Del Mutolo, as shown by the correction afterwards made. Such was a mistake as to the actual status of the proceedings in which no erroneous judicial consideration of Judge Avilla was involved, which could only be attacked directly by the remedies provided therefor. The power to vacate here involved is independent from the time for any regular remedy. It has been exercised almost three years after the judgment was rendered. In re Rothrock, 14 Cal.2d 34, 92 P.2d 634.

[13] The recital in the minute order of Judge Avilla of nothing but the fact that Stevenson had abandoned the petition for hearing to determine title shows that he did not consider the merits of Castle's petition, but erroneously thought that because of said attempted dismissal the court had lost jurisdiction over the whole matter. In such case the appellate court will reverse the decision for the purpose of decision of the merits by the trial court, unless it appears as a matter of law that the appellant cannot be entitled to relief. Verdier v. Verdier, 36 Cal.2d 241, 244, 223 P.2d 214; See Robinson v. Superior Court, 35 Cal.2d 379, 383–384, 218 P.2d 10.

[14] The fact that plaintiff had appealed from the correcting order of Judge Del Mutolo did not prevent its consideration by Judge Avilla as the correcting order was self-executing because it did not require any process of the court to carry it into effect. The appeal does not stay the effectiveness of such an order. Caminetti v. Guaranty Union Life Ins. Co., 22 Cal.2d 759, 763, 141 P.2d 423.

[15, 16] Laches is a question of fact, to be decided primarily by the trial court considering all the facts and surrounding circumstances of the particular case. (18 Cal.Jur.2d Equity § 54.) It is not for this court to decide as a matter of law whether Castle's motion to set aside was barred by laches. The less so as the power to set aside for mistake rests particularly in the court in which the mistake was made.

The order of May 3, 1955 is affirmed; the order of June 16–17, 1955 is reversed and the cause remanded for further proceedings in conformity with the views expressed herein, plaintiff to bear the costs of the appeal.



149 Cal.App.2d 751

Harry JANNIS, Respondent,

v.

Cecil R. ELLIS and Norman Liebman, Appellants.

In the Matter of the Arbitration Between Harry Jannis, Petitioner,

and

Cecil R. Ellis and Norman Liebman.

Civ. 21954.

District Court of Appeal, Second District, Division 3, California.

April 3, 1957.

Proceeding for confirmation of award made by arbitrators under agreement for arbitration of dispute between partners. The Superior Court, Los Angeles County, John J. Ford, J., entered order confirming award, and a partner appealed. The District Court of Appeal, Vallée, J., held that where arbitration award was made on September 9, and pursuant to stipulation between parties arbitrators on February 9 filed clarification of award incorporating original award, object of appointment of arbitrators was not fulfilled until clarification was filed, and therefore petition to

superior court filed on March 12 was timely filed, for statutory requirement that application for order confirming award be filed within three months after award had been waived with respect to original award.

Affirmed.

1. Arbitration and Award ⇐29

Arbitration is predicated on the voluntary agreement of parties, and arbitrators derive their powers from the agreement.

2. Arbitration and Award ⇐29

Generally, when arbitrators have delivered their award they are said to be functi officio and their powers and duties under submission are terminated unless parties resubmit matter to them, but parties may agree on further action by arbitrators as continuation of original submission.

3. Arbitration and Award ⇐15

It is competent for parties who have submitted controversy to arbitrators to alter terms of submission even after original award is delivered, and to enlarge powers of arbitrators.

4. Arbitration and Award ⇐72

Where award was made on September 9, but pursuant to stipulation arbitrators, on February 9, filed clarification of award, incorporating original award, object of appointment of arbitrators was not fulfilled until clarification was filed, and therefore petition to superior court for order confirming award filed on March 12 was timely filed and statutory requirement that application for such order be filed within three months after award had been waived with respect to original award. West's Ann. Code Civ.Proc. § 1287.

Aaron Levinson and Albert E. Marks, Beverly Hills, for appellants.

Daniel A. Schiffer, North Hollywood, and Rudolph Pacht, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from an order confirming award of arbitrators.

Respondent Jannis and appellants Ellis and Liebman were partners under a written agreement which provided for arbitration of controversies between them. A controversy arose which was submitted to a board of arbitrators. On September 9, 1955 the arbitrators made an award in writing.

On October 5, 1955 the attorneys for the respective parties entered into a written stipulation requesting the arbitrators to clarify the award with respect to whether it included a loan of $2,465.50 made by respondent Jannis to the partnership. On February 9, 1956 the arbitrators filed a document titled "Clarification of Award of Arbitrators Pursuant to Stipulation" in which they stated they had made their award under date of September 9, 1955; stated "Said award is made a part hereof by reference"; referred to the stipulation of the parties for clarification; and stated "The said award is exclusive of the said loan of Harry Jannis." [1]

On March 12, 1956 respondent Jannis petitioned the superior court to confirm the award as clarified. Appellants petitioned for an order vacating the award. The petition to vacate was denied and the award was confirmed. Ellis and Liebman appeal.

Section 1287 of the Code of Civil Procedure in relevant part reads:

"At any time within three months after the award is made, unless the parties shall extend said time in writing, * * * any party to the arbitration may apply to the superior court of

1. "The undersigned arbitrators duly made their award under date of September 9, 1955. Said award is made a part hereof by reference. The attorneys for the respective parties to the arbitration have requested by written stipulation clarification of the award in the following respects, to wit:

"'Whether or not the award of $13,906.67 includes the loan of Harry Jannis to the Servette Company in the sum of $2,465.50, or whether said award is exclusive of the said loan of Harry Jannis.'

"The said award is exclusive of the said loan of Harry Jannis."

> the county or city and county in which said arbitration was had for an order confirming the award; and thereupon said court must grant such an order unless the award is vacated, modified or corrected, as prescribed in the next two sections. * * *"

The next two sections are not pertinent in this case.

Appellants' claim is that because the petition to confirm was not filed within three months after September 9, 1955, the date the original award was made, the court was without jurisdiction to confirm. The claim is without merit.

[1, 2] Arbitration is predicated on the voluntary agreement of the parties, and the arbitrators derive their powers from the agreement. Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 184, 260 P.2d 156. Generally when the arbitrators have delivered their award they are said to be *functi officio*. Their powers and duties under the submission are terminated unless the parties resubmit the matter to them. Sturges, Com. Arbitrations and Awards, 510, § 220. The parties may agree on further action by the arbitrators as a continuation of the original submission. People ex rel. Cranford Co. v. Willcox, 153 App.Div. 759, 138 N.Y.S. 1055, affirmed 207 N.Y. 743, 101 N.E. 174.

In Frederick v. Margwarth, 221 Pa. 418, 70 A. 797, 18 L.R.A.,N.S., 1246, it appeared that the arbitrator did not decide on a number of matters which were submitted to him, but thereafter on notice of rehearing rendered an award on the whole cause. In holding the new award was enforceable, the court observed, 70 A. 797:

> "The main contention of the appellant is that the arbitrator's authority ended with the making of the first award. The rule undoubtedly is that, when an arbitrator has made and delivered his award, the special power conferred upon him ends. But an award must be final, complete, and coextensive with the terms of the submission. The arbitrator, through mistake, failed to consider and decide a part of the dispute submitted to him, and the award was invalid because incomplete. But the agreement was still in force, and it was competent for the arbitrator to finish his work by making a full and complete award. Hamilton v. Hart, 125 Pa. 142, 17 A. 226, 473. The agreement to refer was a part of the contract into which the parties entered, and the defendants could not withdraw from it."

To like effect, Fargo v. Reighard, 13 Ind. App. 39, 39 N.E. 888, 41 N.E. 74; Schenck v. Voorhees, 7 N.J.L. 383, 390; Cracchiolo v. Carlucci, 62 Ariz. 284, 157 P.2d 352, 354; 6 C.J.S., Arbitration and Award, § 52, p. 194; 3 Am.Jur. 924, § 93. Cf. Lewiston-Auburn Shoeworkers Protective Ass'n v. Federal Shoe, Me., 114 A.2d 248.

[3] It is of course competent for the parties to alter the terms of the submission even after the original award is delivered, and to enlarge the powers of the arbitrators. Eveleth v. Chase, 17 Mass. 458, at page 459, states:

> "And after it [the award] is delivered, if the parties so agree, they may open the subject for reconsideration; * * * which may be done for the correction of mistakes, or for a new hearing of the parties.
>
> "In the case before us, the object of the referees was to explain doubtful matter in their award. In a court of chancery, an award under such circumstances would be set aside or amended. Such a procedure is perhaps attended with great difficulties, without the consent of the parties to the submission. Here there was such consent, before the alteration was made, and an expression of satisfaction afterwards. The explanatory paper, therefore, became part of the award, and the whole is to be taken together as making one award."

[4] The requirement of section 1287 that an application for an order confirming the award be filed within three months after

the award is made was clearly waived with respect to the award made September 9, 1955. The so-called clarification of the award was made pursuant to stipulation of the parties; it incorporated the original award as a part of it; it formed a complete execution of the power delegated to the arbitrators; it was not until it was made that the object of their appointment was fulfilled and their authority terminated. It was not until February 9, 1956 that the award contemplated by section 1287 was made. The application to confirm was filed within three months of that date and within time.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



149 Cal.App.2d 414

Arthur SCHERTZ, Plaintiff and Respondent,

v.

RECORD MACHINE & TOOL CO., a corporation, and Carl Baker, Defendants and Appellants.

Civ. 5370.

District Court of Appeal, Fourth District, California.

March 25, 1957.

Rehearing Denied April 18, 1957.

Hearing Denied May 22, 1957.

Action by buyer for amount paid as part payment on business. The Superior Court, Kern County, Norman F. Main, J., rendered judgment for buyer and sellers appealed. The District Court of Appeal, Barnard, P. J., held that where partial payment was made in 1950, pursuant to oral agreement for sale of one-fourth of stock of corporation and a one-fourth interest in its business and assets, original agreement was rescinded and new oral agreement was made in March 1952, wherein amount paid was to be considered loan, and sellers acknowledged loan as late as December 1952, action brought in July 1954 was not barred by two year statute of limitations.

Affirmed.

1. Corporations ⇐121(4)

Complaint alleging that buyer had paid $10,000 under oral agreement, which was evidenced in writing by letter from seller, as partial payment for one-fourth of stock of corporation and for one-fourth interest in assets of corporation, that sellers had not delivered stock and that permit for issuance of stock had not been applied for or issued, sufficiently alleged a cause of action for money had and received.

2. Corporations ⇐121(5)

In buyer's action for amount paid to sellers under oral agreement, evidence sustained finding that agreement had been for the sale of one-fourth of stock of corporation and a one-fourth interest in its business and assets.

3. Corporations ⇐121(7)

Where agreement provided for sale of one-fourth of stock of corporation and one-fourth interest in business and assets of corporation but no stock had been issued and no permit for issuance of stock had been applied for or issued, judgment, awarding buyer return of his partial payment, based on theory of money had and received, was justified.

4. Corporations ⇐121(5)

In buyer's action for amount paid as part payment for one-fourth of stock of corporation and one-fourth interest in assets of corporation, evidence sustained finding that original 1950 oral agreement had been rescinded and that new oral agreement had been made in March 1952, wherein amount paid was to be considered loan and that seller acknowledged loan as late as December 1952.

5. Appeal and Error ⇐908

Where buyer contended that amount he paid as partial payment toward purchase of one-fourth of stock of corporation and a one-fourth interest in its business and

assets had been changed into loan to sellers by agreement with sellers, and trial court found that instrument introduced by buyer contained acknowledgment by sellers of debt to buyer, since sellers did not have exhibit transferred to reviewing court, reviewing court must assume that exhibit supported finding.

6. Limitation of Actions ⇐49(1)

Where partial payment was made in 1950 pursuant to oral agreement for sale of one-fourth of stock of corporation and a one-fourth interest in its business and assets, original agreement was rescinded and new oral agreement made in March 1952, wherein amount paid was to be considered loan, and sellers acknowledged loan as late as December 1952, action brought by buyer to recover payment in July 1954 was not barred by two-year statute of limitations. West's Ann.Code Civ.Proc., § 339.

Montgomery G. Rice, Los Angeles, for appellants.

Dorris, Fleharty, Phillips & Underhill, Bakerhill, for respondent.

BARNARD, Presiding Justice.

This is an action to recover the amount paid by the plaintiff as partial payment for a one-fourth interest in the defendant corporation, including its stock, assets and business. All dealings in this connection occurred between the plaintiff and the defendant Baker, who was president of the corporation and who was carrying on its business.

This action was brought on July 9, 1954. The amended complaint alleged that about December 8, 1950, the plaintiff paid to the defendants $10,000 on an oral agreement that this was to be in partial payment for one-fourth of the shares of stock in the corporation and for a one-fourth interest in the property and assets of the corporation, and that said agreement was evidenced by the following writing:

"December 8, 1950

"Mr. Arthur Schertz:

"We have a verbal agreement as of buying one fourth interest in this business and property.

"I want you to try it out to your satisfaction for 90 (ninety) days before you are committed, then if for any reason you wish to resign, I would require 2 (two) years to pay back the money ($10,000.00) as a loan on the company. If you decide you wish to go on with our agreement you will be required to raise the balance of $15,000 to complete our bargain of one quarter interest. This should be an advantage to us both.

"Carl Baker, Pres.

"Record Machine & Tool Co."

It was further alleged that the consideration was to be $25,000; that the plaintiff was to pay $10,000 in cash and to convey to the defendant a house and lot in Taft at the agreed value of $15,000; that the plaintiff has been at all times ready, able and willing to perform on his part but the defendants, while accepting and retaining $10,000 cash, have refused to accept a written transfer of the house and lot; that the defendants never issued and delivered to the plaintiff the said one-fourth of the stock of the corporation, have never applied to the corporation commissioner for a permit for the issuance of such stock, and the corporation commissioner has never issued such a permit; that the defendants thereby became indebted to the plaintiff in the sum of $10,000 with interest thereon; that said sum has not been paid except for certain credits set forth; and that there is now due, owing and unpaid the sum of $11,881.36. The prayer is that the plaintiff have judgment for that amount.

The amended answer of the defendants admitted that the corporation had never issued or applied for the right to issue any shares of stock to the plaintiff, and alleged that the action was barred by Section 339 of the Code of Civil Procedure. As affirm-

ative defenses it was alleged that the defendants had a conditional sales contract for the purchase from another corporation of certain buildings, machinery and patents; that the plaintiff paid this $10,000 for an option giving him the right for a period of 90 days to acquire a one-fourth interest in that conditional sales contract, by paying the further sum of $15,000, and providing that in the event he elected not to pay the $15,000 he would be deemed to have loaned the $10,000 to the defendants for the term of two years from that date; that on or about January 1, 1952, the plaintiff notified the defendants of his decision not to pay the $15,000 and complete his purchase of an interest in the sales contract; that on or about January 1, 1952, it was "agreed between the parties" that the defendants had made certain payments which "should be credited to defendants on the loan from plaintiff, and that the balance due on said loan as of January 1, 1952, was $9680"; that as of January 1, 1952, the defendants executed and delivered to the plaintiff two notes, each dated that day and due in two years with interest; that the first note was for $5000 and the second for $4680; that the second contained the provision that $60 per month should be paid thereon; that by the delivery and acceptance of said notes the obligation of December 8, 1950 was fully paid and extinguished; that subsequently the defendants made certain payments to the plaintiff on the second note amounting to $1140; and that the defendants had overpaid the plaintiff for certain work in the sum of $2009.11 and it was orally agreed between the parties that this sum should be applied on the amount due on said notes. The prayer was that the plaintiff take nothing by reason of this action.

The trial of the action took two days. The defendant Baker was in court but did not take the stand. The defendants cross-examined the plaintiff at great length but called no witness in their behalf. A large number of written exhibits were received in evidence, none of which have been brought up on this appeal except for the writing dated December 8, 1950, which is above quoted.

The court found, among other things, that in December, 1950, these parties entered into an oral agreement which was evidenced by the writing above quoted, whereby the defendants agreed to sell the plaintiff a one-fourth interest in this corporation for a total consideration of $25,000; that thereafter the plaintiff paid and the defendants received $10,000 in cash; that by reason of the neglect, failure and refusal of the defendants, and not otherwise, this agreement was never consummated or completed; that at all times up to March 16, 1952, the plaintiff was ready, willing and able and so offered to perform his part of that agreement; that no application for a permit to issue stock was ever made by the defendants to the corporation commissioner, and no stock was ever issued or authorized; that on March 16, 1952, the agreement for the purchase and sale of a one-fourth interest in this business was mutually rescinded and terminated by the parties, and it was agreed that the $10,000 was to be deemed and treated as a loan; that at said time the defendants agreed to repay the $10,000 to the plaintiff with interest at 6% from that date; that thereafter, on December 28, 1952, the defendants executed a document in writing, "being Plaintiff's Exhibit No. 6", whereby the defendants acknowledged said indebtedness and set forth therein certain debits and credits due to and from plaintiff and defendants; that on March 16, 1952, after the making of said agreement that the $10,000 was to be considered as a loan the defendants were entitled to certain credits because of payments made; that after making these credits a total of $9647.65 is now due, owing and unpaid from the defendants; and that the plaintiff's cause of action is not barred by Section 339 of the Code of Civil Procedure. Judgment was in favor of the plaintiff for $9647.65, and this appeal followed.

The appellants contend that the amended complaint did not allege facts which were sufficient to state a cause of action against them, and that the cause of action pleaded,

no matter how considered, is one based upon an oral contract and is barred by the two-year statute of limitations. It is argued that the amended complaint alleges an oral contract by which the plaintiff agreed to transfer real property; that the allegations as to a contract to "transfer and convey" are too indefinite in that it was not alleged that there was any "outstanding stock", or what property was to be conveyed, or when it was to be conveyed; that it was not alleged that the plaintiff had paid or delivered, or at least tendered, all he was bound to pay or deliver, and it was not alleged that there was a written offer of tender either of money or lot; that the writing of December 8, 1950 did not evidence any oral agreement but was an offer to make a different contract requiring a payment of the $15,000 in cash, in lieu of taking the house and lot as a payment of $15,000; that it is not alleged that this writing of December 8 was ever accepted in writing; that it is not alleged that the plaintiff ever tendered $15,000 in cash; and that the writing of December 8 cannot be enforced as a valid agreement for the transfer of real property since it does not describe any real property.

In contending that upon any theory the plaintiff's cause of action is barred by the two-year statute it is argued that the oral contract pleaded remains an oral contract, even though evidenced by a writing, since it was so indefinite as to necessitate resort to parol testimony to make the contract complete; that if the action is viewed as one for money had and received any implied promise to return the $10,000 is barred by the two-year statute; and that if there was a cancellation and rescission in March, 1952, this action was not brought until more than two years after that date. In the closing brief it is further argued that the plaintiff could not rescind since he was in default after 90 days from December 8, 1950, and since there was no evidence that the defendants were ever in default; and that there was no evidence to support the court's finding that the agreement between the parties was mutually rescinded and terminated on March 16, 1952, or the finding that the parties then agreed that this $10,000 was to be deemed and treated as a loan from plaintiff to defendants, to be repaid to him with interest at 6% from that date.

[1] The complaint in this action was not one for specific performance or to enforce any contract. Its purpose was obvious, and it clearly appears from the answer that the defendants were in no way deceived as to its purpose and intent. Its effect was to allege that the defendants had received this money which they were not entitled to retain. It alleged that the stock had not been delivered, and that a permit to issue such stock had not been applied for or issued. It sufficiently alleged a cause of action for money had and received, and it cannot be held that the complaint was so deficient as to deprive the court of jurisdiction to proceed with a trial of the issues presented by the pleadings.

[2, 3] It was admitted that the defendants had received the $10,000, that it had not been repaid, and that no permit to issue stock in this corporation had ever been applied for or issued. It also appeared without conflict that the parties had later changed their position by mutual agreement, and that it was thereafter agreed that the plaintiff was entitled to a return of his money except for certain credits to be allowed. The answer admitted that long after the 90-day period was up and "as of January 1, 1952", the parties had agreed that the $10,000 should be considered as a loan and that the balance due as of that date was $9,680. While the answer alleged that the agreement was for the purchase and sale of an interest in another contract, instead of an interest in this corporation and its business, there was no evidence to sustain that allegation. There was ample evidence that the agreement was for the purchase of stock in the corporation and a one-fourth interest in its business and assets. Since no stock had ever been issued and no permit applied for or secured, a judgment based on the theory of money had and received was justified. There was

evidence that the defendants took possession of the house and lot, and used it for many months, and that they asked the plaintiff to delay a transfer of title to them. There was also evidence that the defendants were in default, and were never in a position to complete the original deal.

[4–6] The finding that the agreement for the purchase and sale of a one-fourth interest in this business was mutually rescinded and terminated on March 16, 1952, and that it was then agreed that the $10,000 was to be deemed and treated as a loan, is fully sustained by the evidence. It is supported by the allegation of the answer to the effect that it had been agreed that this should be a loan and that the balance due on the loan as of January 1, 1952 was $9,680. The testimony of the plaintiff was that this agreement was actually made about March 15 or 16, 1952. The answer alleged that the defendants executed and delivered two notes totaling that amount and that $60 per month was paid thereon for a time. While it was admitted that these notes were executed, there was no evidence that they were delivered or accepted by the plaintiff, although he testified that he saw the notes and saw the amount of one of them about the middle of March, 1952. Not only was there sufficient evidence of a rescission and termination of the original agreement and the making of a new agreement that the $10,000 be considered as a loan, but there was ample evidence of subsequent admissions on the part of the defendants that they owed the money and agreed to pay it. They made payments for many months on what they admitted was a loan. In addition to the testimony of the plaintiff, two statements of account of some sort which were thereafter given to the plaintiff by the defendants, were introduced in evidence. The record indicates that these constituted admissions of the amount due to the plaintiff as of the times they were prepared. The court found with respect to one of these instruments that on December 28, 1952, the defendants executed a document in writing, "being Plaintiff's Exhibit No. 6", whereby and wherein they acknowledged their debt to the plaintiff and set forth figures showing the claimed amount due. Since the defendants did not see fit to have this exhibit brought up it must be assumed, in support of the judgment, that it supported and justified the finding made. Kipp v. Warriner, 86 Cal. App.2d 814, 195 P.2d 888; Alex Foods, Inc., v. Metcalfe, 137 Cal.App.2d 415, 290 P.2d 646. There was ample evidence that a new agreement was mutually agreed upon between the parties on or about March 16, 1952, changing the original contract for the purchase and sale of an interest in this business to one providing that the $10,000 paid by the plaintiff was a loan which was to be repaid by the defendants, and that the defendants acknowledged this new obligation as late as December 28, 1952. Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 167 P.2d 719, 164 A.L.R. 685. The action was brought on July 9, 1954, well within two years after that date. The essential findings of the court are fully sustained by the evidence and the record fails to show any good reason, even on technical grounds, why the defendants should be relieved from the obligation which they assumed orally and in writing, which they continued to acknowledge, and against which they failed to offer any evidence.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

149 Cal.App.2d 648

Edgar F. SMITH and Flora E. Smith, Plaintiffs and Respondents,

v.

Frank E. RICKARDS and Bernetta Rickards, and Modoc County Title Company, a Corporation, Defendants,

Frank E. Rickards and Bernetta Rickards, Appellants.

Civ. 8890.

District Court of Appeal, Third District, California.

April 1, 1957.

Action by purchasers of store building and stock in trade against vendors and title company for rescission of contract of sale for vendors' alleged fraudulent misrepresentations inducing the sale. The Superior Court, Modoc County, A. K. Wylie, J., entered judgment of rescission, and vendors appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that evidence sustained trial court's finding of misrepresentation as to amount of business done in sale of gasoline from gas pump on the premises sold.

Judgment affirmed.

1. Vendor and Purchaser ⇐117, 120, 126

Purchasers of store building and stock in trade located therein were justified in remaining in possession of living quarters in rear of building and in conducting the business purchased until rights of purchasers and vendors could be judicially determined in action to rescind for fraud, in view of fact that store patrons were accustomed to coming in at any time, and, therefore, notice of rescission was not required to offer fair value of use and refusal to charge purchasers with rental value was proper.

2. Vendor and Purchaser ⇐126

Defrauded purchaser who elects to rescind may, in process of restoring parties to status quo, be charged with fair value of use of the property during occupancy, but circumstances may be such that it would be inequitable to make such an award to the defrauding vendor.

3. Vendor and Purchaser ⇐44

In action by purchasers of store building and stock in trade against vendors and title company for rescission of sale on ground of vendors' alleged fraudulent misrepresentations inducing the sale, evidence sustained trial court's findings that portions of the premises sold were not within lines of lots sold but were within public streets.

4. Vendor and Purchaser ⇐34

In action for rescission of sale of store building and stock in trade, representation that improvements, such as front porch, gasoline pump, and ramp approach to basement beneath building, were within lot lines was, if false, fraudulent in a material way, and, therefore, it was immaterial that no one was able to say whether the public rights of way in street in which the improvements were located consisted of easements or fee title.

5. Vendor and Purchaser ⇐44

In action by purchasers of store building and stock in trade against vendors for rescission of sale because of alleged fraudulent misrepresentations inducing the sale, evidence sustained trial court's finding of misrepresentation as to amount of business done in sale of gasoline from gas pump on the premises sold

6. Vendor and Purchaser ⇐33

Provision in contract of sale that buyer had personally examined property and was familiar with its location and condition and was not relying upon any representation relating thereto was not sufficient to protect vendors from being held responsible for their alleged fraud. West's Ann.Civ.Code, § 1668.

7. Vendor and Purchaser ⇐123

In action by purchasers of store building and stock in trade against vendors for rescission of sale on ground of vendors' alleged fraudulent misrepresentations inducing the sale, fundamental requisite in action was that the decree should do equity.

8. Interest ⊂⊃1

In equitable actions, rule of law as to interest is generally followed, but interest is sometimes allowed by courts of equity in exercise of sound discretion when it would not be recoverable at law.

9. Fraud ⊂⊃60

Interest may be awarded as an element of damages sustained by reason of fraud where amount of plaintiff's loss and date from which interest, if awarded, should be computed are capable of definite ascertainment.

10. Interest ⊂⊃39(1)

Where sums which purchasers of store building and stock in trade had paid vendors were definite as to time and amount, and vendors had refused to accept rescission, based upon vendors' alleged fraudulent misrepresentations inducing the sale, thereby compelling purchasers to maintain the property and expend other specific funds in doing so, allowance to purchasers of interest at rate of 7 per cent on such amounts from time of service of notice of rescission was proper. West's Ann.Civ.Code, § 1709.

Herbert P. Welch, Lakeview, Or., for appellants.

Robnett & Wilson, Alturas, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment in favor of plaintiffs, declaring the rescission of a sale to plaintiffs by defendants of a store building and stock in trade located in the village of Lake City in Modoc County. The judgment of rescission was based upon fraudulent misrepresentations inducing the sale.

The complaint alleged the following representations to have been made: That appellants were doing a good business with annual sales upward of $28,000 and with a net profit of 15% of sales; that 50% of the business was on credit, but that there was no loss arising therefrom; that the well at the rear of the store building, which constituted the only water supply, was a good well and that it always supplied an abundance of water for household and domestic purposes and for irrigation of the lot; that a covered porch attached to the front of the store building was within the property lines; that a gasoline pump was within the property lines; that a ramp leading down under the store building and constituting the only entrance to the basement was within the property lines; that the sale which included the stock in trade would, as to the stock, be made upon a basis of cost plus 20%; that certain additions to the building and a new roof all then in process of construction would be completed in good workmanlike manner; that the gas pump yielded a profit of $100 per month. The trial court found that all of the representations above recited were made; that they were false and untrue and were known to be so by the appellant; that they were made for the purpose of inducing the sale; that they were relied upon by respondents who were in ignorance of their falsity; that respondents would not have dealt otherwise. The trial court also found that, having completed the sale, respondents took possession of the store and did not become fully advised as to the misrepresentations made until about three months later, whereupon they promptly gave notice of rescission, offering to restore and reconvey to appellants all things of value which they had received, upon condition that appellants reimburse them for sums paid on the purchase price and sums laid out in reliance on respondents' statements. Appellants refused this offer to rescind and have since maintained steadily that respondents had no right to rescission.

We may say generally without detailing the evidence that an examination of the lengthy transcript discloses there was substantial evidence to support the court's findings concerning the fraud by which appellants induced respondents to purchase the property and the stock in trade.

[1, 2] Appellants first contend that the notice of rescission was defective in that

it did not offer specifically to allow the fair value of the use of the property during its occupancy by respondents. Concerning this matter of the right of appellants to receive the value of the use and occupation of the property, the trial court on substantial evidence found as follows: That the store premises are located in a small village with only a few inhabitants; that the patronage comes principally from surrounding ranches; that it has been the custom over the course of the years for the operators of the store to keep the store open until late in the evenings, and upon holidays as well as business days because the patrons come in at all hours to obtain their supplies and such hours are necessary if the business is to succeed; that in view of the circumstances and the dependence of the business upon the patronage of the ranchers and in order to keep the store open as required, it was necessary for the operators to live on the premises; that the store building contains living quarters in the rear, and that from the time they took possession it had been necessary for respondents to live in said premises in order to operate the business just as appellants had done during the time they ran the store; that since giving the notice of rescission it has been necessary for respondents to continue these practices, all against their will, because of the fact that they considered themselves bound to return the store, the property and the business to the appellants upon the final determination of this litigation, rescission having been refused by appellants when offered to them; that the store building was fully occupied by the business save for the living quarters in the back, and that these could not be rented because necessarily occupied by respondents for the reasons above stated. While it has often been stated that a defrauded vendee electing to rescind may in the process of restoring the parties to the status quo be charged with the fair value of the use of the property during occupancy, nevertheless circumstances may be such that it would be inequitable to make such an award to the defrauding vendor. See Shermaster v. California Home Bldg. Loan Co., 40 Cal.App. 661, 669, 181 P. 409. It is often impossible to make literal restoration to the status quo in declaring rescission, and the party entitled to rescind is not compelled in his offer to rescind to specify in detail what he proposes to do in the way of restoration. Here, respondents offered to convey and deliver to appellants all property and things of value which they had received by virtue of the fraudulent transaction and demanded that they be made whole on their part. Upon refusal of their offer, they remained in possession for the benefit of both parties, an action which the trial court found to have been necessary if the interests of all were to be preserved. Respondents then began this action, submitting themselves to equitable jurisdiction, asking that rescission be declared by decree of the court, and that the parties be returned to the condition they were in before the fraudulent transaction was consummated. We find their notice of rescission to have been adequate; that they were justified in remaining in possession of the living quarters and therefrom conducting the business until the rights of the parties could be judicially determined; and that the trial court was justified in view of the circumstances in refusing to charge respondents with the rental value of the property.

[3, 4] Appellants next contend that the trial court's findings that portions of the premises were not within the lot lines but were within the public streets are not supported by the evidence. The deed from appellants to respondents described the property as Lot 1 in Block J of the town of Lake City in accordance with the official plat of Lake City and as being 80 feet north and south by 130 feet east and west. It was shown that this was the manner in which the property was marked on the county assessor's plats; that an ancient map made in 1896 and found in the county surveyor's office likewise described the property as Lot 1 in Block J of the town of Lake City. No plat of the subdivision of Lake City had ever been

recorded in the recorder's office, but the county surveyor testified that pursuant to order of court he had made a survey in order to locate Lot 1 on the ground and to also locate the public ways upon which it was supposed to front, so as to determine whether or not the improvements were within the lot lines and were not upon the public ways; that he had prepared a map showing his survey (this map was received in evidence); that to determine the location of the property he had made a thorough search of the county records and of the files in his office; that he determined from a book on file and a map on file in the county surveyor's office the proportions and distances of that part of Lake City and then resorted to the original government land office survey of the section corner and the quarter corner to "bring in control of the property"; that from that control he did determine the boundaries of Lot 1 of Block J of Lake City and located it on the ground; that while the main building was located approximately along the north and the east lines of the lot, which was a corner lot, the ramp giving entrance to the basement, and the front porch upon which was the gasoline pump, all extended into the public street. The witness further stated that he had called to his aid in locating the property the evidence of cultural features, such as old fence lines and the like which indicated that the lot lines he had fixed by his survey were correct. He stated that he had tied his survey into the State Plane coordinates, a method of determining the location of a point or series of points by line in relation to an overall system. Without following the witness through the complexities of this method of locating a description on the surface of the earth, we quote his ultimate statement that by the use of the system, "it boils down to the condition that only one position can have the coordinate as stated". We think the court was fully justified in accepting the testimony of the surveyor that, as the result of what he had done, he had definitely located the boundaries of the property on the ground and determined therefrom that the front porch, the gasoline pump, and the ramp approach into the basement beneath the building, were all in the public streets. In this connection we deem it immaterial for the purposes of this action that no one was able to say whether or not the public rights of way consisted of easements or of the fee title. Either way, the representation that these improvements, so vital to the use of the store building, were all within the lot lines was, if false, fraudulent in a material way.

[5] Appellants next attack the finding of misrepresentation as to the amount of business done in the sale of gasoline from the gas pump. Respondent Flora E. Smith testified that, during the negotiations, when appellants were asking that after the down payment required and agreed to, progress payments be made at the rate of $100 a month, she protested that such a sum was more than ought to be required; that "Mr. Rickards laughed and said the gas pump was taking in enough to more than make the payment of $100 a month". Appellants point out that by the sales tax reports, it was established that gross sales of gasoline had been averaging $148 per month, and that no representation was shown to have been made that it was the profits from the pump which would exceed $100 a month. Since the respondents would need profits as opposed to gross sales to make the payments required, the statement that the pump produced enough to make the contract payments of $100 a month supported the finding of the court that the representation was that it was the profit from the pump which would furnish the necessary funds. It was shown that the profits on the sales actually amounted to about $35 per month.

[6] Appellants next contend that by virtue of certain provisions of the contract of purchase, respondents had disabled themselves from asserting fraud. The provisions were as follows: "Buyer has personally examined said property and

is familiar with its location and condition and is not relying upon any representation relating thereto." Such provisions have often been held insufficient to protect a fraudulent vendor from being held responsible for his fraud. Civ.Code, Sec. 1668; Simmons v. Ratterree Land Co., 217 Cal. 201, 203–204, 17 P.2d 727.

[7–10] Appellants next contend that the decree was erroneous in that it included an award of interest from the date of notice of cancellation and rescission as to amounts of money paid to appellants by respondents in reliance, as the court found, upon the fraudulent representations made to them. The fundamental requisite in a case such as this is that the decree shall do equity. "In equitable actions, * * *, the rule of law as to interest is generally followed; 'but interest is sometimes allowed by courts of equity in the exercise of a sound discretion, when it would not be recoverable at law.'" McCowen v. Pew, 18 Cal.App. 482, 485, 123 P. 354, 355; see, also, Williams v. Graham, 83 Cal.App.2d 649, 653, 189 P.2d 324. "Interest may be awarded as an element of damages sustained by reason of fraud where the amount of the plaintiff's loss and the date from which interest, if awarded, should be computed are capable of definite ascertainment." 37 C.J.S. Fraud, 141g, p. 469. It is apparent from the record that the sums of money paid to appellants by respondents were definite as to time of payment and as to amount. The trial court so found. The findings were that respondents paid to appellants prior to notice of rescission specific sums on specific dates totaling $11,261.92, and the court allowed interest on that sum at the rate of 7% from the time of notice of rescission served. It was also found that, by the refusal of appellants to accept rescission, respondents had been compelled to maintain the property, to hold the same in readiness to return and reconvey, and in so doing, expended other specific funds, aggregating $511.06. The court allowed interest on this aggregate from the service of notice of rescission. It is statutorily declared by Civil Code, Section 1709 that one who wilfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers. We find no error in the allowance of interest made by the court.

The judgment appealed from is affirmed.

PEEK, J., and McMURRAY, J. pro tem., concur.



149 Cal.App.2d 642

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph John MANGIAMELI, Defendant and Appellant.

Cr. 5808.

District Court of Appeal, Second District, Division 1, California.

April 1, 1957.

Defendant was convicted of receiving and holding moneys staked, pledged, bet and wagered on result of trial and contest of speed between horses, and from the judgment of the Superior Court of Los Angeles County, Allen T. Lynch, J., defendant appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law ⇐1159(6)

Where evidence, circumstantial or otherwise, establishes commission of crime charged and accused's perpetration thereof, appellate tribunal, in reviewing conviction, will not appraise weight of evidence, but will consider and determine only whether, on face of evidence, trier of facts can justly be held not to have found sufficient facts to warrant inference of accused's guilt.

2. Criminal Law ⇐1159(2)

To warrant reversal of conviction, conclusion in court below must be clearly shown to be unsupported by any substantial evidence on any hypothesis whatever.

3. Criminal Law ⇐1144(13)

On appeal from conviction of crime, appellate court must assume in favor of verdict existence of every fact which jury could have reasonably deduced from evidence and then determine whether such facts are sufficient to support verdict.

4. Criminal Law ⇐1159(6)

Where circumstances reasonably justify jury's verdict of conviction, reviewing court's opinion that such circumstances might also reasonably be reconciled with defendant's innocence will not warrant interference with jury's determination.

5. Criminal Law ⇐1159(2, 4)

Reviewing judges are in no position to determine credit which should be accorded to witnesses or weigh their testimony and hence are not authorized to review evidence, unless it may fairly be held on its face to be insufficient to support ultimate issue involved, in which case review is not of question of fact, but purely of law. West's Ann.Code Civ.Proc., §§ 1847, 2061.

6. Criminal Law ⇐553, 1159(4)

In prosecution for receiving and holding moneys wagered on horse race, trial judge was authorized to reject any testimony contradicting that of deputy sheriffs, if he conscientiously felt warranted in so doing after full and fair consideration thereof, and District Court of Appeal cannot disturb trial court's findings from such officers' testimony, in absence of any claim that it was inherently improbable. West's Ann.Code Civ.Proc., §§ 1847, 2061; West's Ann.Pen.Code, § 337a, subd. 3.

7. Gaming ⇐98(1)

Evidence was sufficient to sustain conviction of receiving and holding moneys staked, pledged, bet and wagered on result of trial and contest of speed between horses. West's Ann.Pen.Code, § 337a, subd. 3.

Block, Toler, Bulloch & Biggerstaff, Francis B. Toler, Jr., Compton, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with three violations of Section 337a of the Penal Code. We are here concerned only with Count II in which a conviction resulted and by which defendant was accused of a violation of Subdivision 3 of the foregoing Penal Code section, in that he did "* * * receive, hold, * * * certain moneys * * * staked, pledged, bet and wagered * * * upon the result of a trial * * * and contest of speed * * * between beasts, to wit, horses". From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

The prosecution introduced evidence that on March 10, 1956, Deputy Sheriffs Ray and Keesling entered the 6800 Club and seated themselves at the bar next to a Mr. Horton who was looking at a daily newspaper and writing certain notations on a slip of paper. When Mr. Horton left the bar he was followed by the officers to a smoke shop at 6716 Central Avenue. This shop was operated by the defendant who was standing in the rear thereof, and was handed a slip of paper and some money by a man who came out of the back room of the shop. In that back room six or eight people were seated around two tables. They were looking at the National Daily Reporter or racing forms and listening to the results of races.

Mr. Horton entered the back room as did Officer Keesling while Officer Ray engaged the defendant in conversation.

The latter was busy at the time writing on a slip of yellow paper. The paper contained a number of initials and figures. This was an "owe sheet," that is a record of the money owed by or to the "book".

Mr. Horton left the back room. As he approached the defendant he handed the former a piece of paper, a betting marker, i. e., the record of a bet which a better gives to a bookie, and two one-dollar bills, saying, "Here, Joe, this is for the third." The defendant, who knew Mr. Ray was an officer pushed Mr. Horton's hand away.

Officer Keesling returned to the back room. Officer Ray told the defendant "Let's go to the back room". Whereupon defendant yelled, "Get out, everybody, the cops", and himself jumped for the front door but was prevented from making good his escape.

In defendant's pants pocket the police found a slip of paper which contained the names of a number of horses that were racing that day at the Santa Anita Race Track. This paper was a betting marker. Defendant testified that this marker was not taken from his person.

A pink slip of paper which defendant admitted was his is also an "owe sheet".

As a witness in his own behalf defendant testified that he never possessed the paper identified as a betting marker and which the officers testified they retrieved from a pocket in his trousers; that the two slips identified as "owe sheets" were records of money owed and money loaned and merchandise sold and that one was a half completed copy of the other; that Mr. Horton did not attempt to hand him anything, as a bet, and that Horton was under arrest at the time he came from the back room to the front room.

Defendant denied that he at any time called out, "Get out everybody, the cops", but that following his arrest he "hollered, 'everybody out', that I was closing".

As a witness for the defendant, Mr. Horton testified that he did not at any time hand or try to hand the paper with the horses names thereon and the money to defendant.

[1–4] As his sole ground for reversal appellant contends that the evidence is insufficient to sustain the judgment. With this contention we cannot agree. Where evidence, circumstantial or otherwise, establishes that a crime has been committed and that the accused was the perpetrator thereof, an appellate tribunal in reviewing a conviction will not appraise the weight of the evidence but will consider and determine only whether upon the face of the evidence it can justly be held that the trier of facts could not have found sufficient facts to warrant the inference of guilt. In other words, it must be made clearly to appear that the conclusion arrived at in the court below is unsupported by any substantial evidence upon any hypothesis whatever. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. As was said in the case just cited, 15 Cal.2d at page 681, 104 P.2d at page 780: " 'We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

In the case now engaging our attention there was testimony that appellant received a slip of paper and money from a man who had just come out of the back room of appellant's shop, a room in which men were studying the National Daily Reports and racing forms and listening to the results of the races.

At that time the appellant was working on an "owe sheet," a record of money owed to or by a "book".

That while conversing with a police officer, whom the appellant knew was an officer, a third person attempted to place a bet saying, "Here, Joe, this is for the third." Appellant pushed away the paper and money. On this piece of paper were listed numerous horses running in various races at Santa Anita on that day.

After appellant's arrest he attempted to escape and to warn the other occupants of his back room that the police were raiding his establishment.

In appellant's pocket was found a piece of paper which listed numerous horses running in various races at Santa Anita on that day together with notations indicating the amount to be bet on each.

[5, 6] True, the foregoing testimony was in conflict with that proffered by appellant himself and the witness Horton. But, as has often been repeated, reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony, and are therefore not authorized to review evidence, except where, on its face, it may fairly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. It has been ordained by the legislature that the duly constituted arbiters of the facts are the exclusive judges of the credibility of witnesses, Code Civ. Proc., sec. 1847, and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates, Code Civ.Proc., sec. 2061. So, in the instant case the trial judge was authorized, if he conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been contradictory to that given by officers Keesling and Ray. Since there is no claim that the testimony of the officers can be stricture as inherently improbable, that is, that it would not seem possible that what they testified to could have occurred under the circumstances described, we are without power to disturb the findings made therefrom in the court below.

[7] That the evidence is abundantly sufficient to sustain the conviction herein, to us, seems manifest. See People v. Hart, 46 Cal.App.2d 230, 231, 233, 115 P.2d 546; People v. Bateman, 57 Cal.App.2d 585, 587, 135 P.2d 192; People v. Abraham, 53 Cal.App. 2d 564, 565, 128 P.2d 39; People v. Stones, 99 Cal.App.2d 54, 55, 221 P.2d 202; People v. Kahn, 27 Cal.App.2d 645, 646, 81 P.2d 632; People v. Rubin, 115 Cal.App.2d 186, 187, 251 P.2d 374; People v. Tompkins, 109 Cal.App.2d 215, 217, 240 P.2d 356.

The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and FOURT, JJ., concur.



149 Cal.App.2d 469

C. G. BYSON, Plaintiff and Appellant,

v.

CITY OF LOS ANGELES, a municipal corporation; Service Construction Co., a California corporation, et al., Defendants.

City of Los Angeles, a municipal corporation, Respondent.

Civ. 21906.

District Court of Appeal, Second District, Division 3, California.

March 27, 1957.

Rehearing Denied April 19, 1957.

Hearing Denied May 22, 1957.

Contractor's action against city of Los Angeles to recover damages allegedly sustained due to city's breach of construction contract that had been awarded to contractor. The Superior Court of Los Angeles County, Lloyd S. Nix, J., ordered a non-suit and contractor appealed. The District Court, Shinn, P. J., held that complaint was sufficient to state a cause of action against city for breach of contract arising from city's alleged erroneous demand that contractor do certain work before work would be accepted.

Reversed.

1. Appeal and Error ⇐863

Where defendant's motions to exclude evidence, for a summary judgment and judgment on pleadings were tantamount to a general demurrer, review was limited to question as to whether under the facts

pleaded, complaint stated the substance of a cause of action on any theory.

2. Municipal Corporations ⇐374(1)

Statute exempting city from liability for any portion of expenses incurred by contractor in performance of his contract, did not bar maintenance of contractor's action against city for damages for breach of construction contract on ground that city required contractor to do certain repair work in addition to work covered by contract before acceptance of work. West's Ann.Streets & High.Code, § 5285.

3. Municipal Corporations ⇐360(1), 374(1)

Where a contractor has fully complied with plans and specifications of city contract, demand of city that contractor do further work before acceptance is a breach of city's duty under contract, and contractor could comply with demands of city and still sue for breach of contract. West's Ann.Streets & High.Code, §§ 5360–5365.

4. Municipal Corporations ⇐360(6)

Where contractor claimed that he had performed his contract with city according to its plans and specifications, but city demanded that he do certain repair work and stated that it would not accept contract until such repair work was done, contractor had no choice other than to comply with city's demand before he could receive any compensation and completion of work under pressure of economic necessity, did not amount to a voluntary act for which he would not be entitled to compensation. West's Ann.Streets & High.Code, §§ 5000 et seq., 5360.

5. Pleading ⇐69

Where contractor sued city for damages for breach of contract and alleged that breach of contract occurred when city wrongfully refused to accept work and demanded that certain work be performed before acceptance, reference in complaint to work done over as repair work was not an admission by contractor that any work was defective.

6. Municipal Corporations ⇐374(1)

Statute providing that a contractor who is aggrieved by any act or determination of superintendent of streets or engineer in relation to contract or to assessment, shall prior to the day fixed for hearing upon assessment appeal to legislative body, is not applicable to dispute between contractor and city which arose during course of work or to claims asserted by contractor against city for breach of contract arising out of city's alleged unlawful refusal to accept work unless certain other work was performed. West's Ann.Streets & High. Code, §§ 5360 et seq., 5362, 5366, 5367.

Grant & Popovich, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Alfred E. Rogers and John F. Feldmeier, Deputy City Attys., Los Angeles, for respondent.

SHINN, Presiding Justice.

The present action is against the City of Los Angeles to recover $13,042.51 damages allegedly sustained due to the city's breach of a construction contract awarded plaintiff under authority of the City Charter and the Improvement Act of 1911, Streets and Highways Code, section 5000 et seq. The gravamen of the amended complaint is that the city wrongfully compelled plaintiff to perform certain repair work not contemplated by his contract; recovery is sought for $11,741.23, the cost of said repairs, and for $1,301.28 interest which plaintiff paid for the use of money he was obliged to borrow in order to complete said repairs. Trial was to the court. Before the introduction of any evidence, defendant made motions to exclude evidence, for summary judgment and for judgment on the pleadings; the court granted these motions and ordered a nonsuit. Plaintiff appeals.

The amended complaint contains two causes of action. The material allegations of the first cause of action are the following: Plaintiff, a licensed contractor, enter-

ed into a written agreement on March 31, 1952 with the Board of Public Works of the City of Los Angeles whereby he agreed to grade and construct concrete sidewalks, curbs, driveways and a roadway within the 116th Street and Anza Avenue Improvement District in accordance with detailed plans and specifications which were made a part of the agreement; plaintiff performed the work in the presence of city inspectors in accordance with the plans and specifications and all of said work was accepted by them. On August 19, 1953 he notified defendant that the work had been completed in accordance with the plans and specifications and requested a final inspection; defendant thereupon informed him that his work would not be accepted until he made certain repairs; plaintiff at first refused to comply with this demand on the ground that he had fully performed all the requirements of the contract, but since the contract provided that he could not obtain compensation until the job was accepted as complete, plaintiff made the repairs under protest informing defendant that he reserved the right to seek additional compensation for the repair work he was wrongfully required to do; its cost was $11,741.23, which plaintiff was obliged to borrow; interest on the loan totaled $1,308.28. On December 21, 1953, plaintiff filed a claim for the cost of the repair work with the city clerk pursuant to the provisions of sections 362, 363 and 376 of the City Charter; the clerk referred the claim to the city council, which rejected it on April 16, 1954. On May 21, 1954, plaintiff filed a claim for the interest he paid on the loan; this claim was rejected by the city council after the commencement of the present action. On February 19, 1954 all the construction work was accepted by the city.

The second cause of action is a common count for work, labor and materials furnished. The answer denies that plaintiff had completed the work according to the terms of the contract at the time he requested a final inspection; it also denies that the instruments filed with the city clerk constitute claims as required by the City Charter.

Defendant's motions to exclude evidence, for summary judgment and for judgment on the pleadings were predicated on the following grounds, viz.: The city is exonerated from liability for damages by the terms of the contract; the amended complaint does not allege any breach of contract by the city; plaintiff is a volunteer and is not entitled to recover for the additional work; the original complaint alleged that plaintiff's damages were occasioned by the fault of a subcontractor and he is bound by his former pleading; defendant is not liable in quantum meruit; and that if acceptance of plaintiff's work was wrongfully refused, his remedy was an appeal to the city council from such unjustified refusal. Streets and Highways Code, sections 5366–8.

[1] Inasmuch as defendant's motions were tantamount to a general demurrer, our review is limited to the question whether, under the facts pleaded, the amended complaint states the substance of a cause of action on any theory. Bice v. Stevens, 136 Cal.App.2d 368, 289 P.2d 95; Miller v. McLaglen, 82 Cal.App.2d 219, 186 P.2d 48, and cases therein collected.

The first question to be considered is the sufficiency of the complaint to allege a breach of contract on the part of the city. Defendant argues that the complaint does not state a cause of action for the reason that the contract, in conformity with the requirements of the Improvement Act, exempts it from liability for any portion of the expenses incurred by a contractor in the performance of his contract. In this connection, the city relies on section 5285 of the Streets and Highways Code. That section provides: "The contract shall contain express notice that, in no case, except when it is otherwise provided by law or by charter will the city, or any officer thereof, be liable for any portion of the expense, nor for any delinquency of persons or property assessed."

[2] The exemption from liability is not a bar to the maintenance of the present action. The statute does not purport to relieve the city from liability for breach of contract; it simply states that the city may not be held accountable for the payment of the original contract price. See McBean v. City of San Bernardino, 96 Cal. 183, 186, 31 P. 49; Conlin v. Board of Supervisors, 99 Cal. 17, 23, 33 P. 753, 21 L.R.A. 474. The complaint does not seek recovery for sums alleged to be due under the contract. On the contrary, it proceeds on the theory that plaintiff is entitled to the damages occasioned by defendant's refusal to accept work which had been completed in accordance with the contract and its demand that he do other work not required by the agreement.

[3] When a contractor has fully complied with the plans and specifications at the time he notifies the city of the completion of his job, it becomes the duty of the street superintendent or the engineer to accept his work, prepare an assessment for the sum specified in the contract, and file the assessment with the city clerk for action thereon by the legislative body. Streets and Highways Code, §§ 5360–5. If plaintiff had fully performed his contract on August 19, 1953, the date of his notice to defendant, defendant's refusal of his work and its consequent demand that he do further work was a breach of its duty under the contract. Plaintiff could comply with the demands of the city and sue for breach of contract. Borough Const. Co. v. City of New York, 200 N.Y. 149, 93 N.E. 480; Anderson v. State, 103 Misc. 388, 175 N.Y. S. 229; Gearty v. Mayor, etc., of City of New York, 171 N.Y. 61, 63 N.E. 804; Mannella v. City of Pittsburgh, 334 Pa. 396, 6 A.2d 70.

[4] Defendant urges that even if it wrongfully refused to accept the work, plaintiff's performance of the additional work under protest was a voluntary act for which he is not entitled to compensation. This argument cannot be sustained. Under the plan adopted by the Improvement Act, plaintiff had no choice other than to comply with the city's demand. A contractor must look to the assessment levied against the individual property owners in order to obtain payment for his work. Payment is not forthcoming until the assessment has been prepared and approved by the city council. And the assessment is not prepared until the contractor's work has been finally accepted by the city. Streets and Highways Code, § 5360. Thus plaintiff could receive no compensation until he had performed the work demanded which he alleges was not required by the plans and specifications. He acceded to the demands under the pressure of economic necessity. Under the facts alleged we have no doubt of the involuntary nature of the work done by plaintiff under protest.

[5] It is also claimed in support of the judgment that the original complaint contained an admission that the improvements had not been completed in accordance with the terms of the contract at the time plaintiff requested a final inspection and that the admission is decisive against his claim for damages. This assertion is not borne out by the record. At no point in the original complaint is there an admission that the work had not been completed in conformity with the contract. Plaintiff's reference to the work done over as repair work was not an admission that any work was defective. The complaint alleged full performance by plaintiff.

[6] The next question to be considered is the contention of the city that plaintiff should have taken his dispute to the city council by means of an appeal. Defendant argues, in this connection, that an appeal was mandatory under the provisions of section 5366 of the Streets and Highways Code and that the filing of claims with the city clerk did not constitute compliance with the statute. Section 5366 reads as follows: "The owners, the contractor, or his assigns, and all other persons interested in any work done under this division, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets or engineer in relation thereto, or who claim

that the work has not been performed according to the contract in a good and substantial manner or who claim that any portion of the work for any reason was omitted or illegally included in the contract or having or making any objection to the correctness of the assessment or diagram or other act, determination or proceedings of the superintendent of streets or engineer, shall prior to the day fixed for the hearing upon the assessment appeal to the legislative body by briefly stating in writing the grounds of appeal. Any objection, appeal or protest not made at the time and in the manner hereinabove provided shall be deemed to be waived voluntarily by any person who might have made such appeal, protest or objection, and such person shall be deemed to have consented to the proposed assessment and any other matter on which objection, protest or appeal could be made." Plaintiff contends, on the other hand, that a contractor injured by a breach of contract on the part of the city need not appeal to the legislative body as a condition precedent to bringing an action for damages. We agree.

The enactment relied upon by defendant is to be found in Chapter 16 of the Improvement Act, which is entitled "Making and Confirming the Assessment." Section 5360 of the Streets and Highways Code, the first section in that chapter, provides that the assessment shall be made "after the contractor has fulfilled his contract to the satisfaction of the street superintendent, or the engineer if such power has been delegated to him * * *." Only after the assessment has been filed with the clerk is a time fixed "when all persons interested in the work done or in the assessment will be heard by the legislative body." Streets and Highways Code, § 5362. Under section 5366, an appeal may be filed at any time "prior to the day fixed for the hearing upon the assessment * * *." It is a matter of pure chronology that a grievance which is a matter of appeal to the city council cannot come before the council until all the work has been accepted by the city. Plaintiff was aggrieved in that acceptance of his work had been refused. Yet his grievance could not have been remedied by an appeal to the legislative body. Since the assessment procedure is conditioned upon final acceptance of the improvement by the street superintendent or the engineer, and since the work demanded had to be performed before acceptance of the improvements could be secured, plaintiff's dispute was not within the scope of the appellate procedure. The purpose of the hearing is to settle all questions as to the performance of the work in conformity with the contract and to see that the assessment is proper in all respects. The council may "confirm, amend, alter, modify or correct" the assessment, Streets and Highways Code, § 5367, and it may re-allocate the assessment among the individual property owners, see Johnson v. City of Los Angeles, 210 Cal. 240, 291 P. 395, but it could not have increased the amount of the assessment so as to include plaintiff's claim for damages. The rights to be settled in the hearing are those of the contractor and the property owners arising out of the contract and the council is to adjudicate all conflicting claims. The procedure prescribed by section 5366 is not applicable to disputes between plaintiff and the city which arose during the course of the work or to the claims asserted by plaintiff against the city for breach of contract.

The briefs discuss the question whether the city would be liable for interest but this is beside the question whether the complaint states a cause of action. The second cause of action is not strictly in quantum meruit. It incorporates by reference the material allegations of the first cause of action.

It is unnecessary to determine whether the claim filed by plaintiff would have constituted substantial compliance with the appellate procedure, had that procedure been applicable.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

149 Cal.App.2d 681

Glen GORE, Plaintiff and Respondent,

v.

Marcus L. WITT, Jr., Defendant and Appellant.

Civ. 5394.

District Court of Appeal, Fourth District, California.

April 2, 1957.

Action by contractor for foreclosure of mechanic's lien for clearing and leveling defendant's land. From a default judgment entered by the Superior Court, Kern, County, R. B. Lambert, J., and from an order refusing to vacate and set aside the default, the defendant appealed. The District Court of Appeal, Barnard, P. J., held that where allegation that defendant believed that he had been served on a certain day was not denied, and defendant employed his attorney within sixteen days after actual service, but attorney was misinformed at to true date of service, and notice of application for relief from default judgment was accompanied by a proposed answer containing allegations, which if proved, would defeat or largely defeat the plaintiff's claim, denial of motion for relief from default judgment was an abuse of discretion.

Judgment and order reversed.

1. Judgment ⇐138(2)

Under statute authorizing court to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, motion for relief from default judgment will be denied unless it appears that in arrangement for his defense, a defendant has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon an important business matter. West's Ann.Code Civ. Proc., § 473.

2. Appeal and Error ⇐957(1)
Judgment ⇐139

A motion for relief from default judgment is addressed to sound discretion of trial court, which discretion is to be exercised in conformity with the law and in a manner to subserve, and not to defeat, the ends of substantial justice, and if there is any doubt as to whether a default should be set aside, such doubt should be resolved in favor of the application, but the ruling on such a motion will not be reversed in the absence of a clear showing of an abuse of discretion.

3. Judgment ⇐139

Where allegation that defendant believed that he had been served on a certain day was not denied and he employed his attorney within sixteen days after actual service, but attorney was misinformed as to true date of service, and notice of application for relief from default judgment was accompanied by a proposed answer containing allegations, which if proved, would defeat or largely defeat the plaintiff's claim, denial of motion for relief from default judgment was an abuse of discretion. West's Ann.Code Civ.Proc., § 473.

4. Judgment ⇐163

On hearing of motion for relief from a default judgment, sufficiency of complaint upon which default judgment was based should be considered. West's Ann.Code Civ.Proc., § 473.

5. Appeal and Error ⇐865

Question as to whether or not a default was properly entered may be reviewed upon an appeal from the judgment.

6. Judgment ⇐163

On appeal from a default judgment, an objection that complaint failed to state facts sufficient to constitute a cause of action may be considered.

7. Judgment ⇐101(2)

Where complaint filed by contractor, who was engaged in business of leveling land, contained no allegations that he was duly licensed, complaint failed to state facts sufficient to constitute a cause of action for foreclosure of mechanic's lien for leveling of land for defendant, and entry of default judgment upon complaint was improper.

West's Ann.Code Civ.Proc., § 473; West's Ann.Bus. & Prof.Code, §§ 7031, 7049.

Deadrich, Bates & Stewart, Kenneth H. Bates, Bakersfield, for appellant.

J. O. Reavis, Delano, Vizzard, Baker & Sullivan, Lawrence N. Baker, Bakersfield, for respondent.

BARNARD, Presiding Justice.

The defendant has appealed from a default judgment, and from an order denying his motion to open and vacate the judgment of default and for other proper relief. These appeals have been consolidated and are presented on a clerk's transcript.

On May 3, 1956, the plaintiff filed a complaint for the foreclosure of a mechanic's lien in which he alleged that he was a contractor regularly and actively engaged in the business of leveling land; that in December, 1955, he entered into a contract with the defendant for the removal of trees from a certain 80 acres of land at the agreed price of $400; that on January 2, 1956, the parties agreed that the plaintiff should remove all trees and level this land in conformity with grade stakes placed thereon by a licensed surveyor, and the defendant agreed to pay him $400 for the removal of the trees and an additional $5,857.44 for leveling the land; that pursuant to these agreements and between January 10 and March 12 he removed all trees from the ground and stacked them on the property to be burned by the defendant, and completed the leveling work to the satisfaction of the said land surveyor; and that on March 28, 1956, he recorded a verified claim and notice of lien, a copy of which was attached to the complaint.

A summons was issued on May 3 which, with a copy of the complaint, was served on the defendant on May 7 in Tulare County where he lived. On June 8, 1956, the plaintiff filed a request for entry of the default of the defendant and on that day the clerk entered that default. On June 14, 1956, after a hearing at which the plaintiff testified and the notice of contractor's claim of lien and notice of lis pendens were received in evidence, the court ordered judgment in favor of the plaintiff in accordance with the prayer of the complaint. A written judgment and decree for foreclosure of mechanic's lien was signed by the judge on June 15, and was filed and recorded on June 18, 1956.

On June 22, 1956, the defendant filed notice that on July 2, 1956, he would move for an order vacating and setting aside the judgment entered and for such other relief as might be proper, and that the motion would be based on the grounds that the default judgment was taken against him through his mistake, inadvertence, surprise or excusable neglect. A proposed answer and counterclaim and two affidavits were attached to the notice of motion. The answer, among other things, admitted the agreement to pay $400 for the removal of the trees and admitted an agreement for the leveling work, but alleged that the agreed price for the leveling work was $5,208.64 instead of $5,857.44. It also denied that the work was completed on or about March 12, and alleged that "to this date" the work has not been completed. As a separate defense and by way of counterclaim it was alleged that the plaintiff had agreed to complete the work on or before February 15; that the plaintiff did not complete the job of leveling; that the plaintiff refused to remedy the defects in the work, and the defendant was required to expend $1,125 in partially completing the work and it would require an additional $2,000 to finish the leveling; and that the defendant had been otherwise damaged by the plaintiff's failure to complete the work by February 15. In his affidavits the defendant alleged that he had a good and substantial defense on the merits; that the summons was served on him in Tulare County; that he believed it was served on May 16, 1956; that he remembered that it was served on that day because that day was his birthday; that the 30-day period within which he was required to answer expired on June 15 (a Friday) and the first day on which default could have been

entered would have been June 18; that he retained an attorney to represent him on May 23 and told this attorney that he was served on May 16; that his attorney made a note of that fact on the back of the summons and complaint, and prepared his answer; that upon attempting to file the answer on the morning of June 18 he found that a judgment had been entered as of June 14; and that if said summons was served upon him on May 7 he was then and still is mistaken as to the date of service, by reason whereof he neglected to appear and answer until after his default had been entered.

Two affidavits were filed in opposition to the motion, one by the plaintiff's attorney and one by that attorney's secretary. The attorney alleged that on June 18, he received a telephone call from defendant's attorney requesting additional time in which to answer; that he refused this request on the ground that default judgment had been obtained on June 14, and a formal judgment signed on June 15; and that he had been told by the constable who served the summons that the defendant had attempted to persuade the constable to sign an affidavit to the effect that the service of summons had been made on May 17 instead of May 7. The secretary's affidavit alleged that she had received the original returned summons on May 9, 1956 with a bill for services in serving the same; that on May 9 she sent the constable a check in payment for these services; and that this check had been paid on May 17. The motion to set aside the default judgment was heard on July 2, 1956, and an order was entered denying the motion and giving the defendants 20 days stay of execution. These appeals followed.

[1, 2] Ordinarily, a motion for relief from a default judgment, under section 473 of the Code of Civil Procedure, will be denied unless it appears that in arranging for his defense a defendant has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon an important business matter. Elms v. Elms, 72 Cal.App. 2d 508, 164 P.2d 936. It is well settled that such a motion is addressed to the sound discretion of the trial court; that this discretion is to be exercised in conformity with the law and in a manner to subserve, and not to defeat, the ends of substantial justice; that the ruling on such a motion will not be reversed in the absence of a clear showing of abuse of discretion; that it is the policy of the law that every case should be heard on its merits, and section 473 is a remedial provision to be liberally construed to the end that cases be disposed of upon their merits; that for these reasons a reviewing court listens more readily to an appeal for an order denying relief than one granting relief; and that where there is any doubt as to whether a default should be set aside such doubt should be resolved in favor of the application. Brill v. Fox, 211 Cal. 739, 297 P. 25; De Mello v. De Mello, 124 Cal.App.2d 135, 268 P.2d 26.

[3, 4] While inadvertence or negligence on the part of the defendant here appears, the showing with respect to whether or not they were excusable is not too strong. However, the allegations that the defendant believed he had been served on May 16, and that he so informed his attorney were not denied. It appears without conflict that he employed his attorney within sixteen days after the actual service, that the attorney was misinformed as to the true date of service, and that the default was taken as soon as possible. Within four days after requesting an extension of time and learning that a default had been entered, notice of an application for relief was given. This was accompanied by a proposed answer containing allegations which, if they were proved, would defeat or largely defeat the plaintiff's claim. In addition to these matters the sufficiency of the complaint upon which the default judgment was based should have been considered. That complaint alleged that the plaintiff was regularly engaged in business as a contractor and it failed to allege that he was a duly licensed contractor at the time in question, as required by section 7031 of the Business and Professions Code. It contained no allegations showing that the work in question came within the exception

provided for in section 7049 of that code, which provides that the requirement for a license shall not apply to work incidental to farming. So far as the complaint is concerned it might well be that this land was being leveled for subdivision or manufacturing purposes. In Fraenkel v. Bank of America, 40 Cal.2d 845, 256 P.2d 569, although it was held that a demurrer was properly sustained where the complaint failed to allege that the plaintiff had a license, it also appeared that the complaint might be amended and it was further held that a denial of leave to amend constituted an abuse of discretion. At the time the motion to vacate in the instant case was heard it appeared, from certain other facts alleged in the defendant's answer, that the complaint could be so amended as to comply with the statute, but no such amendment was proposed or made. Under all of the circumstances shown by the record it might well be held that an abuse of discretion appeared in the denial of the motion.

[5–7] The defendant has also appealed from the default judgment entered. The question as to whether or not a default was properly entered may be reviewed upon an appeal from the judgment. Pickerill v. Strain, 196 Cal. 683, 239 P. 323. On an appeal from a default judgment an objection that the complaint failed to state facts sufficient to constitute a cause of action may be considered. Martin v. Lawrence, 156 Cal. 191, 103 P. 913. Under section 7031 of the Business and Professions Code the plaintiff was not entitled to either bring or maintain any action of this nature without both alleging and proving that he was duly licensed, unless facts were alleged showing that he came within the exception provided for in section 7049 of that code. The complaint here contained no such allegations, no amendments were allowed or made, and the complaint on its face disclosed that it did not comply with the statute. While the complaint could have been amended, and it would have been an abuse of discretion to refuse leave to amend, it did not state a cause of action at the time the default judgment was entered. It cannot be said that a default judgment was properly entered when the complaint, as it then stood, disclosed on its face that it did not state a cause of action and that it did not contain allegations required by law. Apparently, the complaint can be amended to sufficiently state a cause of action but if such an amendment is hereafter made a new service on the defendant will be required and he will have an opportunity to defend the action on its merits.

Since the judgment must be reversed, it is obvious that the order refusing to set aside the judgment and default should also be reversed. The judgment and the order appealed from are reversed.

GRIFFIN and MUSSELL, JJ., concur.



149 Cal.App.2d 702

Joseph GEORGE, Distributor, a corporation, Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State of California, Russell S. Munro, Director of Alcoholic Beverage Control, and Norman W. Finney, Respondents.

Civ. 17188.

District Court of Appeal, First District, Division 2, California.

April 3, 1957.

Mandamus proceeding by holder of two distilled spirits wholesaler's licenses against Department of Alcoholic Beverage Control and Director of Alcoholic Beverage Control and another to obtain annulment of revocation of second license. The Superior Court, Santa Clara County, Leonard R. Avilla, J., denied writ, and holder appealed. The District Court of Appeal, Comstock, J. pro tem., held that revocation of distilled spirits wholesaler's license after department found

that continuance of license was contrary to law was matter within department's discretion, and trial court would have no authority under rules of mandamus to control such discretion.

Judgment affirmed.

1. Intoxicating Liquors ⇐129

State Board of Equalization and Department of Alcoholic Beverage Control, as administrative agencies of state deriving their powers from the legislature under constitutional authority, had power to promulgate rules such as rule pertaining to surrender of license on closing of business and to interpret such rules.

2. Intoxicating Liquors ⇐110

Rules promulgated by State Board of Equalization and Department of Alcoholic Beverage Control and such agencies' interpretations of such rules cannot contravene clear provisions of law, and the interpretations cannot be arbitrary, inconsistent, contradictory, or unreasonable.

3. Intoxicating Liquors ⇐58

Where holder of distilled spirits wholesaler's license in county in which quota of six such licenses had been established, purchased second such license from third party and had second license issued in holder's name but did not conduct liquor business at premises covered in second license, which was continued to be counted in calculating the license quota, issuance of second license was improper. West's Ann.Bus. & Prof. Code, §§ 23778, 23779, 23781.

4. Administrative Law and Procedure ⇐330
Statutes ⇐219

Where statute needs construction or implementation by rule or regulation, or valid rule requires interpretation, administrative agency charged with its enforcement may reasonably furnish such construction or interpretation in aid of the purpose of the law, and such contemporaneous administrative construction is entitled to great weight and generally will not be departed from by the courts unless clearly erroneous or unauthorized.

5. Administrative Law and Procedure ⇐413
Statutes ⇐219

In absence of ambiguity, erroneous administrative interpretation of statute or valid rule does not give legal sanction to a long continued incorrect construction.

6. Statutes ⇐219

Rules or interpretations conflicting with plain meaning of a statute are void.

7. Licenses ⇐37

Intent is controlling factor where constructive delivery of document, such as a license, is in question, and license is as fully effective without being physically passed from one party to other as if so passed if parties meant document to be operative without manual tradition.

8. Intoxicating Liquors ⇐58

Where holder of distilled spirits wholesaler's license purchased second such license from third party and applied for issuance of such second license in holder's name but stated that license was to be issued for record only and held by state board of equalization, and second license was issued and recorded in holder's name but was not physically delivered to holder, license was issued and constructively delivered, and, therefore, holder would not be heard to contend that, because of nonissuance of second license, statutes prohibiting issuance of second license to same person were not violated. West's Ann.Bus. & Prof. Code, §§ 23779, 23781.

9. Intoxicating Liquors ⇐109

Where distilled spirits wholesaler's license had been issued and was being used, contrary to law, and holder claimed ownership, dominion, and a measure of control over license, adjudication of validity of license and of interpretation of rule under which license was issued was proper, and order of revocation as of its effective date, wiped out any right of further exercise of permission purportedly granted by license.

10. Equity ⇐65(2)

Where president of corporation, which already held a distilled spirits wholesaler's license, in application for issuance of second license in corporation's name, made, in

verified application for second license, statement, known to be false, that corporation intended in good faith to conduct business at location mentioned in second license, corporation was in court with unclean hands in seeking annulment of revocation of second license, and equitable estoppel would not operate against state to prevent revocation of second license which had been issued contrary to law.

11. Estoppel ⇐54

One who acts with full knowledge of plain provisions of law and their probable effect upon facts within his knowledge and who is represented by counsel, cannot claim ignorance of true facts or reliance to his detriment upon conduct of person claimed to be estopped.

12. Estoppel ⇐54

Ignorance of true facts and reliance to one's detriment upon conduct of person claimed to be estopped are essential elements of equitable estoppel.

13. Equity ⇐29
Estoppel ⇐62(1)

Neither doctrine of estoppel nor any other equitable principle may be invoked against a governmental body to defeat effective operation of policy adopted to protect the public or to frustrate purpose of the government's laws or thwart its public policy.

14. Mandamus ⇐87

Revocation of distilled spirits wholesaler's license after Department of Alcoholic Beverage Control found that continuance of license was contrary to law was matter within department's discretion, and trial court would have no authority under rules of mandamus to control such discretion. West's Ann.Bus. & Prof.Code, §§ 23778, 23779, 23781.

Gallagher, Ruffo & Rainville, Charles R. Wayland, San Jose, for appellant.

Edmund G. Brown, Atty.Gen., Charles A. Barrett, Deputy Atty. Gen., for respondents.

COMSTOCK, Justice pro tem.

This is an appeal from a judgment denying to appellant a peremptory writ of mandate directed to the Department of Alcoholic Beverage Control of California and the Director of Alcoholic Beverage Control.

The proceedings were instituted for the purpose of vacating and annuling an order of respondent department and its director revoking a distilled spirits wholesaler's license standing in the name of appellant and originally acquired by it in 1953.

For convenience in this decision the appellant, petitioner below, may be referred to as the "petitioner," the Department of Alcoholic Beverage Control of California as the "Department," the Director of Alcoholic Beverage Control, Russell S. Munro, as the "Director" and the State Board of Equalization of California as the "Board."

All the pertinent questions presented by the appeal arise from the petition and attached exhibits, the return filed by way of answer, the findings of fact and conclusions of law and the judgment. No testimony was taken at the trial. Attached to the petition was a transcript of proceedings, including testimony taken at the hearing before the Department conducted by the Hon. Ivores R. Dains, hearing officer.

As stated in appellant's opening brief, the case does not present a factual dispute. The grounds urged for reversal are designated as appellant's "position" on this appeal and are as follows: "(1) The State Board of Equalization was empowered and authorized to promulgate Rule 65. The Board was likewise legally authorized to reasonably construe said rule. (2) The construction placed upon Rule 65 permitting the holding of "frozen", or "inactive" or surrendered distilled spirits wholesaler's licenses was reasonable and within the power and authority of the Board. (3) Said construction had been accepted and had been unchallenged for many years

prior to January 1, 1955, the date upon which the Department of Alcoholic Beverage Control succeeded to the powers and authority of the State Board of Equalization pursuant to Constitutional amendment. (4) Petitioner was never issued an effective license covering the premises in question for the reason that no license certificate was ever delivered to it. The physical custody and possession of the several certificates at all times remained with the Board and the Department without petitioner having access to them. (5) As an administrative agency the Department was without power to change or repudiate the long standing interpretation placed by its predecessor agency upon Rule 65 particularly where petitioner relied upon such interpretation to its detriment. The power and authority of the Department to abolish, change or otherwise interpret this rule as to present or future applications for licenses is not questioned. (6) Because of the manifest injustice inherent in the action of the Department the doctrine of equitable estoppel is applicable and should be invoked. (7) The interests of justice at least required reasonable notice to petitioner of the contemplated action of the Department to the end that petitioner might have been given an opportunity to dispose of the license or to utilize it in connection with premises outside of the City of Salinas."

We find no error in the proceedings or judgment.

Rule 65 of the Rules of the State Board of Equalization (Title 4, California Administrative Code) in effect in July, 1953, reads as follows: "65. *Surrender of License on Closing Business.* Every licensee who surrenders, abandons or quits his licensed premises, or who closes his licensed business for a period exceeding two weeks, shall, within ten days after surrendering, quitting, or abandoning the licensed premises, or closing his business, surrender his license or licenses to the Board."

[1, 2] Appellant contends that the Board and the Department, as administrative agencies of the state deriving their powers from the legislature under constitutional authority, had power to promulgate rules such as Rule 65 and to interpret them. With this broad premise, we think there can be no quarrel. California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028. We do not agree, however, that such rules or interpretations may contravene clear provisions of law or that arbitrary, inconsistent, contradictory or unreasonable interpretations of rules may lawfully be adopted. Blatz Brewing Co. v. Collins, 69 Cal.App.2d 639, 160 P.2d 37; American Distilling Co. v. State Board of Equalization, 55 Cal.App.2d 799, 131 P.2d 609. The point here is whether the Board, in preparing a license certificate for appellant (it already having one license for premises in the same city and not intending to do business at the premises covered by the second license) and keeping it in its possession, but nevertheless made out as issued and recorded in appellant's name, with license fee fully paid by it, and charging it against the quota of licenses authorized for Monterey County, under all circumstances present, acted unlawfully and in excess of authority. Respondents do not here question the validity of Rule 65. They challenge the right of the Board to have applied said rule as it did and claim that it contains no authority for the questioned acts done purportedly under it in this case. They further urge that the action taken by the Department in revoking the license was proper and fully supported by the record and, hence, that there is no duty to vacate or annul the order or reinstate appellant's license.

The essential facts are as follows:

Petitioner corporation for a period of years had owned a distilled spirits wholesaler's license for premises at 310 Monterey Street, Salinas, California. This license may for convenience be referred to as "License No. 1." On or about July 14, 1953, petitioner applied to the Board for the transfer to it of another license of the same type covering the premises at 124 Monterey Street, Salinas, which had theretofore been issued to and was then held by

Andrew K. Thanos Co., Inc. and paid the Board the prescribed fee of $250. Petitioner paid the Thanos Co. $25,000 for said license. After investigation, a report was filed with the Board by Mr. Jerry M. O'Brien, District Liquor Administrator for District Seven, recommending such transfer and stating that the license certificate when issued was to be held by the Board under the provisions of Rule 65. The report and recommendation were approved by the Board and on or about August 25, 1953, a distilled spirits wholesaler's license, Certificate No. G–254A, for the period July 1, 1953, to June 30, 1954, was issued and recorded in the name of petitioner by the Board, but not physically delivered to petitioner. Contemporaneously with the application for said license a letter was written by the attorney for petitioner to the Board stating that the license was to be issued for record only and to be held by the Board under Rule 65. It was held by the Board purportedly as surrendered under Rule 65. We may refer to this license as "License No. 2."

When petitioner purchased said license from the Thanos Co. and at all times when said proceedings in connection with it were being taken, petitioner did not intend to keep any stock of liquor at 124 Monterey Street, or to conduct business there, or to lease or otherwise possess or acquire said premises or actively use said license in connection therewith.

A quota of six distilled spirits wholesaler's licenses had been established by the Board for Monterey County and License No. 2 was counted in calculating the number issued therein and was charged against said quota.

In petitioner's verified application for the license, Mr. Joseph George, petitioner's president, stated petitioner intended to conduct business at 124 Monterey Street, though this was not true. He offered as an explanation of this statement that "If our attorney thought it was procedural, I believed he didn't believe it should be left blank."

For the year July 1, 1954 to June 30, 1955, petitioner applied and paid for, and the Board issued and held a renewed license, in like manner as before, and for the year July 1, 1955 to June 30, 1956, petitioner applied to the Department for a further renewal and paid the required fee, but, though the Department held the fee, petitioner was not notified of its action on this application.

On or about January 3, 1955, Norman W. Finney filed with the Department the accusation initiating the proceedings which resulted in the revocation of petitioner's license.

On July 28, 1953, Baruh Liquors also applied for a distilled spirits wholesaler's license for the premises at 124 Monterey Street, this being a transfer of a license previously held by Baruh Liquors for 6 Central Ave., Salinas. This transfer was duly approved and the license issued and continuously since said issue a license covering said 124 Monterey Street has been held by Baruh Liquors, which has actually conducted its business there, the license being one of the quota of six established for Monterey County.

Mr. Joseph George never personally consulted with anyone representing the Board on the specific question whether petitioner would be allowed to purchase and hold a second license in the City of Salinas or whether, in view of the fact that petitioner did not intend to keep a stock of liquor or conduct business at 124 Monterey Street, it would be lawful for it to own said License No. 2. It does not appear that anyone acting for petitioner had any representations on these subjects specifically made to him by anyone representing the Board. However, Mr. Jerry M. O'Brien testified that the holding of a license for record under the provisions of Rule 65 was a uniform practice of the Board and had been such throughout the state for many years. He stated that other than Rule 65 he knew of no written authority for such practice. He said he had discussed the matter with the legal counsel for the Board at Sacramento; that he knew of no written interpretation of Rule 65 authorizing the practice, but that it

had been his own interpretation that said Rule permitted it, and that under this interpretation it would have been possible for any holder of a distilled spirits wholesaler's license in Monterey County to have bought up the entire quota of licenses for said county and have them held for record under Rule 65 as inactive licenses as was done in petitioner's case.

Section 23778 of the Business and Professions Code reads: "A distilled spirits wholesaler's license shall not be held by any person unless at all times throughout the license year he has on his wholesale premises a reasonable stock of distilled spirits, as determined by the department, for which he has fully paid lawful money or its equivalent."

Section 23779 of the Business and Professions Code reads: "No wholesale license shall be issued to any person who does not in good faith actually carry on or intend to carry on a bona fide wholesale business by sale to retail licensees of the alcoholic beverage designated in the wholesale license, and the department may revoke any wholesale license when the licensee fails for a period of 45 days actively and in good faith to engage in the wholesale business and shall revoke any distilled spirits wholesaler's license held by any person who fails to comply with applicable provisions of Sections 23378, 23379, 23776, 23777, and 23778. Sale by a wholesale licensee to himself as a retail licensee is not the transaction of a bona fide wholesale business."

Section 23781 of the Business and Professions Code reads: "Not more than one distilled spirits manufacturer's license, or one rectifier's license, or one distilled spirits wholesaler's license shall be issued to any one person in any one city."

[3] There was no attempt to comply literally with said sections 23779 and 23781 of the Business and Professions Code. We think license No. 2 was issued in violation of the plain provisions of said sections. The evidence is practically undisputed in support of the judgment and of the action of the Department in revoking said license. The argument of the appellant, however, is that the revocation resulted solely from what was at best a claimed technical violation of said sections; that there is no evidence or charge that petitioner was guilty of fraud or corrupt dealing; that every step taken by petitioner had the full approval and acquiescence of the Board; that the Board's interpretation of Rule 65 permitting the holding of "frozen" or "inactive" or surrendered distilled spirits wholesaler's licenses was reasonable and within the authority of the Board; that said interpretation had been unchallenged for many years; that petitioner was never actually issued an effective license covering the premises in question; that the Department, as the successor of the Board, was without power to change or repudiate the long standing interpretation placed by the Board upon Rule 65, particularly where petitioner relied upon such interpretation to its detriment; that because of the manifest injustice inherent in the action of the Department, the doctrine of equitable estoppel is applicable and should be invoked and that the interests of justice required reasonable notice to petitioner of the contemplated action of the Department to the end that petitioner might have been given an opportunity to dispose of the license or utilize it in connection with premises outside the City of Salinas.

In considering the appeal by petitioner from the decision of the Department, the Alcoholic Beverage Control Appeals Board held that compliance with section 23778 of the Business and Professions Code had been expressly waived by the Board, but that there had been a clear violation of sections 23779 and 23781 and petitioner had not been prejudiced by the Department's ruling that section 23778 had been violated. We are not called upon here to decide, and we express no opinion with respect to, the effect of section 23778. The judgment of the trial court held that sections 23779 and 23781 were violated and that under all the facts presented the revocation of petitioner's license was proper. It is with this judgment that we are concerned on this appeal.

[4–6] Much of petitioner's position is based upon the contentions that in promulgating Rule 65, and interpreting said rule as permitting the practice testified to by Mr. O'Brien, the Board acted reasonably and within its powers to implement the statutes by regulations in aid of their purposes. We find nothing in Rule 65 which even faintly hints at justifying the granting of a second distilled spirits wholesaler's license to a licensee already holding one for premises in the same city or to a person who does not in good faith actually carry on or intend to carry on a bona fide wholesale business as provided by the statute. Sections 23779 and 23781 expressly and in clear, unmistakable, mandatory terms prohibit such issuance. Rule 65 deals with the surrender of licenses to the Board by licensees who have surrendered, abandoned or quit their licensed premises, or closed them for a period exceeding two weeks. While it is true that where a statute needs construction, or implementation by rule or regulation, or where a valid rule requires interpretation, an administrative agency charged with its enforcement may reasonably furnish such construction or interpretation in aid of the purpose of the law, and that contemporaneous administrative construction is entitled to great weight and courts generally will not depart from it unless it is clearly erroneous or unauthorized, Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 156 P.2d 1, it is also firmly established that, "Where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction." California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 294, 140 P.2d 657, 661, 147 A.L.R. 1028; Gunn v. State Board of Equalization, 123 Cal.App.2d 283, 287, 266 P.2d 840. Rules or interpretations in conflict with the plain meaning of a statute are void. Hodge v. McCall, 185 Cal. 330, 197 P. 86.

[7–9] In attempting to justify what the Board did for petitioner, it is argued that section 23781 does not prohibit the holding for record of licenses as was done in this case; that in enacting the section the legislature did not attempt to define "issue"; that the mere preparation of a license certificate in the name of petitioner, coupled with immediate surrender without delivery to the applicant, did not constitute issuance; that public policy and public welfare were neither subverted nor contravened by the rule or by the Board's interpretation of either the statute or Rule 65. Substantially the same argument is advanced with respect to section 23779. Our view is that the word "issue" is too clear in its meaning to require further definition and that the preparation of the license certificate in petitioner's name and acceptance of a concurrent surrender, the charging of a license fee, the recording of the license as held by or for petitioner and the counting of it against the quota for the County of Monterey, all done notwithstanding petitioner already had another license in Salinas and that it did not intend to conduct business at all at 124 Monterey Street, was clearly the issuance of a license in direct violation of both said sections. It is of no aid to say that the license was merely held "for record" or "inactive," or that the certificate was not physically possessed by the licensee. The question of issue or delivery of the license is one of intent where no physical possession of the certificate is transferred. Here petitioner paid a former licensee $25,000 for the license and in 1953–'54 and 1954–'55 paid the Board the required fees for the license and renewals and in 1955 tendered the renewal fee which was held without action by the Department, obviously pending the outcome of this litigation. The recommendation by Mr. O'Brien in 1953 was that the license *when issued* be held under Rule 65 and the letter from petitioner's attorney to the Board in connection with the July, 1953 application stated that the license was *to be issued* for record only and to be held by the Board under Rule 65. Intent is the controlling factor where constructive delivery of a document is in question and where the parties mean it to be operative without manual tradition, it is as

fully effective as if physically passed from one to the other. It seems to us highly inconsistent to claim at one point that the license was never issued and, hence, sections 23779 and 23781 were not violated, and at another that a license issued to petitioner was surrendered upon its abandoning or quitting business at the licensed premises, and at still another that an injury was done to petitioner by the Department revoking its license. If the license was never issued, it never came into existence as such and there was nothing to revoke; petitioner had nothing to lose. We think the situation is, that the license was issued and constructively delivered; that petitioner acquired and enjoyed certain privileges thereunder, among them the "freezing" of one of the quota of six licenses established for Monterey County, thereby eliminating competition to some extent and affording petitioner the benefit of some control over the permission to do a wholesale liquor business in the county which might have been available to another had it not been tied up by the method employed. The license having been issued and being used contrary to the express terms of the law, and petitioner claiming ownership, dominion and a measure of control over it, it was proper to adjudicate the validity or invalidity of it and of the interpretation placed upon Rule 65 in handling it. The order of revocation, as of its effective date, wiped out all right of any further exercise of the permission purportedly granted by the license.

In Board of Trustees of Leland Stanford Junior University v. State Board of Equalization, 1 Cal.2d 784, 37 P.2d 84, 96 A.L.R. 775, it was held to be the mandatory duty of the Board to revoke a license granted in direct violation of section 172a of the Penal Code.

[10] To appellant's contention that the doctrine of equitable estoppel should be applied to prevent the revocation of its license, respondents reply that elements of equitable estoppel are lacking here; that petitioner comes into court with unclean hands, its president having verified a statement in the application that it intended in good faith to conduct business at 124 Monterey Street, known to be false, and that estoppel will not operate against the state so as to frustrate the purpose of its laws or thwart its public policy. We agree that equitable estoppel should not be applied in this case.

[11–13] There is no evidence that petitioner parted with the $25,000 paid to the Thanos Co. because of anything said or done by the Board or its agents. It may well have bargained for this license in the open market in reliance upon the "common knowledge" that this is done "notwithstanding the necessity of the Board's approval," as was commented upon in Mollis v. Jiffy-Stitcher Co., 125 Cal.App.2d 236, 270 P.2d 25. True, it paid its license fees to the Board in the hope and expectation that the license would be issued to and held for it, but this was done, so its hopes were not destroyed and it was not misled. Petitioner has been disappointed, perhaps, that the status of the "inactive" or "frozen" or "surrendered" license has not been permitted to remain stationary for an indefinite time, but the record is silent as to any representation, practice, custom or interpretation of guaranteeing to anyone a fixed or permanent status as a licensee. Moreover, we think where one acts with full knowledge of plain provisions of law, and their probable effect upon facts within his knowledge, especially where represented by counsel, he can neither claim (1) ignorance of the true facts or (2) reliance to his detriment upon conduct of the person claimed to be estopped, two of the essential elements of equitable estoppel. Safway Steel Products, Inc., v. Lefever, 117 Cal.App.2d 489, 256 P.2d 32; Bear Creek Co. v. James, 115 Cal.App.2d 725, 252 P.2d 723. While the once strict rule against invoking equitable estoppel against the state or its agencies has been somewhat relaxed, so that government is now held in some instances to the same standards of rectitude as individuals, Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323; La Societe Francaise, etc. v. California Employment Commission, 56 Cal.App.2d 534, 133 P.2d 47;

Garrison v. State of California, 64 Cal.App. 2d 820, 149 P.2d 711; Dettamanti v. Lompoc Union School District, 143 Cal.App.2d 715, 300 P.2d 78, still it is the law that "neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public" and that the government may not be estopped "so as to 'frustrate the purpose of its laws or thwart its public policy.'" County of San Diego v. California Water & Telephone Co., 30 Cal.2d 817, 826, 186 P.2d 124, 130, 175 A.L.R. 747. To permit in this case the issuance of the license to have any continued validity or recognition against the clear expression of legislative purpose in sections 23779 and 23781 would definitely do violence to the doctrine stated in the case last cited. See, also, Taylor v. Spear, 196 Cal. 709, 238 P. 1038; Western Surgical Supply Co. v. Affleck, 110 Cal.App.2d 388, 242 P.2d 929.

Since we hold that no estoppel arose, we deem it unnecessary to discuss or decide whether the "clean hands" doctrine applies here.

[14] In advancing the argument that fair dealing and the interests of justice required that petitioner be given more notice and an opportunity to dispose of the license, petitioner admits that no specific authority has been found to sustain this point. Reference is made to Reynolds v. State Board of Equalization, 29 Cal.2d 137, 173 P.2d 551, 174 P.2d 4, wherein the Board was upheld in suspending rather than revoking a license for a violation of a statute and it is argued that suspension was the most the Department should have imposed and that revocation was an abuse of discretion. We do not so view it. It was a matter of discretion with the Department to revoke the license once it found that the continuance of it was contrary to law. The trial court had no authority under the rules of mandamus to control that discretion. In Board of Trustees of Leland Stanford Junior University v. State Board of Equalization, supra, the court directed the Board to cancel the license, holding that to be proper. Thus no abuse occurred. While, as stated in the Reynolds case, the possibility of merely suspending the license was not considered in the Stanford case, still it stands as authority for revocation. Neither this nor the trial court may direct the Department how to act within discretionary bounds.

The judgment is affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



149 Cal.App.2d 666

C. C. MOORE & CO., Engineers, Plaintiff and Appellant,

v.

John R. QUINN, County Tax Assessor of the County of Los Angeles, et al., Defendants and Respondents.

Civ. 21829–21832.

District Court of Appeal, Second District, Division 1, California.

April 2, 1957.

Hearing Denied May 29, 1957.

Actions to recover taxes paid under protest. The Superior Court, Los Angeles County, Joseph W. Vickers, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Doran, J., held that since component parts, manufactured by others and delivered to job sites to be assembled by contractor pursuant to contracts with city to install complete, assembled steam-generating plants, were under absolute control of cities and cities had made partial progress payments based on value of such parts pursuant to contracts, the beneficial and possessory interest in such parts, though not yet attached or assembled as part of plants, was in city and contractor was not taxable in respect to such parts.

Judgment reversed and judgment ordered for plaintiff in accordance with opinion.

1. Contracts ⇐143

Detached provisions of contract standing alone, except when viewed in relation to instrument as a whole, are not determinative of question as to when title to or beneficial interest in tangible personalty vests, unless such provisions precisely answer the query.

2. Taxation ⇐184

Where component parts, manufactured by others according to detailed specifications in contract and delivered to job site for assembly by contractor pursuant to contract prepared by city to install complete, assembled steam-generating plant, were under absolute control of city and city had made partial progress payments based on their value pursuant to contract, true beneficial and possessory interest in such parts, though not yet attached or assembled as part of plant, was in city, and contractor was not taxable in respect to such parts. West's Ann.Rev. & Tax.Code, § 405.

3. Taxation ⇐79

The beneficial interest in taxable property on the first Monday in March, and not any technical legal concept of title, determines to whom such property should be assessed for taxation. West's Ann.Rev. & Tax.Code, § 405.

4. Contracts ⇐175(2)

Evidence of the surrounding circumstances should be considered in determining intention of contracting parties.

5. Contracts ⇐155

Contract will be construed against party who prepared instrument and in favor of the other contracting party.

6. Municipal Corporations ⇐226, 956(1)

Municipalities, whether acting as contracting parties, exercising taxing power, or otherwise engaged, are subject to established principles of ethics and fair dealing.

James E. Neville and James Neville, Los Angeles, Russel Shearer, Shearer, Thomas & Lanctot, San Francisco, Robert H. Heeb, San Francisco, of counsel, for appellant.

Harold W. Kennedy, County Counsel, Gordon Boller, Asst. County Counsel, Alfred Charles DeFlon, Deputy County Counsel, Los Angeles, for respondents, except City of Los Angeles.

Roger Arnebergh, City Atty., Spencer L. Halverson, Deputy City Atty., Los Angeles, for respondent City of Los Angeles.

DORAN, Justice.

The present appeal involving four actions consolidated for trial and appeal, questions the assessment and taxation of certain component parts of steam boilerplants, manufactured by third parties according to minute and detailed specifications prescribed by the municipalities in written contracts with appellant engineers, and delivered directly to the job sites by the manufacturers on or before the first Mondays in March of the years, 1953 and 1954.

As stated in appellants' brief, "Those parts which had been affixed or attached permanently to the boiler structures were not assessed, the assessor presuming title had vested in the municipalities. The assessments on the tools, equipment, and consumable supplies provided by the plaintiff for the purpose of the jobs were voluntarily paid by the plaintiff and are not the subject of this action."

The appellant duly protested any assessment of the unattached boiler parts, and upon denial thereof, paid the taxes under protest and instituted the present actions against the County Tax Assessor, of the County of Los Angeles and the Cities of Burbank, Glendale and Los Angeles, to recover back the taxes so paid. The judgment of the trial court sustained the assessments whereupon the plaintiff contractor instituted the present appeal.

The contracts and specifications involved herein were prepared by the cities and submitted to those wishing to bid on the jobs. And, as appellant avers, "The plaintiff's

position required that he accept the contracts as drawn and meet the detailed specifications of the cities or not submit the bid. * * * The property involved on each of the jobs was essentially the same. * * * The plaintiff was in no way concerned with the manufacture of these component parts but it was obligated to assemble them into the completed steam generating units after their arrival at the job sites. Basically comparable to a toy erector set, this assembly process required that the plaintiff do little more than weld or bolt the prefabricated parts into place. * * * Each component part was specifically manufactured for the unit in which it was to be incorporated and thus was incapable of use elsewhere without uneconomical expenditures for alteration".

The job sites were owned, selected and controlled by the respective cities; fences and guards were maintained by the cities, and after delivery of the parts to the job sites, the plaintiff contractor was unable to remove such parts without a permit. The cities' control over the taxed, component parts so delivered, extended through the assembly periods, "during which", as appellant states, "their possession of said property is subject only to the plaintiff's right and obligation under the contracts to assemble the component parts for the benefit of the cities upon foundations constructed by the latter".

According to the stipulated facts, plaintiff, in performance of its contract, purchased from various manufacturers and suppliers the component parts which were shipped directly to the job sites. The bills of lading, shipping orders or manifests therefor recited that such parts were "consigned to the City of Burbank Power Plant, 164 West Magnolia Boulevard, Attn: C. C. Moore & Co., Engrs., Burbank, California". Invoices or bills for such shipments were sent to the plaintiff contractor.

As stipulated, "all payments which were made to said sellers and suppliers for said component parts and materials were made by said plaintiff and no such payment or payments were required to be made by the City of Burbank. That upon arrival of said property at the job site plaintiff invoiced said City therefor, and thereupon said City made progress payments to plaintiff of 50% of the value of the property so invoiced, in accordance with the terms of the contract" between plaintiff and the City.

It was further stipulated that the progress payments so made by the City to plaintiff, as received, were "deposited in its (plaintiff's) bank account; that in its property statement made to the defendant Assessor for tax purposes plaintiff reported its solvent credits and included therein the amount of its balance in said bank account as of the first Monday in March and was assessed and taxed in the County of Los Angeles on the basis of such statement".

In respect to this matter it is contended that "Thus, the plaintiff is not only a victim of an illegal assessment but has also suffered because of the unconstitutional imposition of double taxation. It was taxed once upon these partial payments received and deposited in its bank account and again on the full value of the component parts thus partially paid for and delivered to the job sites". The tax so assessed and paid under protest on this unattached property at the Burbank job was $5,124.34; at the Glendale job site, $1,786.31; at the Los Angeles site in 1953, $37,373.10, and in 1954, $522.69.

In sustaining the validity of the assessment, the trial court found that the contract was one "for plaintiff to furnish and erect for said City, complete and ready for operation at the City's steam plant site in Burbank, California, a boiler unit for a total lump sum price of $812,572.00, and was not a sale or a contract for the sale or delivery of component parts thereof or materials therefor".

The formal contracts set forth the detailed specifications in respect to the different jobs which, as hereinbefore indicated, were similar in nature. These contracts contain no provisions relating to payment

of taxes and, with the exception of the Burbank contract, do not directly deal with passing of title.

Section 10 of the Burbank contract, however, reads as follows: "All work done and materials delivered on the premises to form part of the works *are considered property of the City* and are not to be removed without the Department's consent, but the Contractor shall have the right to remove all surplus materials from the site as the work progresses." (Italics added.)

The Glendale and Los Angeles contracts, similar in nature but differing somewhat as to terms of payment, do not contain provisions such as that quoted from the Burbank contract. However, Section 32 of the Glendale contract does provide that "all shipments shall be consigned and properly directed to the Public Service Department, City of Glendale California", to which "Invoices shall be rendered in triplicate". All of the contracts contemplate that the appellant shall install complete, assembled steam plants for an agreed total price.

[1, 2] Various other provisions have been singled out and presented by the contending parties as proving or disproving the contentions made. However, as in all contracts and other legal instruments, such detached provisions standing alone are not determinative except when viewed in relation to the instrument as an entirety, or where such provisions precisely answer the query. When viewed in the light of the contracts considered as a whole and the surrounding circumstances, the appellant's arguments find support therein.

In dealing with appellant's contention that it should not have been taxed in respect to unattached, component parts of the steam plants in question, the basic provisions of Revenue and Taxation Code, Section 405, should be noted. "Annually, the assessor shall assess all the taxable property in his county, except State assessed property, to the persons owning, claiming, possessing, or controlling it at 12 o'clock meridian of the first Monday in March". On that date the boiler parts in question had been delivered but were not assembled.

Research by both parties to this appeal has failed to disclose any case involving an identical factual situation. There is, however, a strong analogy between the present case and Douglas Aircraft Co. v. Byram, 1943, 57 Cal.App.2d 311, 134 P. 2d 15, 16, and other cited cases. In the Douglas opinion it was held that title to materials and parts upon which progress payments were made under a contract for the construction of airplanes and spare parts by a corporation for the United States government, vested in the federal government, and that the property was exempt from county taxation.

As pointed out by the respondent, in the Douglas case, the contract with the government contained the provision that "The title to all property upon which any partial payment is made prior to the completion of this contract, shall vest in the Government in its then condition forthwith upon the making of any such partial payment or payments". As will be seen by comparison, such language is not fundamentally divergent from the terminology employed in the Burbank contract which states that "All work done and materials delivered on the premises to form part of the works *are considered property of the City* * * *". (Italics added.) It is difficult to imagine language more positive.

Although the other contracts here involved do not contain similar language, it seems not unreasonable to infer from the general context and circumstances that if technical legal title had not passed to the cities, beneficial possession and complete control had so passed. No interest remained in the contractor other than the contractual obligation to assemble the parts.

The passing of technical legal title to the unassembled parts is not necessarily involved in the present problem, for under Section 405 of the Revenue and Taxation Code, the assessor is empowered to assess property "to the persons owning, claiming, possessing, or controlling it" on the first

Monday in March. When it is considered that the appellant had no right to remove the parts, much less to transfer title thereto, and that the cities reserved absolute control prior to assembly of the parts, it can only be concluded that the true, beneficial interest was in the respective cities rather than in the appellant contractor whose only duty was to assemble the parts.

[3] The Douglas Aircraft opinion, just cited, contains an interesting discussion of such beneficial, possessory interests, making that case applicable not only to the Burbank contract but likewise to the Glendale and Los Angeles contracts under which appellant was operating. The airplane parts, like the boiler parts here involved, were but portions of a component whole in which the beneficial interest or "usufructuary right" as phrased in the Douglas case, was in the government rather than the contractor. It is this interest, rather than any technical legal concept of title, which should furnish the determinatory factor.

The entire reasonableness of this conclusion becomes the more apparent when it is considered that these component boiler parts were specially manufactured for the individual jobs according to the cities' demands, making such parts practically useless for any other job or purpose. Whether at the moment of the assessment date these parts were actually attached and assembled or were then on the job site awaiting such action would seem to be of little or no importance since in either event the cities were in complete control and possession. The relation of the component parts to the boiler plant was not dissimilar to that of a key manufactured to fit a particular lock. Whether such a key be actually in the lock or elsewhere at a given moment cannot alter the interrelation of the two or change the basic nature of the situation.

[4] Both parties to this appeal aver that evidence of the surrounding circumstances should be considered in determining the intentions of the parties. This is undoubtedly true. It is evident that all of the contracts contemplate that the appellant contractor should, for a specified over-all sum, assemble complete steam plants, the component parts of which had been manufactured by other parties and delivered to the city controlled job sites, there to be attached to the cities' real estate.

No circumstance has been pointed out and there is no reasonable contractual interpretation indicating, either directly or indirectly, that it was ever contemplated that the total sum to be paid appellant would later be drastically reduced by taxes assessed against unassembled parts in contrast to those similar parts already attached. This reduction of appellant's remuneration will amount to some $44,000.

Had such been the intention, it would have been an easy matter to have inserted some definite provision to that effect. It is now too late to attempt to engraft, by implication or judicial theorizing, such an additional burden on one of the contracting parties. Nor can it be supposed that since a municipality is one of the parties, some principle of interpretation may be invoked in its favor differing from that applicable to individuals.

[5] Relative to contracts drafted by insurance companies, and in analogous situations, it is a long established rule that such agreements will be construed against the party who prepared the instrument and in favor of the other contracting party. In the present case, the appellant contractor had nothing to say in respect to the form of the contract or the terminology there employed.

[6] It should be borne in mind that Law as well as Equity is possessed of a conscience. Municipalities, whether acting as contracting parties, exercising the taxing power, or otherwise engaged, are subject to the established principles of ethics and fair dealing. A municipal corporation can only display its conscience vicariously, through the activities of its officers and departments. And such officers, whoever they may be, are but the

designated representatives of the individuals who compose the government. The appellant, a member of the public as well as a contracting party, is entitled to fair consideration at the hands of the public's representatives. Under the record as here presented and the judgment as herein rendered, it is deemed that the appellant has received something less than this consideration.

As already noted herein, when the boiler parts were delivered by the manufacturers to the city job sites, such parts were invoiced to the respective cities which thereupon made partial payments of 50% or more to the appellant who, in turn, remitted to the manufacturers. As soon as received these payments were deposited in the appellant's bank account, whereupon such bank balance was increased to that extent.

"This account", as said in appellant's brief, representing in effect the applicable portions of the purchase price received on the taxed component parts, was reported by plaintiff as solvent credits in its property statement as required by law. As a result plaintiff was assessed and taxed on the basis of such statement. Therefore, says appellant, "It was taxed once upon these partial payments received and deposited in its bank account and again on the full value of the component parts thus partially paid for and delivered to the job sites". In view of the decision already indicated herein, it becomes unnecessary to determine whether this procedure constitutes, as appellant argues, a double taxation. However, the situation does constitute a part of the surrounding circumstances.

The judgment of the trial court is reversed and judgment ordered requiring the respective respondents to refund to appellant the amount of taxes paid under protest, in accordance with the views hereinbefore expressed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

149 Cal.App.2d 383

Mary A. CRIMMINS, Plaintiff, Cross-Defendant and Respondent,

v.

Walton A. GOULD, Emelia H. Gould, Lorenz Costello, Kenneth A. Johnson, Defendants, Cross-Complainants and Appellants.

No. 17206.

District Court of Appeal, First District, Division 1, California.

March 25, 1957.

Declaratory judgment and injunction action to determine defendants' rights in roadway. Defendants cross-complained to establish their rights in the roadway. The Superior Court, San Mateo County, Edmund Scott, J., entered judgment for plaintiffs on complaint and cross-complaint, and defendants-cross-complainants appealed. The District Court of Appeal, Bray, J., held that action of owners of dominant estate in the extending roadway, which had been created on private property, to public street, dedicating it as public street, and allowing owners of adjoining parcel, which did not acquire right to use roadway by grant or prescription, to connect, with roadway as extended, a public street running across adjoining parcel resulted in abandonment by misuse of easement in the roadway.

Judgment affirmed.

1. Dedication ⇐44

In declaratory judgment and injunction action to determine rights in roadway, evidence, which revealed that town performed small amount of improvement and repair on roadway, but which failed to establish offer of dedication of roadway by owner and formal acceptance by public authority or long continued use by public, was not sufficient to establish that roadway became a public way.

2. Dedication ⇐35(1), 37
Highways ⇐1

Private property may become public way, other than by purchase, where owner makes offer of dedication and there is for-

mal acceptance by public authority or long continued use by public itself or where, in absence of express offer of dedication by owner, there is long continued adverse use by the public.

3. Dedication ⇐41

Long continued use by public of private property by public as public way raises presumption that property owner had made offer of dedication.

4. Easements ⇐36(1)

Use of land by one other than owner is generally presumed to be adverse, not permissive.

5. Easements ⇐36(3)

In declaratory judgment and injunctive relief action brought to determine rights in roadway originally built on private property, evidence was sufficient to establish that owners of parcel of land which adjoined roadway but which had never been owned by person creating roadway did not acquire, either by grant or prescription, right to use the roadway.

6. Easements ⇐30(1), 31, 61(2)

Generally, misuse or excessive use of easement is not sufficient to result in abandonment or forfeiture of the easement, and an injunction is the proper remedy. West's Ann.Civ.Code, § 811, subd. 3.

7. Easements ⇐31

Where burden of servient estate is increased through changes in dominant estate increasing use of easement and subjecting it to use by nondominant property, forfeiture of easement will be justified if the unauthorized use may not be severed and prohibited. West's Ann.Civ.Code, § 811, subd. 3.

8. Easements ⇐24

Where easement of ingress and egress appurtenant to particular parcel was acquired at time of single ownership of such parcel, the easement would be extended to subdivided portions of such parcel.

9. Easements ⇐30(1)

Action of owners of dominant estate in the extending roadway, which had been created on private property, to public street, dedicating it as public street, and allowing owners of adjoining parcel, which did not acquire right to use roadway by grant or prescription, to connect, with roadway as extended, a public street running across adjoining parcel resulted in abandonment by misuse of easement in the roadway. West's Ann.Civ.Code, § 811, subd. 3.

10. Easements ⇐31

Where easement in roadway over private property had been abandoned as result of misuse, and, unless fence was built across roadway at its intersection with southerly line of dominant tenement, there was no feasible way of keeping general public and residents of land adjoining dominant tenement out of the roadway, relief less than declaration that dominant tenement owners no longer had right to use roadway would be improper. West's Ann. Civ.Code, § 811, subd. 3.

11. Declaratory Judgment ⇐324
Easements ⇐26(2)

Where, in action to determine parties' right in roadway over private property, complaint alleged that owners of dominant tenement had no interest in roadway except as right of way for orchard purposes, but such owners had replaced orchard by subdivision, such action was tantamount to extinguishment of easement by change, and, therefore, permitting complaint to be amended to allege that easement had been extinguished by increase of burden on roadway was proper, even though original relief sought was restriction of roadway to agricultural use, in view of fact that amendment did not change cause of action, but, at most, changed relief sought and that original complaint contained a prayer for general relief.

12. Constitutional Law ⇐278(1)

Court's determination that, by their misuse of easement in roadway, dominant tenement owners had abandoned right of easement did not constitute a taking of their property without due process, even though the easement appurtenant to such tenement was a valuable right. West's Ann. Civ.Code, § 811, subd. 3.

Crist, Peters & Donegan, Elton F. Martin, Palo Alto, for appellants.

Robert E. Burns, Martin Lalor Crimmins, Crimmins, Kent, Draper & Bradley, San Francisco, for respondent.

BRAY, Justice.

Plaintiff sued in declaratory and injunctive relief primarily to determine that defendants have no rights in a certain roadway. Defendants cross-complained for like relief primarily to establish their rights in said roadway. From a judgment in favor of plaintiff and against defendants and cross-complainants, the latter appeal.

Questions Presented.

1. Did "McCormick Lane" become a public way?

2. Was the easement in said lane extinguished by misuse?

3. Should lesser relief have been granted plaintiff?

4. Amendment of complaint to conform to the proof.

5. Was the court's determination unconstitutional?

Evidence.

In 1929 McCormick owned a tract of land in Atherton. It was bounded on the north by Watkins Avenue and on the south by Fair Oaks Lane. That year McCormick built McCormick Lane to give access to Fair Oaks Lane. The lane runs northerly from Fair Oaks Lane to the junction of the southerly lines of parcels 1 and 2. Adjoining parcel 1 on the west is parcel 2. Only the southeasterly point of parcel 2 touches McCormick Lane. At the time the lane was first constructed parcel 1 as well as the land through which the lane ran was owned by McCormick. Parcel 2 never was. The McCormick land other than parcel 1 has been subdivided and is now owned by Hecker, Hans, Crimmins, Gould and Baxter. Express rights of way over McCormick Lane were deeded to all of these owners except Baxter who was given an oral right of way. In 1931 McCormick deeded the lane to Crimmins in fee. Crimmins later deeded the Crimmins property and the lane to plaintiff, his wife.

The map shows McCormick Lane as originally maintained, and the extension thereof and Burns Avenue as constructed by defendants.



The lane is paved, with a red rock fill entrance to parcels 1 and 2. Both parcels 1 and 2 now belong to defendants Walton and Emelia Gould. In 1926 McCormick conveyed parcel 1 to a predecessor of the Goulds together with "an easement of Right of Way for ingress and egress," such easement to commence five years thereafter.

At the time of trial, the Goulds, of record, appeared to own two portions of the McCormick property—the former Gibbs place with its easement over McCormick Lane, and parcel 1, which had an easement of ingress and egress to and from McCormick Lane. In addition they now own parcel 2. In 1954 they subdivided parcels 1 and 2 into 29 residential lots. Six of these are wholly within parcel 1 and two other lots lie substantially within it. By a roadway dedicated to the public and accepted by the town, defendants extended McCormick Lane northerly across parcel 1 to its junction with Watkins Avenue. They also constructed "Burns Avenue," a public road, across parcel 2 connecting it to the extension of McCormick Lane on parcel 1.

At the entrance to McCormick Lane on Fair Oaks Avenue there has been continuously posted a sign reading "McCormick Lane." At one time a sign stated "Not a Through Street" or "Dead End Street." No other signs have been posted there. About 1925, parcels 1 and 2 were planted with pear and walnut trees. During the early years the orchard and the lane were separated by a wire fence which the orchardist removed in 1941. There has been no obstruction since. From 1931 through 1954 the orchard was operated by tenants who used the lane as a means of ingress and egress in their orchard operations. The peak of the use was in harvesting season when for about three and a half days fruit pickers and trucks hauling fruit used the lane. Otherwise the use by the orchardists was an average of at least once a week. Some fruit went out over Watkins Avenue.

Sometime between 1940 and 1942 Crimmins quarreled with an orchardist and put cardboard signs at the orchard end of the lane and at a place about midpoint on the lane, saying that it was a private road, permission to pass revocable. The signs were directed at the orchardist and were torn down and thrown away. None have been posted since, nor has there ever been any barricade at the Fair Oaks Lane entrance. Prior to 1948 no taxes were assessed against the lane. Since 1948 taxes for plaintiff's residence and the lane have been assessed together to plaintiff.

In 1935 Mr. Crimmins offered to deed the lane to Atherton but the offer was refused unless the road was rebuilt to specifications. Instead Crimmins resurfaced the road, the cost being borne by then property owners, McCormick, Gibbs' predecessor, Baxter and Crimmins. The other property owners including the owner of parcel 1 refused to pay. Thereafter the road was maintained solely at the expense of the four above mentioned property owners.

The lane was used by others not connected with the properties surrounding the lane. The Atherton police patrolled it occasionally. Sightseers and those who thought the lane was a public street would drive in and out. Groups would drive to the orchard end for a picnic or to park. "Necking" couples drove in. A few cars were abandoned on the road. Public utilities were granted rights of way in the lane. In 1952 sanitary district inspectors and workers used it in connection with the installation of a sewer outfall system across the parcels. About twenty years ago at its junction with Fair Oaks Lane Atherton installed guard rails on each side of the lane, and has maintained them since. At Mr. Crimmins' request in 1935, the town installed an electric street light at midpoint in the lane. Ever since the town has supplied the current and upkeep of the light. Chuckholes in the lane were repaired from time to time by the town just as any other street would be repaired. In 1946 Mr. Crimmins in a letter to defendants' predecessor claimed ownership of the lane and objected to the manner in which the tenant farmer was using the lane and several discussions were had between them in which

Crimmins disputed the use of the lane. Crimmins notified defendants' predecessors that he was opposed to the proposed subdivision extending McCormick Lane into it. On learning of the new subdivision Crimmins notified defendants that the lane was not to be connected to the subdivision. Since the connection was made in 1954 the use of the lane and the wear and tear thereon has greatly increased.

On this evidence, the court found that the lane had never become a public way; that the lane was subject to an easement "as a private means of ingress and egress for Parcel One;" that no easement or right of way in or over the lane ever existed as to parcel 2; that by defendants' acts in subdividing parcel 2 and in laying out public roads on parcels 1 and 2 connecting McCormick Lane with Watkins Avenue the burden on the lane has been substantially increased by the public and by occupants of parcel 2 and their invitees, causing substantial damage to plaintiff. The burden of maintenance on McCormick Lane was slight as compared to what it will be; that the acts of defendants are incompatible with the nature and exercise of the servitude appurtenant to parcel 1 granted in 1926 over the lane; it is impossible to use the easement granted in 1926 as it was intended to be used or to segregate the use of the lane by the owners of parcel 1 or 2, from its use by the general public; that because of defendants' acts they no longer have any right to use, occupy or pass over the lane. The court concluded that defendants had not acquired as appurtenant to parcel 2 any easement or right of way; that the easement appurtenant to parcel 1 has been extinguished and thereupon enjoined defendants from using it.

1. Public Way.

[1–3] The foregoing recital shows that the lane never became a public way. Such use of it as was made by the public was permissive only. The small amount of improvement and repair made by the town did not constitute an adverse use or an acceptance by the town of the lane as a public way. The only offer of it as such was rejected by the town. There are only two methods by which private property may become a public way other than by purchase: (1) By an offer of dedication by the owner and a formal acceptance by a public authority or long continued use by the public itself. This did not exist here. (2) Where no express offer of dedication is made by the owner, by long continued adverse use by the public. In such event offer of dedication by the owner is presumed. The evidence showed no such situation here. See Union Transp. Co. v. Sacramento County, 42 Cal.2d 235, 240, 267 P.2d 10, for discussion of these two methods.

[4] Defendants contend that the use by the public of McCormick Lane was such as to give rise to the presumption mentioned in Walter G. Brix, Inc. v. Brown, 145 Cal. App.2d 177, 302 P.2d 74, 75: "* * * there is a general presumption that a use by other than the owner is adverse and not permissive * * *." The sporadic use by the public of McCormick Lane is not the type of use required. In the Brix case, 145 Cal.App.2d at page 178, 302 P.2d at page 75, the court quoted from City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 450, 181 P. 658: "'In order to constitute such dedication, or such abandonment, by the owner, his intention to that effect must appear * * *'" and further stated that whether a dedication of land for public purposes has occurred in any instance is a conclusion of fact to be drawn from the circumstances of the particular case.[1] There the facts were much stronger in favor of dedication than here. The reviewing court pointed out, however, that there was evidence to controvert the idea of dedication but that conflicts in the evidence were to be resolved by the trial court, which there resolved them in favor of dedication. In our case, if the presumption applies, it

1. This statement answers defendants' contention that the trial court's finding in our case on the subject of no public way is a conclusion of law and not a finding of fact.

was overcome by the positive showing that the comparatively little use made of the lane by the public was a permissive one. Paraphrasing language in the Brix case, 145 Cal.App.2d at page 178, 302 P.2d at pages 75, 76, in many of the cases cited by defendants for the proposition that showings contrary to those found by the court in our case should upset the judgment, the language quoted is from cases wherein the reviewing courts upheld findings of trial courts on conflicting evidence that a dedication of the particular roadway had been made.

2. Extinguishment of Easement.

[5] The evidence clearly shows that parcel 2 neither by grant nor prescription acquired any right to use McCormick Lane. The small use of it made by the owners or occupants of parcel 2 over the years until recently was not an adverse one. The most serious question in the case is whether the easement of ingress and egress to and from the lane appurtenant to parcel 1 was lost by the attempted change in use. Plaintiff concedes that the change from orchard to residential estates did not extinguish the easement. It is the acts of defendants in extending McCormick Lane to Watkins Avenue dedicating it as a public street, and in allowing the owners of parcel 2 to connect with McCormick Lane as extended, a public street, which runs across parcel 2 and connects with Watkins Avenue, which plaintiff claims extinguished the easement of parcel 1. Defendants thereby attempted to use the easement appurtenant to parcel 1 for the benefit of all owners in parcel 2 and the public generally. This caused the court to declare the easement abandoned by misuse.

Civil Code, § 811, subdivision 3, provides that a servitude is extinguished by "the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; * * *." Lux v. Haggin, 1886, 69 Cal. 255, 4 P. 919, 10 P. 674, said the section was a statutory declaration of the well settled rule "that if the owner of a dominant estate do acts thereon which permanently prevent his enjoying an easement, the same is extinguished, or if he authorize the owner of the servient estate to do upon the same that which prevents the dominant estate from any longer enjoying the easement, the effect will be to extinguish it." 69 Cal. at pages 292–293, 10 P. at page 692. In Fletcher v. Stapleton, 1932, 123 Cal.App. 133, 10 P.2d 1019, it was held that grading by the dominant owner of his lot plus the act of the city in lowering the street created a situation where there was no practical enjoyment left. Therefore, the easement was extinguished.

In cases involving extraordinary or excessive use, all parties in the instant case agree that the servient owner is entitled to an injunction. See De la Cuesta v. Bazzi, 1941, 47 Cal.App.2d 661, 118 P.2d 909; Watson v. Heger, 1941, 48 Cal.App.2d 417, 120 P.2d 153.

[6, 7] However, here the question is not the propriety of an injunction but rather the propriety of an extinguishment. There do not seem to be any California cases on extinguishment for excessive use by non-dominant property where the right given to the dominant estate was by grant. But there are a number of out-of-state cases. The general rule is that misuse or excessive use is not sufficient for abandonment or forfeiture, but an injunction is the proper remedy. (16 A.L.R.2d 610.) But where the burden of the servient estate is increased through changes in the dominant estate which increase the use and subject it to use of non-dominant property, a forfeiture will be justified if the unauthorized use may not be severed and prohibited. (16 A.L.R.2d 613.) See also Penn Bowling Recreation Center v. Hot Shoppes, 1949, 86 U.S.App.D.C. 58, 179, 16 A.L.R.2d 602 F.2d 64.

[8] The situation here is different than that in Tarpey v. Lynch, 155 Cal. 407, 101 P. 10. There a water ditch easement appurtenant to 80 acres of land under single ownership was held to accrue to each portion thereof divided among plural ownerships. Thus in our case the easement of ingress and egress appurtenant to parcel 1,

although acquired at a time of single ownership of that parcel, would be extended to the subdivided portions of that parcel. But not content with that, defendants here attempted to extend it to all parts of parcel 2 which had no easement therein and also attempted to extend it to two public streets. It is not a question of merely "some increase in burden" upon a servient tenement by permitting an easement appurtenant to attach to each of the parts into which a dominant tenement may be subdivided, which comment (b) to section 488, Restatement of Property, and a number of cases cited by defendants, state is permissible. Rather it is one of the performance of acts by the owner of the servitude "which is incompatible with its nature or exercise." Civ.Code, § 811, subd. 3.

The California cases holding that injunctive relief is a proper remedy of the servient owner for unauthorized or excessive uses of an easement[2] do not hold that it is the exclusive remedy. As hereafter pointed out an injunction could not grant plaintiff real relief where defendants have attempted to tie two public streets into their easement.

[9] The fact that the cases which to date have interpreted section 811, subdivision 3, were ones not of misuse or overuse of an easement but were ones where a change in conditions of either the dominant or servient estates made the easement impossible of use, does not mean that the application of the section is limited to such situations. Certainly here the situation which defendants deliberately brought about is "incompatible with" the "nature or exercise" of the easement. Defendants quote 28 C.J.S., Easements, § 62, p. 729: "The right to an easement is not lost by using it in an unauthorized manner or to an unauthorized extent, *unless it is impossible to sever the increased burden so as to preserve to the owner of the dominant tenement that to which he is entitled, and yet impose on the servient tenement only that burden which was originally imposed on it without the obligation attempted to be imposed on it by alterations.* The rule is especially applicable where the servitude is not materially increased. Such a misuser does not authorize the owner of the servient estate to prevent a further use of the easement by erecting obstructions, or by restraining the owner of the easement by force or violence, the proper remedy being an action for damages, or for an injunction if the remedy at law is inadequate." (Emphasis added.) The situation here meets the one covered by the exception described by the underlined portion of the above quotation.

3. Lesser Relief.

[10] Defendants' contention that lesser relief than a declaration that defendants no longer had any right to use McCormick Lane is without merit. A sign as suggested by defendants to the effect that the lane was restricted to the use of residents of McCormick Lane alone would not protect plaintiff's rights. Nor would an injunction attempting to restrain all persons from using McCormick Lane other than owners or residents fronting on the lane or their invitees be practicable or enforceable. Defendants have extended the lane in a sort of an inverted "Y." The northerly ends of each section of the Y join Watkins Avenue, so that what is equal to two through streets run into McCormick Lane. Such a sign and injunction would not prevent all or any of the residents of parcel 2 as well as the general public from using McCormick Lane. The only practical way of preventing this is to close McCormick Lane at its junction with parcels 1 and 2.[3] This

2. De la Cuesta v. Bazzi, supra, 47 Cal. App.2d 661, 118 P.2d 909; Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 5 L.R.A.,N.S., 851; Watson v. Heger, supra, 48 Cal.App.2d 417, 120 P.2d 153.

3. It should be pointed out that in doing this defendants and the owners of lots in parcels 1 and 2 are not deprived in any way of access to Watkins Avenue. Actually they continue to have two ways of reaching it from their lots. They are only deprived of direct access to Fair Oaks Lane, which they can reach by going around the block.

compels the extinguishment of defendants' easement therein. By causing McCormick Lane as extended by defendants and Burns Avenue as joined to it to become dedicated public streets, defendants have made it impossible for the portion of McCormick Lane belonging to plaintiff to be used in a limited way. Unless a fence is built across McCormick Lane at its intersection with the southerly line of parcel 1, there is no feasible way of keeping the general public as well as the residents of parcel 2 out of McCormick Lane.

The situation here is almost identical with that in Knotts v. Summit Park Co., 1924, 146 Md. 234, 126 A. 280, at page 283, where the court stated: "* * * the necessarily increased burden upon the servient estate brought about by the development of the entire tract, of which the dominant tenement formed a small part, worked an abandonment. By reference to the plat filed in the case it will be seen that, by the opening of the roads running north and south through other parts of the tract and connecting them with the avenue running east and west through the entire tract, easy access was given to the old right of way to all lot holders, including those outside of the dominant estate, who are many times the number of those in said estate.

"It is not a satisfactory answer to say that the use of this right of way must be only for the benefit of the lots within the dominant estate. A condition has been created by the act of appellee which makes it impossible, as a practical proposition, for appellant to confine the use to such lots. Tiffany's Real Property (1903 Ed.) p. 733; 9 R.C.L. p. 814, § 70."

4. Amendment.

[11] Defendants contend that the court had no power to permit plaintiff to amend to conform to the proof. The complaint sought to have the easement appurtenant to parcel 1 restricted to an agricultural use and to enjoin defendants and others from increasing the burden of that easement, and to have it declared that the owners and occupants of parcel 2 had no right to use the lane. Plaintiff's opening statement was to the same effect. At the end of the trial plaintiff moved to amend the complaint by alleging the extinguishment of the easement appurtenant to parcel 1 by inordinately increasing the burden on the lane. The court granted the motion. The court had the power to do so. See Jackson v. Thompson, 47 Cal.App.2d 405, 118 P.2d 31; Feigin v. Kutchor, 105 Cal.App.2d 744, 234 P.2d 264. The amendment did not change the cause of action. At most, it changed the relief sought. (There was a prayer for general relief in the complaint.) The complaint alleged that the owners of parcel 1 had no interest in the lane except a right of way for orchard purposes, although now defendants had replaced the orchard by a subdivision, and asked that their use be limited to that. This was tantamount to extinguishment by change, because the owners of parcel 1 could not now use the lane under the requested limitation. The amendment conformed with the evidence produced at the trial.

5. Constitutionality.

[12] While of course defendants' easement appurtenant to parcel 1 was a valuable right, the fact that the court held that by their misuse of it they had abandoned that right, is not taking defendants' property without due process. It is not taking their property at all. It is merely determining that their own acts were such as the law determines constitutes an extinguishment of the easement. By their own acts they have made it impossible for either themselves or plaintiff to confine the use of the easement to the owners of lots in parcel 1 only.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

149 Cal.App.2d 236

Charles E. MOORE and Charles E. Moore, III, etc., Plaintiffs,

v.

HUBBARD & JOHNSON LUMBER CO., Defendants, Cross-Complainants and Respondents,

B. B. Byard, Arthur C. Vann and John W. Waldner, individually, and as co-partners doing business under the firm name and style of Trinity River Lumber Company, and R. E. Byard, individually, and as doing business under the firm name and style of Trinity River Lumber Sales Co., Cross-Defendants and Appellants.

No. 17191.

District Court of Appeal, First District, Division 1, California.

March 19, 1957.

Action by purchaser for cost of repairs allegedly caused by defective lumber sold by dealers, wherein one dealer filed cross-complaint against lumber company for breach of warranty of merchantability. The Superior Court, County of Santa Clara, Edwin J. Owens, J., entered judgment for dealer against lumber company, and lumber company appealed. The District Court of Appeal, Fred B. Wood, J., held that where lumber sold by description would not have been saleable as described if it had been known that it was defective, in that it was infested by beetles, implied warranty of merchantability was breached.

Affirmed.

1. Sales ⇐441(1)

In action for breach of warranty of merchantability of lumber, which was infested with beetles, and which had been purchased from defendant and delivered to purchaser with lumber from another lumber company, evidence established that infested lumber had been purchased from defendant. West's Ann.Civ.Code, § 1735.

2. Sales ⇐272

The implied warranty of merchantability in the case of sale by description from dealer who deals in such goods is applicable even if buyer and seller possess equal skill and judgment, where the defect is a latent defect. West's Ann.Civ.Code, § 1735.

3. Sales ⇐272

Where lumber was purchased by description from lumber dealer, there was implied warranty that goods were of merchantable quality. West's Ann.Civ.Code, § 1735.

4. Sales ⇐272

"Merchantable quality" refers to goods which are reasonably suitable for the ordinary uses and purposes of goods of general type described by terms of sale and which are capable of passing in the market under name or description by which they are sold. West's Ann.Civ.Code, § 1735.

See publication Words and Phrases, for other judicial constructions and definitions of "Merchantable Quality".

5. Sales ⇐284(1)

The statutory warranty of merchantability imposes liability if goods contain an impurity of such nature as to render them unusable, and therefore unsaleable for the general uses and purposes of goods of kind described. West's Ann.Civ.Code, § 1735.

6. Sales ⇐284(1)

Where lumber sold by description as No. 1 with 16% No. 2, would not have been saleable as described, if it had been known that it was defective, in that it was infested by beetles, implied warranty of merchantability was breached. West's Ann.Civ. Code, § 1735.

7. Sales ⇐284(1)

The mere fact that defect is latent or hidden does not excuse seller from liability under implied warranty of merchantability. West's Ann.Civ.Code, § 1735.

8. Pleading ⇐236(7)

Granting of permission to defendant to amend his cross-complaint from action for reimbursement and indemnity to one for breach of warranty was not abuse of discretion, even though amendment was deemed to plead a new cause of action, in absence of claim that statute of limitations had run.

9. Appeal and Error ⇐768

In action by purchaser of lumber against dealer who filed cross-complaint for reimbursement and indemnity against lumber company, wherein dealer and lumber company stipulated that dealer would amend his cross-complaint to state cause of action for breach of warranty, after court sustained demurrer to cross-complaint, but, although dealer did not file amended cross-complaint, lumber company did not deny statement in dealer's appellate brief that parties had agreed that trial would continue without filing of cross-complaint, and trial so proceeded, lumber company could not complain that dealer had no pleading upon which judgment in dealer's favor could be based. West's Ann.Civ.Code, § 1735.

10. Trial ⇐2

Simultaneous trial of action by purchaser for cost of repairs of building, allegedly caused by defective lumber sold by dealer, and cross action by dealer against lumber company was not an abuse of court's discretion. West's Ann.Code Civ.Proc., § 1048.

11. Sales ⇐429

Fact that liability of dealer for damages caused by defective lumber sold to purchaser had not been determined, did not prevent dealer from asserting its cross-action against lumber company for breach of warranty of merchantability. West's Ann.Code Civ.Proc., § 1048.

12. Judgment ⇐306

Where at beginning of trial court ruled out cross-plaintiff's count for indemnity, and allowed trial to proceed upon issues presented by count for breach of warranty, trial court's substitution of word damages for word indemnity in its judgment against cross-defendant was correction of clerical error and was within authority of trial court.

Pedder, Ferguson & Pedder, San Francisco, for appellants.

Ropers & Majeski, Redwood City, for respondents.

FRED B. WOOD, Justice.

As stated by Honorable Edwin J. Owens, the trial judge, in an opinion which he wrote and filed, this is an action "commenced originally by the plaintiff Industrial Assets Co. (a co-partnership) against the firm of Buttress and McClellan (a corporation) and Hubbard and Johnson Lumber Co. (a corporation). Subsequently the defendant Buttress and McClellan filed a cross-complaint for declaratory relief against Industrial Assets Co. and Hubbard and Johnson. Still subsequently Hubbard and Johnson filed a cross-complaint against defendant Trinity River Lumber Co.

"The situation, as developed by the evidence is as follows: Industrial Assets Co. entered into a project of building a large warehouse in San Jose to be leased to the American Can Co. With this in mind, contact was made with the firm of Buttress and McClellan, a large construction firm with offices in Los Angeles. As a result of preliminary negotiations a contract for the erection of the warehouse was entered into between plaintiff Industrial Assets Co. and defendant Buttress and McClellan. * * * Certain lumber was purchased from defendant Hubbard and Johnson. The lumber thus purchased was used in the construction of the roof, the lumber being covered on the outside by roofing material placed thereon by a roofing company. It developed subsequently that the lumber used on the northern half of the roof was infested by an insect known as 'Arhopalus productus Le Conte' also known as a 'longhorned beetle.' It is characteristic of this insect to eat its way out of the wood to the surface leaving behind it a hole in the wood. In this case the insects not only emerged from the lumber itself but ate their way also through the protective covering of roofing material, creating numerous holes in the portion of the roof referred to so that in rainy weather the water entered these holes and, finding its way to the seams between the boards, leaked into the warehouse itself. It became necessary therefore to effect frequent repairs upon this portion of the roof and, in order to prevent future damage

through further emergence of the beetles, to replace that portion of the roof by replacing some of the lumber and recovering the northern half of the roof first with sheet metal over which a new coating of roofing material had to be placed. As a result the plaintiff, Industrial Assets Co., brought its suit to recover its cost of these repairs."

Judgment was rendered against Trinity in favor of Hubbard and Johnson upon the latter's cross-complaint.

The Issues

(1) Does the evidence support the finding that Trinity furnished the infested boards? (2) Did Trinity warrant the merchantability of the boards it furnished? (3) Did the court commit prejudicial errors in procedure during the course of the trial?

The Sufficiency of The Evidence

The defect was latent. Visual inspection does not disclose the presence of the larvae. Their entrance holes are too small for detection by the eye. They may remain in the wood for some time before boring their way out, making much larger holes.

If Trinity had supplied all of the roof boards there would, of course, be no doubt that all of it came from its mill. However, Trinity supplied about two-thirds and another mill operator, Triangle Lumber Company, supplied about one-third of the boards used. This posed the issue of tracing the infested boards to their source.

Trinity's lumber was marked near the end of each board: Its No. 1 grade, by the stamp of the West Coast Lumbermen's Association; its No. 2, by a blue crayon slash mark. A good many of these marks were removed in fabrication, by cutting the boards upwards of two feet from the end. The lumber supplied by Triangle was not marked.

There was evidence that infested boards and boards bearing the No. 1 stamp were in juxtaposition. Adjacent boards would have come from the same load of lumber. Each load was brought directly from the mill to the job and dumped in a single pile at the saw site. The ends of the boards in that pile would be tongue and grooved (the tongue and groove work at the mill stop a short distance from the end of each board) and taken on lumber carriers to the building, where it was put in place and nailed to the roof. There was no commingling of lumber received respectively from Trinity and from Triangle. There was also evidence that some of the boards in which holes had developed bore Trinity's No. 1 grade mark, and some bore Trinity's No. 2 blue slash marks.

Concerning this issue and his appraisal of the evidence, Judge Owens said: "The burden on Hubbard and Johnson is to establish that the infested lumber was purchased from Trinity Lumber Co. This burden, of course, requires Hubbard and Johnson to establish the fact by 'a preponderance of the evidence.' We are concerned with 'logical probability.' Does the evidence indicate that it is more probable that the infested lumber was Trinity lumber than that it was not Trinity lumber? To establish this probability Hubbard and Johnson rely upon five criteria, (1) accessibility of beetles to the wood, (2) the actual grade stamp of Trinity upon some of the infested wood, (3) the blue slash marks upon some of the infested wood, (4) the pattern of boards as identified in the portion of the roof where the holes were located and the leakage occurred, (5) the proportionate amount of total lumber which was supplied by Trinity.

[1] "With respect to the first criterion, the evidence establishes that the type of beetle here involved lays its eggs in 'dead' wood and that when the beetle emerges from the wood subsequently it flies away to renew the process in other 'dead' wood. It is capable of flying several miles. One of the more common causes of 'dead' wood is fire, that is a tree which, while still standing, has been attacked by fire. The evidence in this case shows that the lumber in question was taken from one side of the Trinity River while, on the other side of the river, the trees had been devastated by fire. The lumber in question was permitted to remain on the ground after the trees were cut long

enough to render the timber 'dead' and thus a likely prey for beetles emerging from the fire-killed timber. Without analyzing in detail the evidence bearing upon the other four criteria, the Court is of the opinion that Hubbard and Johnson have met the burden of establishing, by a 'preponderance of the evidence' that the infested lumber was purchased by Hubbard and Johnson from the Trinity Lumber Co." We concur in Judge Owens' analysis and conclusion on this phase of the inquiry.

Warranty of Merchantability

The evidence supports the findings that lumber infested as this lumber was is not merchantable and that Trinity impliedly warranted that this lumber was merchantable.

[2] We concur in Judge Owens' exposition of the applicable principles of law: "The second subdivision of C. C. 1735 provides for an implied warranty of merchantability in the case of a sale by description from a dealer who deals in such goods. (C. C. 1735 (2)) In such a sale the goods are warranted to be of *merchantable quality*. This warranty is applicable even if buyer and seller possess equal skill and judgment where the defect is a *latent* defect.

[3] "In the instant case the goods were purchased by description, viz., 2x6 Douglas fir tongue and groove, No. 1, with sixteen percent (16%) No. 2." Trinity is a seller who deals in goods of this description (see subd. 2 of section 1735). "In such a case there is implied the *warranty* that the goods be of *merchantable quality*. (Emphasis added)

[4, 5] "The term 'merchantable quality' has been given a multitude of definitions. A very recent case from the California Supreme Court has given its definition of this term. The court said. " 'Many definitions of "merchantable quality" have been given but all of them include the basic proposition that the quoted words refer to goods which are reasonably suitable for the ordinary uses and purposes of goods of the general type described by the terms of the sale and which are capable of passing in the market under the name or description by which they are sold. (Citing authorities.) Hence it seems clear that the statutory warranty is sufficiently broad to impose liability * * * if the goods contain an impurity of such a nature as to render them un-usable, and therefore unsaleable, for the general uses and purposes of goods of the kind described. Burr v. Sherwin Williams Co., 1954, 42 Cal.2d 682, 694 [268 P.2d 1041].'

[6] "In this case the goods, i.e., the lumber, contained beetles embedded in them when sold. The presence of such beetles in the lumber is in the nature of a latent defect. In such a case the lumber could only be used for very limited purposes. Since this defect was hidden it was in the nature of a latent defect. Further, there was evidence that if such a defect were known the lumber would be discarded as not being either No. 1 or No. 2 lumber. In such a case the lumber would be *unusable* and *unsalable*. Applying the rationale of the Burr case, supra, such goods would not be merchantable. Further, it is usually stated that the goods must be such that with the defects *known* they would be salable as goods of the general kind which were described or supposed to be when bought. (Kenney v. Grogan, 17 Cal.App. 527, 533 [120 P. 433]; Rockwood & Co. v. Parrott & Co., [142 Or. 261], 19 P.2d 423; 1 Williston on Sales 486, section 243). As has been pointed out, if this defect were known they would not have been salable 'as goods of the general kind which were described.' They would not measure up to the description given by the purchaser, and hence would breach the implied warranty of merchantability.

[7] "The mere fact that the defect was latent or hidden does not excuse the seller. Quite the contrary. The case of Tremeroli v. Austin Trailer Equipment Co., 1951, 102 Cal.App.2d 464, at page 477 [227 P.2d 923, at page 931] said: '* * * the substantial weight of authority is to the effect that, under the Uniform Sales Act, the implied warranty extends to latent defects. [Citing

authority.] This appeals to us as sound law.'"

Collum v. Pope & Talbot, Inc., 135 Cal. App.2d 653, 288 P.2d 75, invoked by Trinity, is inapplicable. In that case, in contrast to the present case, there was no privity of contract.

Procedural Points

The trial judge took under submission Trinity's demurrer to the cross-complaint and proceeded with the taking of testimony at the trial. The next day he sustained the demurrer, with leave to amend. The parties then stipulated that Hubbard and Johnson would amend to state a cause of action for breach of warranty and that Trinity would answer thereto. In the course of their discussion counsel apparently turned this into a stipulation that such an amendment be deemed to have been filed by Hubbard and Johnson and denied by Trinity. At any rate, the trial proceeded just as if the issues that such pleadings would frame were before the court for decision. We find in that no basis for a reversal. The "demurrer" in question was a part of Trinity's answer. The day appointed for the commencement of the trial had arrived. The record does not disclose any objection made by Trinity to going ahead with the trial. Its counsel participated in the examination of witnesses that day. The point is without merit upon this appeal.

[8] We do not find error in the permission granted Hubbard and Johnson to amend its cross-complaint from an action for reimbursement and indemnity to one for breach of warranty, a permission which was granted upon sustaining Trinity's demurrer. Trinity did not then nor does it now claim that the statute of limitations had run, which would be the only significant consequence if such an amendment were deemed the pleading of a new cause of action.

[9] Next, Trinity says no further amended cross-complaint was filed and so, it says, Hubbard and Johnson had no pleading upon which the judgment in its favor could be based. One of the counts of the complaint in question pleaded breach of warranty. Hubbard and Johnson says in its brief that "both counsel agreed that the trial would continue without the filing of a cross-complaint," and we find in Trinity's closing brief no denial of that statement. Moreover, the trial proceeded just as if the indicated amendment, and Trinity's answer thereto, had been filed.

[10] Nor do we perceive any abuse of discretion in the trying of the main action and this cross action at the same time. Code Civ.Proc. § 1048.

[11] At the time of the trial, says Trinity, Hubbard and Johnson had sustained no damages, because its liability to the plaintiff had not yet been determined; therefore, its claim against Trinity was premature. That is a non-sequitur. An intermediate purchaser, such as Hubbard and Johnson, "may recover the amount for which he is liable to his subpurchaser [the plaintiff herein] * * * notwithstanding that the purchaser [Hubbard and Johnson] has not settled with the subpurchaser or suffered judgment, [Citations]." Grupe v. Glick, 26 Cal.2d 680, 690, 160 P.2d 832, 838.

[12] Finally, Trinity asserts error in a correction which the trial judge made in the judgment as first filed. It originally awarded $29,094.07 to Hubbard and Johnson against Trinity "as reimbursement and indemnity." Later, the judge changed "indemnity" to "damages." This seems, quite clearly, the correction of a clerical error and thus well within the authority of the trial judge to make. The findings of fact speak unmistakably of damages for breach of warranty and, at the beginning of the trial the court had ruled out the count for indemnity, allowing the trial to proceed upon the issues presented by the count for breach of warranty.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

149 Cal.App.2d 799

Ike BAUMBACH, Plaintiff, Cross-Defendant and Respondent,

v.

John B. JORGENSEN, an individual doing business under the firm name and style of Jorgensen Farms, Defendant, Cross-Complainant and Appellant.

Civ. 8987.

District Court of Appeal, Third District, California.

April 4, 1957.

Action for an accounting of moneys alleged to have been received by defendant from sale of grapes claimed to have been marketed for the account of the plaintiff, wherein defendant filed a counterclaim for alleged damages. From judgment of the Superior Court, San Joaquin County, George F. Buck, J., in favor of the plaintiff, the defendant appealed. The District Court of Appeal, Peek, J., held that where money advanced to lessee of vineyard by defendant, who was in business of harvesting and marketing grapes was to be repaid from receipts of grape crop, but lease was assigned to plaintiff before any grapes came into defendant's possession, defendant, who had entered into marketing agreement with plaintiff, could not, as a factor, offset against money in his hands but owing to plaintiff, the money advanced to lessee.

Judgment affirmed.

1. Factors ⇐45

Where money advanced to lessee of vineyard by defendant, who was in business of harvesting and marketing grapes, was to be repaid from receipts of grape crop, but lease was assigned to plaintiff before any grapes came into defendant's possession, defendant, who had entered into marketing agreement with plaintiff, could not, as a factor, offset against money in his hands but owing to plaintiff, money advanced to lessee.

2. Factors ⇐47(3)

Lien of a factor belongs to class known as possessory liens and factor must have either actual or constructive possession of goods, or their proceeds, in order that his lien may attach thereto, unless it is otherwise provided by statute.

John D. Chinello, Fresno, for appellant.

R. P. Rott and Robert K. Elliott, Lodi, for respondent.

PEEK, Justice.

Defendant appeals from a judgment in favor of plaintiff in an action for an accounting of moneys alleged to have been received by defendant from the sale of grapes claimed to have been marketed for the account of plaintiff.

The complaint alleged that pursuant to an oral agreement, defendant marketed grapes produced by plaintiff on the Babcock vineyard during the 1953 season, but that defendant failed and refused to give plaintiff a proper accounting. The complaint concluded with a prayer for an accounting and a judgment for the amount found to be due. Defendant answered denying generally the allegations of the complaint, and as an affirmative defense alleged that one Shumate, as the lessee of said vineyard, entered into a written agreement with defendant by which defendant agreed to harvest and market the crop for Shumate; that defendant dealt solely with Shumate and was without notice or knowledge of any assignment from Shumate to plaintiff of the lease of said vineyard; that Shumate received no consideration from plaintiff for the assignment of said lease; and that defendant was willing to pay to the party entitled to it the sum shown by an account which he filed as an exhibit attached to said answer. By cross-complaint defendant alleged that plaintiff had converted other grapes to defendant's damage in the sum of $1,000. At the conclusion of the trial the court found generally in accordance with the plaintiff's complaint and generally that the allegations contained in defendant's affirmative defense and his cross-complaint were untrue and entered judgment accordingly in the sum of $7,261.

Defendant's motion for a new trial was denied and this appeal followed.

The evidence shows that the defendant, who was in the business of marketing and harvesting grapes, originally entered into an agreement with Shumate on March 11, 1953, to market and harvest the crop grown on the Babcock vineyard; that defendant advanced to Shumate certain moneys which were to be repaid out of the first receipts from the crop; that on April 15, 1953, Shumate assigned his entire leasehold interest in the vineyard to the plaintiff; that an acceptance of such assignment was executed by the landowners and thereafter plaintiff entered into possession under the lease, farmed and operated the property, paid all costs and expenses in connection with the crop produced; that defendant had knowledge of plaintiff's ownership of the crop at the time he entered into the marketing agreement with plaintiff; that defendant was present at the preparation of the "Application for Allotment under Tokay Marketing Agreement" wherein plaintiff appeared as the grower and owner of the grapes for the 1953 season; that said document was signed by defendant personally as shipper; and that a copy thereof was delivered to defendant. The record further shows that plaintiff had no knowledge of defendant's marketing agreement with Shumate until after the close of the 1953 season, and that Shumate solicited and obtained marketing agreements and acted as a field man for defendant during the 1953 season. There was also testimony by Shumate that the marketing agreement executed by him and defendant on March 11, 1953, was never to have been used by the parties as such but was executed solely for the purpose of giving defendant written evidence of the advances made by defendant to Shumate.

It is defendant's contention that since the crop came into his hands as a factor, he was entitled to offset the funds in his hands with the advances he had made to Shumate, and therefore the evidence does not support the findings and judgment. In support thereof, defendant primarily attacks the sufficiency of the evidence and in particular the testimony of Shumate. It is quite apparent from the record that much of the testimony was in conflict; however, the resolution of that conflict was for the trial court and not this court on appeal.

[1, 2] Under the circumstances the only question presented to this court is, as defendant properly notes, to what extent if any he as a factor may offset, against the balance admittedly in his hands and owing to plaintiff, the money advanced to Shumate. It is the general rule that "the lien of a factor belongs to the class known as possessory liens; and it is a well-settled rule that the factor must have either the actual or the constructive possession of the goods, or their proceeds, in order that his lien may attach thereto, unless it is otherwise provided by statute. Necessarily, a lien cannot be acquired before the goods come into his possession, or after his possession has ceased." 35 C.J.S., Factors, § 45, p. 443; see also 22 Cal.Jur.2d Factors and Comm. Merchants, sec. 26, p. 27; and 22 Am.Jur. Factors, sec. 45, p. 331.

It is not denied that at the time of defendant's dealings with Shumate there was no crop. It necessarily follows that since a factor's lien is possessory, defendant's lien as a factor could not have attached until he had "either the actual or the constructive possession" of the grapes, at which time the grapes were owned by plaintiff, and hence the judgment of the trial court must be affirmed.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

149 Cal.App.2d 808

Ella Jane GOLDSTRASS, an Incompetent person, by Frederick McCann, her guardian ad litem, Plaintiff and Appellant,

v.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association, Clency H. Hasbrouck, D. H. Smith, Lillian Empey, Irene Mossoni, d/b/a Laurel Sanitarium, et al., Defendants,

Security-First National Bank of Los Angeles, a national banking association, Clency H. Hasbrouck, D. H. Smith, Lillian Empey, and Irene Mossoni, Respondents.

Civ. 21864.

District Court of Appeal, Second District, Division 3, California.

April 5, 1957.

Hearing Denied May 29, 1957.

Action by an incompetent person, by her guardian ad litem, against a bank, as trustee, and four individuals for alleged fraud and conspiracy in inducing execution of trust agreement by plaintiff as trustor. On plaintiff's death before trial, the guardian ad litem, as executor of decedent's will, was substituted as plaintiff. The Superior Court of Los Angeles County, Lewis Drucker, J., granted motions for nonsuit as to individual defendants and rendered judgment on a directed verdict for defendant bank, and substituted plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that evidence was insufficient to require submission of case to jury.

Judgments affirmed.

1. Conspiracy ⇐21
Fraud ⇐64(5)

In action for alleged fraud and conspiracy in inducing execution of trust agreement, evidence was insufficient to take to jury question whether trustor was led by any action of defendant vice-president of defendant trustee bank or trust officer thereof to believe that rentals for leased trust realty were not being collected by plaintiff as trustor's agent and thereby induced to execute trust agreement.

2. Conspiracy ⇐21
Fraud ⇐64(1)

In action for alleged fraud and conspiracy in inducing execution of trust agreement, evidence was insufficient to take to jury question whether defendant vice-president of defendant trustee bank initiated agreement.

3. Conspiracy ⇐21
Fraud ⇐64(1)

In action for alleged fraud and conspiracy in inducing execution of trust agreement, evidence was insufficient to take to jury question whether an individual defendant, who appeared as an attorney for defendant trustee bank in previous action for accounting by it, its removal as trustee and recovery of money advanced to it by trustor's guardian ad litem, joined in alleged fraudulent action of defendant vice-president of bank, inducing execution of agreement, by failing to make proper investigation of trustor's affairs and permitting her to enter into agreement after observing that she was incompetent.

4. Conspiracy ⇐21
Fraud ⇐64(1)

In action for alleged fraud and conspiracy in inducing execution of trust agreement, evidence was insufficient to take to jury question whether a friend of trustor joined in concealment and furtherance of fraud by leading trustor to believe that her brother, acting as her agent, had abandoned her and causing estrangement between them, thereby causing execution of agreement.

5. Trial ⇐139(1)

A non-suit may be granted only when, giving plaintiff's evidence all value to which it is legally entitled, indulging every legitimate inference therefrom, and disregarding conflicting evidence, trial court properly determines that there is no substantial evidence to support jury verdict for plaintiff.

6. Trial ⇐171

A court's right to direct verdict is same as its right to grant nonsuit.

7. Trusts ⇐42

In action for damages resulting from alleged fraud and conspiracy in inducing execution of trust agreement, evidence of trustor's incompetency when agreement was executed presented no issue as to whether agreement was void, but was material only on issue whether she was induced by fraud to execute agreement.

8. Appeal and Error ⇐866(1, 3)

On appeal from judgments of nonsuit as to some defendants and on directed verdict for one of defendants in action for alleged fraud and conspiracy in inducing execution of trust agreement, whether trial court erred in granting defendant's motions to strike from amended complaint allegations concerning damages sustained by trustor through loss of interest on money and sale of her residence by defendant trustee bank need not be considered.

John W. Fay, Beverly Hills, for appellant.

Belcher, Kearney & Fargo, Los Angeles, for respondents Security-First Nat. Bank of Los Angeles and D. H. Smith.

Snyder & Fletcher and W. Cloyd Snyder, So. Pasadena, for respondent Lillian Empey.

Henry Melby, Glendale, for respondents Clency H. Hasbrouck and Irene Mossoni.

PARKER WOOD, Justice.

Action for damages allegedly resulting from fraud and conspiracy in inducing the execution of a trust agreement. Plaintiff Ella J. Goldstrass was the trustor under the agreement. She appeared as plaintiff by her guardian ad litem. Frederick McCann (her brother). She died prior to the trial and Frederick McCann, the executor of her will, was substituted as plaintiff. Defendant Security-First National Bank of Los Angeles, hereinafter referred to as the bank, was trustee under the agreement. In a jury trial, motions for nonsuits were granted as to defendants Hasbrouck, Smith, Empey and Mossoni. A motion by the bank for a directed verdict was granted, and a verdict in favor of the bank was returned, and judgment was entered thereon. Plaintiff appeals from the judgments.

Appellant contends that there was sufficient evidence to require that the case be submitted to the jury.

On December 31, 1948, Mrs. Goldstrass executed a revocable trust agreement wherein the bank was named trustee. The agreement provided, in part, that the income from the trust should be paid to Mrs. Goldstrass monthly during her lifetime; and that the trustee, subject to the discharge of its fiduciary obligations, was vested with all the rights of an owner of the trust property. A schedule, attached to the trust agreement, listed the property which was delivered to the bank, as trustee. The schedule listed two parcels of real property and a draft for $950.61 drawn on a term account in the Glendale office of the bank. One parcel of real property was the house and lot where Mrs. Goldstrass resided, and the other parcel was property which was leased to the Zinke Shoe Company on a long term lease. The trust agreement was amended on February 1, 1949, to provide that the net income of the trust should be added to the principal, forming a common fund, and that the trustee should distribute the common fund to or for the benefit of Mrs. Goldstrass at her request, excepting that if, in the opinion of the trustee, she became incapacitated, the trustee might use as much of the fund for her benefit as the trustee deemed advisable. The bank accepted the trust and acted as trustee (until a successor was appointed as hereinafter stated).

The value of the two parcels of real property as determined by the bank on July 8, 1949, for the purpose of fixing its fee as trustee, was $53,775. On February 1, 1950, Mrs. Goldstrass authorized the bank to sell the residence, and the bank sold it "as of" November 1, 1950, for $12,000.

About August 1, 1950, Mrs. Goldstrass was adjudged incompetent, and Hilda Ross (step-daughter of Mrs. Goldstrass) was appointed guardian of her person and estate.

On May 14, 1952, prior to filing the present action, Mrs. Goldstrass, acting through

Frederick McCann as her guardian ad litem, commenced another action against the bank seeking an accounting, the removal of the bank as trustee, and the appointment of another trustee. Frederick McCann, individually, was also a plaintiff in that action. Further relief sought by him in that action was the payment to him of certain amounts which he allegedly had paid for the support of Mrs. Goldstrass. The bank answered that complaint and also filed an account and resignation as trustee. Mr. Hasbrouck appeared as one of the attorneys for the bank in that action. Mrs. Goldstrass, through her guardian ad litem, filed objections to the account of the trustee and alleged that the sale of Mrs. Goldstrass' house and lot (residence) was in bad faith and that she was damaged thereby in the amount of $7,000. The court overruled the objections, approved the account, accepted the resignation of the trustee, and appointed another trustee (Crules R. Cheek). The decree in that action was entered February 9, 1953. The bank transferred all the assets of the trust to the successor trustee.

The present action (for damages allegedly resulting from fraud and conspiracy in inducing the execution of the trust agreement) was commenced April 13, 1953.

The allegations regarding fraud and conspiracy, in the sixth amended complaint, in the present action were in substance as follows: Defendants unlawfully conspired to make representations to induce Mrs. Goldstrass to execute the trust agreement "wherein and whereby" defendants would obtain profit and income for themselves. Defendants, in furtherance of the conspiracy, falsely represented to Mrs. Goldstrass that: Frederick McCann was not taking proper care of her and had abandoned her; he had collected the rentals from her residence and converted them to his own use; he had sold her furniture and converted the proceeds to his own use; he had not insured her residence against loss by fire; the rentals from the Zinke property were not being collected or were being collected by Mr. McCann and were being converted to his own use; a trustee was necessary in order to provide for her care and to manage her property; if she executed the trust agreement the bank would provide for her care out of the trust property and take care of her. Also, in furtherance of the conspiracy, defendants withheld from Mrs. Goldstrass information concerning provisions which her brother had made for her support during her illness, and information that the rents from the Zinke property were being deposited in her checking account. Plaintiff was incompetent to execute a trust agreement at the time when such representations were made and when such information was withheld. Plaintiff relied upon the representations alleged to have been made by defendants and was induced thereby to execute the trust agreement.

Said amended complaint also alleged that, subsequent to the execution of the trust agreement, the defendants committed various acts for the purpose of furthering and concealing the fraud and conspiracy. Plaintiff sought damages consisting of: trustee's fees and charges and attorneys' fees allowed in the previous action of plaintiff against the bank; loss of interest on money which the bank as trustee allegedly failed to invest; the difference between the alleged market value of the residence and the amount for which the trustee sold the residence; loss of services which Mr. McCann could have furnished to plaintiff without cost to her. Plaintiff also sought punitive damages.

The answers denied the allegations of fraud, conspiracy, and damages. Some of the answers alleged various affirmative defenses, including res judicata, statute of limitations, and estoppel.

The court granted motions of defendants to strike from said amended complaint (1) the allegation as to loss of interest on money which the bank as trustee allegedly failed to invest; and (2) the allegations as to damages allegedly sustained by Mrs. Goldstrass through the sale of her residence by the trustee.

The evidence was, in substance, as follows: About 1923, Mrs. Goldstrass and her husband became residents of Glendale, California. About August, 1947, Mr. Gold-

strass died, and shortly thereafter, Mr. McCann came to California from his home in New Jersey and remained here for a few weeks. While he was in California, Mrs. Goldstrass gave him about $12,000 to invest for her. She accompanied him on his return to New Jersey and remained there until December, 1947, when she returned to California. Mr. McCann invested the money, which he had received from her, in a corporation in which he was the principal investor. The corporation operated a coal mine. About June, 1948, Mrs. Goldstrass became seriously ill and was hospitalized, and Mr. McCann came to California to take care of her. About July, 1948, at the direction of Mr. McCann, Mrs. Goldstrass was moved from the hospital to a sanitarium which was operated by defendant Irene Mossoni. After Mr. McCann came to California he took care of the business affairs of Mrs. Goldstrass and disposed of her furniture and leased her residence. While Mr. McCann was in California (about four months), monthly rental checks of $175 each from the Zinke Company were deposited in the checking account of Mrs. Goldstrass in the Glendale branch of the bank. Those Zinke checks were endorsed, "Deposited to the credit of" Mrs. Goldstrass, by D. H. Smith. Mr. Smith was vice-president of the bank, at the Glendale branch. Mr. McCann, with the permission of Mr. Smith, drew checks on the checking account of Mrs. Goldstrass for her care. In October, 1948, Mr. McCann returned to New Jersey. Before returning there, he informed Mr. Smith that he had arranged with the Zinke Company to have its rental checks sent to the bank each month. Mr. McCann also made arrangements for a real estate broker to collect the rental on the residence of Mrs. Goldstrass, deduct a commission of 5 per cent, and forward the balance to Mr. McCann in New Jersey.

When he returned to New Jersey he was informed that the coal mine, in which he had invested Mrs. Goldstrass' money, had been flooded. He closed the mine, and the assets of the corporation were sold. No part of the money, which he invested for Mrs. Goldstrass, was returned to her. Mr. McCann continued to write checks on Mrs. Goldstrass' account for her care. On November 7, 1948, Mr. McCann wrote a letter to the bank,[1] wherein he requested Mr. Smith to "O.K." an enclosed check and forward it to the sanitarium; he asked Mr. Smith to advise whether the Zinke rent for November had been deposited; he said Mrs. Goldstrass could not handle her affairs; he asked for copies of bank statements. On November 20 Mr. Smith replied to the letter,[2] stating that he had mailed the check to the sanitarium; Zinke's had not paid the rent due November 1;

1. "Herewith check payable to Laurel Sanitarium, W. Laurel St., Glendale, Cal. in amount $267.87 where Mrs. Ella J. Goldstrass is and payments to Sanitarium is due. I enclosed addressed envelope so you can let go forward to them. I send yours to your bank for O.K. rather than direct and little delay will occur.

"Will you be good enough to advise if Zinki send you Nov. rent $175.00 for deposit to credit of Mrs. Goldstrass. Before leaving Glendale I telephoned Zinki Glendale office. Mr. Zinki was not there so I gave his secy my request to mail you hereafter each month $175.00 rent rather than Mrs. Goldstrass who you know can't handle her affairs, by reason of your kindness I have been ask to do so. Zinki office said they would do it.

"Please send me copies of Sept. Oct. and November bank statements. From Nov. on mail to me. Will you change your records accordingly."

2. "Your letter dated November 7th has been received. I mailed the check to the Laurel Sanitarium as requested. Zinke's have not paid to the Bank the rent which was due November 1.

"In regard to sending you Mrs. Goldstrass' cancelled checks and statement, there was no checks in September and only one in October, which has been mailed to your sister at her old home address.

"Two friends of your sister, Mrs. Friend and Mrs. Empey, called at the Bank yesterday with a $35.00 check signed by your sister. The signature was very normal. They advised the money was being used to buy a robe, slippers and other accessories for your sister, and which they said she needs very badly. The check was properly signed and there was nothing for me to do but to cash it."

there was only one cancelled check and it had been sent to Mrs. Goldstrass' home address; two of her friends, Mrs. Friend and Mrs. Empey, had been to the bank with a check for $35, which was signed by Mrs. Goldstrass, and the bank cashed the check. A check of the Zinke Company, dated "11–1–48," for $175 and payable to Mrs. Goldstrass was endorsed by Mr. Smith for deposit to the credit of Mrs. Goldstrass, and was deposited in her checking account on November 27, 1948. Another check of the Zinke Company, dated "12–1–48," for $175 and payable to her was similarly endorsed and deposited on December 1, 1948. About December 3, 1948, Mr. McCann paid $275.15 to the sanitarium for the care of Mrs. Goldstrass. The payment was made by a check which was signed "Ella J. Goldstrass Frederick McCann By authority." The check was presented to the Glendale branch of the bank on December 17, 1948, and on the approval of Mr. Smith, was paid from Mrs. Goldstrass' checking account. When the trust agreement was executed on December 31, 1948, the balance in the checking account of Mrs. Goldstrass was $102.17. On January 3, 1948, $175 was deposited in the checking account. That account was not listed in the property schedule attached to the trust agreement, and the funds in that account were not transferred to the bank as trustee. The term account of Mrs. Goldstrass, which was listed in the schedule attached to the trust agreement, was transferred to the bank as trustee by a check dated December 31, 1948, and signed by Mrs. Goldstrass.

Defendant Hasbrouck, called as a witness under section 2055 of the Code of Civil Procedure, testified as follows: He is an attorney at law and had practiced in Glendale since 1927. He had performed legal services for Mrs. Goldstrass at various times commencing in 1947. About December 23, 1948, the attendant at the sanitarium called him and requested him to come to see Mrs. Goldstrass. About December 27, 1948, he went to the sanitarium and talked with Mrs. Goldstrass. She told him that she wanted to transfer her property to the defendant bank and let the bank take care of it for her. He mentioned a trust and told her that if she transferred her property, under an arrangement whereby the bank took charge of her property and paid her expenses from her funds, a trust would be created. Mrs. Goldstrass also said that "if she turned the property over" she wanted to be free from worry. He told her that if she had the property in the hands of someone who could properly take care of it, she would not have to worry and could try to get well. Mrs. Goldstrass at that time was seated in a wheelchair and seemed strong and alert. Thereafter he called the head office of the bank and requested that a trust officer be sent out to discuss a trust matter with him. A few days later he went to the sanitarium with Mr. Bell, who was a trust officer of the bank. He introduced Mr. Bell to Mrs. Goldstrass, and Mr. Bell told her the procedure of the bank in trust matters. On December 31, 1948, he went to the sanitarium again with Mr. Bell and read to Mrs. Goldstrass the trust agreement, which had been prepared by some one at the bank. He told her that it was the usual form which the bank used and that the charges were the customary charges which the bank put in all its trusts. She signed the agreement. He was not sure that he was present when she signed the amendment but he believed he was. All the legal documents concerning the trust were prepared by the bank. Mrs. Empey was not present when he discussed the trust agreement with Mrs. Goldstrass and she was not present when the agreement was signed. He had known Mr. Smith for many years. He did not discuss the trust agreement with Mr. Smith prior to the time the agreement was signed.

Mr. Bell, called as a witness under section 2055 of the Code of Civil Procedure, testified as follows: He is and had been a trust advisor for the bank for 15 years. He might have talked with Mr. Smith about the trust agreement three times before the agreement was made, but he (Bell) did not recall what the conversation was. He went to the sanitarium about December 22 or 23,

1948, with Mr. Hasbrouck and talked with Mrs. Goldstrass. She told him that she had a residence, and she also had property which was leased to Zinke. She also told him that her brother had gone east and left her by herself with no one to take care of her business and financial affairs. She asked him if the bank "might be able" to take over and manage her properties for her. He told her what the charges would be if the bank accepted the management of her business affairs. The trust agreement was drawn by Mr. Humphrey (apparently an employee of the bank) and was the regular form of trust agreement used by the bank. He (Bell) went to the sanitarium again with Mr. Hasbrouck on December 31, 1948, and Mr. Hasbrouck read the trust agreement to Mrs. Goldstrass. The trust agreement was signed by Mrs. Goldstrass in his presence. He never discussed the trust agreement with Mrs. Empey and he did not see her the day the agreement was signed.

Mr. Smith, called as a witness under section 2055 of the Code of Civil Procedure, testified in part as follows: He had no recollection as to the manner in which the Zinke checks came to him. He recalled only one occasion when a Zinke check was delayed, and he wrote to Mr. McCann stating that the rent had not been paid. He did not recall talking to Mr. Bell regarding a trust agreement. His only recollection of talking with Mrs. Empey regarding Mrs. Goldstrass' affairs was that he talked with her when she and Mrs. Friend came to the bank with a $35 check which had been signed by Mrs. Goldstrass. They told him that Mrs. Goldstrass needed certain clothing and other things. He cashed the check.

As above stated, appellant contends that there was sufficient evidence to require that the case be submitted to the jury. His principal argument is to the effect that the evidence showed, or that the jury could have inferred, as follows: That in November, 1948, Mr. Smith "initiated" the execution of the trust agreement. The Zinke Company paid the rent promptly for 15 years, and mailed the rental checks directly to the Glendale branch of the bank. The Zinke Company mailed the rental check for November, 1948, to the bank on November 1, promptly as usual, and that Mr. Smith "set that check aside," and did not deposit it until November 27, in order to cause Mrs. Goldstrass to believe that the rent was not being collected and thereby induce her to execute the trust agreement. On December 17, 1948, Mr. Smith sent Mr. Bell to the sanitarium to solicit the trust agreement from Mrs. Goldstrass. In order to induce Mrs. Goldstrass to execute the trust agreement, Mr. Smith and Mr. Bell withheld from her the information that the Zinke rentals were being collected. Mr. Smith prepared the property schedule, which was attached to the trust agreement, and in order to conceal the information that the Zinke rentals were being collected, he did not list Mrs. Goldstrass' checking account in the schedule. Mrs. Goldstrass was led, by such actions of Mr. Smith and Mr. Bell, to believe that the Zinke rentals were not being collected and that she executed the trust agreement to assure the collection of the Zinke rentals.

Appellant argues further that the jury could have inferred that Mr. Hasbrouck and Mrs. Empey joined in the alleged fraud of Mr. Smith.

[1] There was no evidence that Mrs. Goldstrass made any inquiry of Mr. Smith or Mr. Bell concerning the Zinke rentals or that either of them withheld from her any information concerning such rentals. There was no evidence that Mrs. Goldstrass knew that there was a delay in the deposit of the Zinke rental check for November, 1948. Mr. Smith, in his letter of November 20 to Mr. McCann (above quoted), advised Mr. McCann that the check had not been received. There was no evidence, however, that Mr. McCann or any one communicated the information to Mrs. Goldstrass that the check had not been received. Mr. McCann testified that he did not write to Mrs. Goldstrass in 1948 after he had returned to New Jersey. He also testified that while he was in California he deposited the Zinke checks in Mrs. Gold-

strass' checking account. Mr. McCann left California in October, 1948, and in his letter of November 7 to Mr. Smith, he stated that before he left Glendale, he telephoned the Zinke office and requested Mr. Zinke's secretary to mail the checks to the bank "rather than Mrs. Goldstrass." Mrs. Empey testified, without objection, that about November, 1948, she received a letter from Mr. McCann in which he stated that he had not received the Zinke check (apparently referring to the November check), and in which he requested her to go to the Goldstrass house and see if the mail had been held up. She testified further that she went to the house several times but the tenent was not there; she finally got the check and took or forwarded it to the bank. There was no evidence that Mr. Smith prepared the property schedule and there was no evidence that Mrs. Goldstrass' checking account was omitted from the schedule in order to conceal the information that the Zinke rentals were being collected. It does not appear how or in what manner the listing of the checking account in the schedule would have disclosed to Mrs. Goldstrass the information that the Zinke rentals were being collected. The balance in that account on December 31, 1948 (the date of the trust agreement), was $102.17, which amount was less than the Zinke monthly rental. There was no evidence that Mrs. Goldstrass was led, by any action of Mr. Smith or Mr. Bell, to believe that the Zinke rentals were not being collected.

[2] Appellant, in support of his argument that Mr. Smith "initiated" the execution of the agreement, refers to an alleged inconsistency as between the testimony of Mr. Bell in his deposition and the testimony of Mr. Hasbrouck at the trial with reference to the date when Mr. Bell first saw Mrs. Goldstrass. Mr. Bell testified, in his deposition of January 7, 1954, that he first met Mrs. Goldstrass "about two weeks" before December 31, 1948, and introduced himself to her. (He testified at the trial that he first met her on December 22 or 23.) Mr. Hasbrouck testified at the trial that he first went to the sanitarium to see Mrs. Goldstrass about December 27, 1948; that he and Mr. Bell went to the sanitarium a few days later and he introduced Mr. Bell to Mrs. Goldstrass. Mr. Bell's deposition was taken about five years after December, 1948; and the trial was about seven years after December, 1948. Under such circumstances the minor differences in the testimony of the two witnesses as to those details—the date when Mr. Bell first saw Mrs. Goldstrass, and who introduced Mr. Bell to her—are of no significance and do not indicate fraud or conspiracy or that Mr. Smith "initiated" the execution of the agreement. There was no evidence of any fraud on the part of Mr. Smith.

[3] Appellant argues to the effect that the jury could have inferred that Mr. Hasbrouck joined in the alleged "fraudulent action of Mr. Smith." That argument seems to be based upon an assumption by appellant that it could also be inferred from the evidence that Mr. Hasbrouck did not make a proper investigation of Mrs. Goldstrass' affairs; that such an investigation by him would have disclosed "fraudulent action" by Mr. Smith; that Mr. Hasbrouck permitted Mrs. Goldstrass to enter into the trust agreement after he had "observed" that she was incompetent. That argument also seems to be based upon the evidence that Mr. Hasbrouck was one of the attorneys for the bank in the other action, hereinabove referred to, wherein Mr. McCann, as guardian ad litem and individually, sought an accounting, removal of trustee, and recovery of money advanced by him. As above stated, there was no evidence of any fraudulent action by Mr. Smith. There was no basis for an inference that an investigation by Mr. Hasbrouck would have disclosed any such action by Mr. Smith. There was no evidence that Mr. Hasbrouck observed that Mrs. Goldstrass was incompetent. Mr. Hasbrouck testified that he concluded that Mrs. Goldstrass was competent at the time she executed the trust agreement. He testified in his deposition that he discussed with her the matter of

guardianship or having the bank as trustee. He testified at the trial that there was nothing about the circumstances that suggested to him that there should be a guardianship. The appearance by Mr. Hasbrouck as one of the attorneys for the bank in the other action was no basis for an inference that Mrs. Goldstrass was fraudulently induced to execute the trust agreement. There was no evidence that Mr. Hasbrouck joined in or committed any fraud.

[4] Appellant argues further to the effect that the jury could have inferred that Mrs. Empey "joined in to conceal and further the fraud complained of." He (appellant) states in his brief that Mrs. Empey advised him that Mrs. Goldstrass was better at the time she signed the agreement than she was when she became sick, that Mrs. Goldstrass "now hated" him, and he "was not to come back to Glendale because his sister would not give him a chance to make a fool of her again." He also states in his brief that Mrs. Empey led Mrs. Goldstrass to believe that he had abondoned her; and we "have a situation where Mrs. Empey played the brother against the sister and the sister against the brother, and neither the brother nor the sister could understand how the other could be so ungrateful." It seems that appellant's argument is that Mrs. Empey concealed alleged fraud of Mr. Smith with reference to the Zinke rent not being paid; that she caused an estrangement between Mrs. Goldstrass and Mr. McCann; and she was present when the trust agreement was executed. Apparently the argument is based upon two letters written by Mrs. Empey to Mr. McCann. One letter, dated December 5, 1948, stated: "I checked with Mr. Smith on Dec. 2nd and found the Zinki check had been received and credited. Met Mr. Johnson and asked if the Broadway tenant had paid and he said yes so 'all is well.' * * * I told her you had to rent the house on account of the insurance. * * * She asks about her bills—is Zinki paying his rent—etc. and we side step. In view of the fact that she had the 'go home' idea I told her the house had to be rented. I am sure she won't sign anything harmful because as I said before she is alert about her property and money." The other letter, dated January 2, 1949, stated: "* * * I went to see her [Mrs. Goldstrass] on Friday and found her busily engaged with two men from the bank's trust department. She has turned over her affairs to them to manage and they will attend to the collections and I suppose ask you to return her papers. I told her you expected to come out soon and she said 'He won't have a chance to make a fool of me again.' The doctor had been there and said she was able to transact business so that is that. She told the two men that you had 'better than $8000.00 and 2300 from her stock' that you were to invest it and put the securities in an envelope with her name on it, etc. Well it is too bad but it will relieve you of a big responsibility. She is looking fine—better than before she took sick. * * *" The letters do not support appellant's statements that Mrs. Empey advised appellant that Mrs. Goldstrass hated him and he "was not to come back to Glendale." The letters do not support his argument to the effect that Mrs. Empey caused an estrangement between him and his sister; and the letters do not support his argument that she was present when the trust agreement was executed. Mrs. Empey testified that she was not present when Mrs. Goldstrass signed the trust agreement, but that Mrs. Goldstrass told her what had occurred. Mrs. Empey testified further that she had known Mrs. Goldstrass since 1923 and they had visited each other often; she had seen Mrs. Goldstrass two or three times a week for approximately 30 years; after Mrs. Goldstrass returned from New Jersey in 1947, she was in Mrs. Empey's house practically every day. It is apparent that the acts of Mrs. Empey in asking about the rent check for November at the request of appellant, in cashing the $35 check for Mrs. Goldstrass, and in visiting and talking with her at the sanitarium were acts of a good friend and neighbor in an effort to be of assistance. There was no

evidence that Mrs. Empey concealed or committed any fraud.

There was no evidence to the effect that defendant Irene Mossoni (operator of the sanitarium) was involved in any way in the execution of the trust agreement. Appellant does not refer to her in his brief.

[5, 6] "[A] nonsuit may be granted only when, disregarding conflicting evidence, giving to the plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, the court properly determines that there is no substantial evidence to support a verdict in favor of the plaintiff." Leonard v. Watsonville Community Hospital, 47 Cal. 2d 509, 305 P.2d 36, 39. "The right of a court to direct a verdict is the same as the right of a court to grant a nonsuit." Gish v. Los Angeles Ry. Corp., 13 Cal.2d 570, 573, 90 P.2d 792, 794. Appellant's arguments regarding fraud and conspiracy are speculative and conjectural.

[7] Appellant contends, in effect, that the evidence showed that Mrs. Goldstrass was incompetent at the time she executed the trust agreement, and that the agreement was void. This is not an action to set aside the agreement. It is an action for damages resulting from fraud and conspiracy in inducing the execution of a trust agreement. The alleged incompetency of Mrs. Goldstrass was material only on the issue as to whether she was induced by fraud to execute the agreement. No issue is presented as to whether the agreement was void.

[8] Appellant contends that the court erred in granting the motions of defendant to strike, from the sixth amended complaint, the allegations concerning damages sustained by Mrs. Goldstrass through the loss of interest on money, and through the sale of her residence. In view of the orders granting motions for nonsuits and for a directed verdict, it is not necessary to discuss the ruling with reference to striking out allegations as to damages.

In view of the above conclusions, it is not necessary to discuss other contentions on appeal. Some of the other contentions on appeal pertain to: the affirmative defenses; appellant's request for special verdicts; and the denial of appellant's motion for judgment notwithstanding the verdict.

The judgments are affirmed.

VALLÉE, J., concurs.

SHINN, P. J., did not participate.



149 Cal.App.2d 543

John M. SEPULVEDA and Marian Sepulveda, Plaintiffs and Appellants,

v.

AYAKO ISHIMARU and George Ishimaru, et al., Defendants and Respondents.

Civ. 17097.

District Court of Appeal, First District, Division 2, California.

March 29, 1957.

Action for property damage and personal injuries resulting when plaintiff's automobile, as it made right turn, was struck from behind by defendant's automobile. The Superior Court, County of Santa Clara, Leonard R. Avilla, J., entered judgment on verdict for defendants, denied plaintiffs' motion for new trial, and plaintiffs appealed. The District Court of Appeal held, in part, that where counsel's argument that a plaintiff's failure to ascertain by looking through rear view mirror whether he could safely make turn was negligence as matter of law, could, if erroneous, have been cured by instruction of court, alleged misconduct of counsel could not be raised on appeal in absence of request for instruction.

Affirmed.

1. New Trial ⇐55

Remark of juror during trial of automobile accident case that automobile bumper which plaintiff's counsel placed on counsel table prior to introduction in evidence, could be sold for a fee, was not such misconduct of jury as would warrant new trial for plaintiff, in absence of timely motion for mistrial, or objection.

2. Trial ⇐317

When knowledge of alleged misconduct of juror is obtained in time to apply to court to remedy or to correct it, party may not sit by in silence taking chances on favorable verdict, and, only after hostile verdict, be heard to complain.

3. Appeal and Error ⇐230, 978(2)
New Trial ⇐163(2)

The import, possible prejudice, character and influence of remark of juror, "he can sell that for a fee," referring to automobile bumper plaintiff's counsel placed on counsel table prior to introduction in evidence, were primarily matters of fact for trial court, order denying new trial decided by implication that verdict was not materially affected by remark, and that plaintiffs suffered no resulting prejudice, and such determination would not be disturbed on appeal, where timely objection had not been made.

4. Appeal and Error ⇐1015(5)
Trial ⇐305

Fact that during trial of automobile accident case, daughter of a juror sat next to defendant and, during recess, wished defendant luck, did not necessarily affect juror's impartiality, in absence of juror's knowledge that daughter had spoken to defendant, and probable effect of such conduct was question of fact for trial court whose implied decision that it did not affect juror reviewing court would not disturb on appeal.

5. Appeal and Error ⇐207

Where action of trial court was not invoked by objection to, or by request for instruction admonishing jury to disregard, allegedly improper remarks of counsel, such misconduct could not be considered on appeal if an admonition to jury would have removed effect thereof.

6. Trial ⇐133(6)

It is only in extreme cases that the court when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct impropriety of act of counsel and remove any effect his conduct or remarks would otherwise have.

7. Appeal and Error ⇐978(2)

The reviewing court must consider that the trial court, by denial of motion for new trial, was of opinion that alleged instances of misconduct of counsel were not prejudicial.

8. Appeal and Error ⇐207

Impropriety, if any, of counsel's argument that plaintiff's failure to ascertain by looking through rear view mirror whether he could safely make turn was negligence as matter of law, could have been cured by instruction of court, and could not be raised on appeal in absence of request for instruction.

9. Trial ⇐133(2)

Even if it were misconduct for counsel to argue in accordance with law contained in instruction of court, where jury was instructed to follow law as stated by court, alleged misconduct was not prejudicial.

10. Appeal and Error ⇐230
Trial ⇐124

Where defendant's counsel in his argument relating to extent of damages for personal injuries, after extensively analyzing plaintiff's conduct relating to his physical symptoms, stated that plaintiff suffered from "law suit-itis", counsel did not thereby imply actual dishonesty, and alleged misconduct of counsel could not be raised on appeal in absence of timely objection thereto.

11. Evidence ⇐471(17)

Testimony of plaintiff in automobile accident case that "I thought all that was necessary was to put out my hand and make my turn", was properly stricken as conclusion.

12. Appeal and Error ⇐1047(3)
Evidence ⇐471(2)

Where, after plaintiff in automobile accident case, had been asked whether he had said anything when defendant told investigating officer that plaintiff had turned directly in front of defendant to make right turn from inside lane, plaintiff testified "I was given to understand that he was interviewing her, and he would talk to me", such testimony was properly stricken out as conclusion of witness and ruling was not prejudicial in view of fact that plaintiff immediately thereafter testified to what officer had told him.

13. Appeal and Error ⇐1064(1)

Where, in action for damage to plaintiff's automobile struck from behind as plaintiff made right turn, an instruction to jury consisted of statute regulating movement of automobile from one lane to another, and statute regulating turning, together with statement that violation of the statutes raised rebuttable presumption of negligence, instruction was not prejudicial, since both statutes are based on same principle and do not conflict. West's Ann. Vehicle Code, §§ 526, 544.

14. Automobiles ⇐169

Statute prohibiting turning of vehicle unless turn can be made with reasonable safety applies to right as well as left turns. West's Ann.Vehicle Code, § 544.

15. Appeal and Error ⇐882(12), 928(4)

In automobile accident case, where record failed to show who requested given instruction consisting of two sections of vehicle statute, it must be presumed by District Court of Appeal that instruction was given at appellants' own request and appellants could not complain.

16. Trial ⇐260(7)

Where trial court as part of charge in case involving automobile collision, gave full instructions concerning proximate cause, refusal of request for instruction that failure to comply with statute does not constitute contributory negligence unless violation was proximate cause of harm, was not prejudicial error.

Morgan & Beauzay, San Jose, for appellants.

Campbell, Custer, Warburton & Britton, San Jose, for respondents. W. R. Dunn, Burlingame, of counsel.

PER CURIAM.

This is an action for personal property injury suffered by plaintiffs Mr. and Mrs. Sepulveda when during the making of a right hand turn the right rear of their car was hit by the right front of a car driven by defendant Ayako Ishimaru with the consent of its owner defendant George Ishimaru. The verdict was for defendants. Plaintiffs' motion for a new trial was denied and they appealed from the judgment entered on the verdict.

It is not contended that the evidence does not support the verdict, correctly so, as it was in substantial conflict, defendant Ayako Ishimaru testifying that the Sepulveda car made the right turn from the inside lane across her path in the outer lane, whereas plaintiff John M. Sepulveda testified that he duly made the turn from the outer lane after giving a hand-signal. Plaintiffs rely on misconduct of the jury and of counsel for defendants and on errors in rulings on evidence and in instruction.

[1–3] *Misconduct of the jury.* On the motion for a new trial an affidavit of plaintiffs' attorney showed that when he was placing a bumper upon the counsel table prior to offering it in evidence in rebuttal as the rear bumper of plaintiffs' car, he heard the juror Austin, who was subsequently chosen as foreman, say in the jury box: "he can sell that for a fee." Appellants contend that this statement indicated a biased mind. However, at the time counsel did not move for a mistrial or even bring the matter to the attention of the court. When knowledge of the objectionable fact is obtained in time to apply to the court to remedy or correct it, a party may not sit by in silence, taking chances of a favorable verdict and be heard to complain after a hostile verdict only. He will then have waived his right to complain. Zibbell

v. Southern Pac. Co., 160 Cal. 237, 253, 116 P. 516; Newton v. Thomas, 137 Cal.App.2d 748, 769, 291 P.2d 503; 3 Witkin California Procedure 2054. Moreover, the import, possible prejudicial character and influence on other jurors of the very vague remark of the juror Austin were primarily matters of fact for the trial court. The order denying the new trial decided by implication that the verdict was not materially affected by the matter complained of and that appellants suffered no prejudice through it. Lafargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538; Jensen v. Southern Pac. Co., 129 Cal.App.2d 67, 80, 276 P.2d 703.

[4] Appellants in their motion for a new trial relied also on an affidavit of a daughter of the juror Velma Collins, to the effect that on April 22, 1955, (the last day of the trial), she accompanied her mother to San Jose to listen to the trial, that during one of the recesses she talked to defendant in the ladies restroom and wished her good luck, and that subsequently she sat next to the defendant in the courtroom. Appellants contend that the stated conduct of the daughter necessarily affected the impartiality of the mother as a juror. We don't agree. There is no evidence whatever indicating that the mother during the deliberations of the jury knew that her daughter had that same day spoken to the defendant in the ladies restroom. Hence, that fact in itself is wholly irrelevant. It does not appear that the daughter had ever before met the defendant or that her good wishes were anything more than a formal courtesy. It may be assumed that the juror will have seen that her daughter at some time sat next to the defendant in the courtroom but it is not clear how this fact can have influenced the mother unless the daughter then and there spoke to the defendant or in other ways showed that she was associating with the defendant or sympathized with her. The affidavit does not state anything of the kind, nor does it indicate how long the daughter sat next to the defendant. The fact alone that a person for some undefined length of time sits next to a party to a lawsuit does not necessarily have any meaning with respect to the relations or sentiments existing between them. The probable effect on the juror of the in itself inconclusive happening was again a question of fact primarily for the trial court whose implied decision that it did not affect the mother we shall not disturb.

[5–7] *Misconduct of counsel.* Many instances of alleged misconduct of defendants' counsel, mainly in their argument to the jury, are relied on by appellants. It is, however, conceded that at no time did counsel for plaintiffs object to any of the conduct complained of or ask the court to admonish the jury to disregard it. "Where the action of the trial court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would remove the effect thereof." Scott v. Times-Mirror Co., 181 Cal. 345, 368, 184 P. 672, 682, 12 A.L.R. 1007. "'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.'" Jensen v. Southern Pac. Co., supra, 129 Cal.App.2d at page 80, 276 P.2d at page 712. The question to be decided is therefore whether any of the instances of misconduct complained of is of such an extreme character. We must consider also that they were submitted to the trial court on the motion for a new trial, the denial of which shows that said court, which is in a better position to evaluate the influence of such conduct, was of opinion that it was not prejudicial.

[8, 9] The misconduct which appellants consider most serious was, if misconduct at all, certainly not of such incurable character. It consisted in allegedly erroneously urging in the argument to the jury that the conduct of Mr. Sepulveda in not ascertaining by looking in his rear view mirror whether he could safely make his turn was negligence as a matter of law, no matter from which lane he made his turn. (Coun-

sel however also told the jury that if the turn was made from the outside lane the failure to look would not be a proximate cause of the accident). Evidently, if such statement as to the law was in any respect erroneous, as contended by appellants, it could have been cured by an instruction of the court to that effect. Appellants urge that objection to said misconduct would have been useless since the court later instructed in line with counsel's argument. If it could be misconduct to argue in accordance with the law contained in the instruction of the court it could certainly not be prejudicial as the jury must at any rate follow the law as stated by the court and they were so instructed in this case.

[10] Appellants urge that a contention of defendants' counsel "that Mr. Sepulveda has a malady which we lawyers run across quite often and which I call 'law suit-itis' ", a contention further elaborated on in the argument, was a deliberate though implied accusation of dishonesty so serious that the failure to object should not preclude it from being raised on appeal. The statement was made in the part of the argument relating to the extent of damages, in which it was expressly admitted that Mr. Sepulveda was hurt to some extent. It was said as a conclusion from an extensive analysis of the evidence regarding the absence of objective symptoms, the appearance of certain symptoms complained of a considerable time after the accident, increased visiting of physicians when the trial drew near, etcetera. The condition to which counsel referred is well known and is called litigation neurosis. (See about it and the frequency of its appearance especially as compensation neurosis I Campbell Workmen's Compensation, p. 325, et seq.) Because of its psychoneurotic character it does not imply actual dishonesty. An admonition by the court if asked could certainly have clarified this. Later, counsel for defendants himself declared: "I think that he thinks he was injured; I don't believe he is deliberately falsifying his testimony." If appellant's argument in this respect could be considered at all as misconduct it would be a matter of imprudent expression not of deliberate and incurable wrongdoing in bad faith.

No good purpose would be served by treating other instances of conduct of counsel complained of separately. We have considered them all and concluded that if any of them constituted misconduct, the effect thereof would have been cured by admonition from the court.

[11] *Errors of law.* Appellants first point out as such the striking of some testimony of Mr. Sepulveda. When he testified: "I knew I was going to make a righthand turn. I knew—saw the reflection of the headlights and I thought all that was necessary was to put my hand out and make my turn," counsel for defendants objected "to what he thought as his conclusion." The court ordered: "Strike it out." Appellants contend that in this manner his testimony as to what he was doing in this regard had been stricken from the record. Obviously, only his conclusion as to what was required was stricken. Shortly before he had testified without objection or striking: "I started applying my brakes. I put my hand out to make a righthand turn." There was neither error nor prejudice.

[12] 1. When Mr. Sepulveda was questioned as to whether he made any remark, when after the accident defendant Ayako Ishimaru told the investigating police officer in his presence that plaintiff had made his right turn directly in front of her from the inside lane, he testified: "No, I didn't think it was the time for me to say anything there. He was interviewing her and I—I was given to understand to begin with that he was interviewing her and he would talk to me and that was it." Counsel for defendants then objected to the part starting with "I was given to understand" as hearsay, the court ruled: "The point beginning at 'given to understand' is objectionable. Strike it out and start from there." The trial continued as follows:

"Q. (By Mr. Bergna) [attorney for plaintiffs] Did the officer say anything to you with reference to your—what you should do while he was talking to the lady?

Let's put it that way. A. He told *he* was going to interview us separately, so my understanding right then—

"Mr. Bergna: Not your understanding. Counsel is right there.

"The witness: He told me he was going to talk to her—he was going to talk to us separately,—"

Appellant points out that the part stricken was not hearsay because it was not intended to prove the truth of the statement of the police officer, but only the fact that the statement was made and that Mr. Sepulveda's understanding of what was said by the officer was relevant. Objection was not sustained to what Mr. Sepulveda *understood* but to what he testified he was *given to understand.* Such was an objectionable statement of the conclusion of the witness as to what the officer wanted him to understand. As immediately thereafter the witness was permitted to testify to what the officer actually said to him, no prejudice whatever could have resulted, even if the sentence had been erroneously stricken. It was plaintiffs' attorney himself who later, without any ruling by the court on this point, prevented the witness from testifying to what he understood.

[13–15] Finally, appellants assign error in instruction consisting in reading to the jury Sections 544 and 526 of the Vehicle Code without explanation or restriction other than BAJI instruction 149.1 to the effect that from the violation of such section a presumption of negligence arises which is not conclusive but can be overcome by proof that the conduct was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. Appellants urge that it was held in Moore v. Miller, 51 Cal.App.2d 674, 125 P.2d 576, that Section 526 does not apply to a right-hand turn and that under the same rationale the requirement of Section 544 that no turn may be made until such movement can be made with reasonable safety does not apply to a right turn. The import of the decision in Moore v. Miller, supra, 51 Cal.App.2d 674, 125 P.2d 576, should have been explained to the jury in the instructions. The contention is wholly without merit. Moore v. Miller, supra, 51 Cal.App.2d at pages 682–683, 125 P.2d at pages 580–581, holds that Section 526 is plainly intended to regulate the use of lanes, and not the making of turns and that Section 544 was the provision applicable to the conduct of defendant in that case, who made a left turn. Hence, it was not error to refuse to instruct on Section 526 where the jury was duly instructed on Section 544. The case does not distinguish between right and left turns and does not imply in any way that the clear provision of Section 544 would not be applicable to right turns. The most that could be derived from the case is that no instruction on Section 526 was required unless in the movement of the vehicles at some time a changing of lanes was involved. Appellants cannot complain of the giving of an instruction on Section 526 because it does not appear from the record at whose request the instruction was given, in which case it will be presumed by the appellate court to have been given at appellant's own request. Lynch v. Birdwell, 44 Cal.2d 839, 847, 285 P.2d 919; Smith v. Pellissier, 134 Cal.App. 2d 562, 570–571, 286 P.2d 66. The giving of the instruction was clearly not prejudicial even if it may have been superfluous as Sections 526 and 544 are based on the same principle and do not conflict.

[16] Appellants do not in their opening brief complain of the refusal to give their requested instruction No. 28, which instruction is cursorily mentioned in their closing brief. It is urged in the latter brief that appellants were at any rate entitled to an instruction that failure to comply with a statute does not constitute contributory negligence unless it is shown that the violation was the proximate cause of the harm. In Landrum v. Severin, 37 Cal.2d 24, 28, 230 P.2d 337, it was held that it was not prejudicial error not to repeat a statement of the rule of proximate cause in a particular instruction concerning the duty of a party under a section of the Vehicle Code, if the court as part of the charge gave full general instructions upon

the meaning of proximate cause and the requirement that negligence must proximately contribute to the injury. Such instructions were duly given in this case.

We do not find any reversible error in the record.

Judgment affirmed.



149 Cal.App.2d 552

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Homer W. SNOWDEN, Defendant and Appellant.

Cr. 5795.

District Court of Appeal, Second District, Division 2, California.

March 29, 1957.

Hearing Denied May 22, 1957.

Proceeding upon motion to set aside judgment of conviction and to withdraw defendants' pleas of guilty and permit him to enter pleas of not guilty. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgment and order denying motion, and defendant appealed. The District Court of Appeal, Fox, J., held that, where defendant had been represented by eminent California counsel and two lawyers from sister state at time he changed his plea of not guilty to one of guilty, and four months had gone by after change of plea and probation had been denied and prison sentence pronounced without suggestion on defendant's part that defendant was not capable of exercising an independent judgment, refusal to vacate judgment of conviction and permit defendant to withdraw his plea of guilty on ground that physical and mental disabilities made defendant incapable of having any free will did not constitute an abuse of trial court's discretion.

Judgment and order affirmed.

1. Criminal Law ⇐274, 998

Because of defendant's obvious interest in outcome of proceeding upon motion to set aside judgment of conviction and withdraw defendant's pleas of guilty on ground that defendant's disabilities made him incapable of having any free will and that defendant had changed his plea to guilty on representation that only misdemeanors were involved and that probation would be granted, full credence was not required to be given to defendant's affidavit or testimony. West's Ann.Pen.Code, §§ 182, 487, subd. 1; West's Ann.Insurance Code, § 1104.

2. Criminal Law ⇐274, 998

Where defendant had been represented by eminent California counsel and two lawyers from sister state at time he changed his plea to one of guilty, and four months had gone, probation had been denied, and prison sentence pronounced without assertion of contention that defendant was incapable of exercising an independent judgment, refusal to vacate judgment of conviction and to permit withdrawal of plea of guilty on ground that disabilities made defendant incapable of having any free will did not constitute an abuse of trial court's discretion.

3. Criminal Law ⇐1158(1)

In proceeding on motion to set aside judgment of conviction and withdraw pleas of guilty, trial court's resolution, adverse to defendant, of conflicting evidence as to whether defendant had been induced to change his pleas of not guilty to pleas of guilty by reason of representations of his attorney, concurred in by deputy district attorney, that defendant would be pleading only to misdemeanors and would get probation was binding upon the District Court of Appeal.

4. Criminal Law ⇐152

Where indictment alleged that defendant had been absent from state for period from November, 1952, to date of return of indictment and defendant admitted that he had been absent for the period from such date to date of return of indictment,

defendant was not entitled to have judgments of conviction for offenses alleged to have been committed in November, 1951, set aside on ground that they were void because the three-year statute of limitations was applicable. West's Ann.Pen. Code, §§ 800, 802.

5. Criminal Law ⇐152

Time during which defendant is absent from state is excluded in determining whether statute of limitations is a bar to his prosecution. West's Ann.Pen.Code, § 802.

6. Criminal Law ⇐152

Where, prior to defendant's entry of plea of guilty after withdrawal of plea of not guilty, court asked defendant whether he admitted allegation in indictment that he had been absent from state for "the" period from certain date to date of return of indictment and defendant's counsel responded in the affirmative, and court then obtained defendant's affirmative answer to question which was the same except for substitution of word "a" for the word "the", defendant would not be heard to contend that he had not admitted being absent for such period. West's Ann.Pen. Code, § 800.

Belli, Crowley & Ford and Arthur J. Crowley, Hollywood, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

FOX, Justice.

This is an appeal by defendant Homer W. Snowden from a judgment of conviction and from an order denying his motion to set aside and vacate said judgment and to withdraw his pleas of guilty to counts 2 and 3 of an indictment and to permit him to enter pleas of not guilty thereto.

As a result of certain financial transactions with the Constitution Life Insurance Company in November, 1951, the Los Angeles County grand jury on May 3, 1955, returned an indictment charging W. Solon Snowden, Ross Bohanon, A. D. Hudspeth and Homer W. Snowden (appellant herein) with one count of conspiracy, Pen.Code, § 182, and thirteen counts of grand theft,[1] Pen.Code, § 487, subd. 1.

Defendant Homer W. Snowden employed J. W. Ehrlich, Esq., to represent him for a fee of $56,000[2] which he assertedly paid. After pleading not guilty to all counts, defendant Homer W. Snowden on April 20, 1956[3], changed his plea to guilty as to counts 2 and 3 of the indictment. In that respect the reporter's transcript discloses the following proceedings:

"Mr. Ehrlich: Your Honor, may the defendant Homer Snowden be given permission at this time to withdraw his former plea of not guilty for the purpose of entering another and different plea as to Counts 2 and 3 of the indictment?

"* * * * * *

"The Court: Mr. Homer Snowden, permission has been requested by your counsel for permission for you to enter a plea of guilty to the charges contained in Counts 2 and 3. Are you familiar with those charges, sir?

"Defendant Homer Snowden: Yes, sir.

"The Court: And are you pleading guilty to those charges freely and voluntarily and because you believe you are guilty of those offenses?

"Defendant Homer Snowden: Yes, sir.

1. A total of $278,934.60 was assertedly involved in these transactions. The insurance company appears to have been fully reimbursed together with interest.

2. This fee did not include counsel's per diem for the trial.

3. At this same court session the indictment against Bohanon was dismissed on motion of the district attorney and defendant W. Solon Snowden entered a plea of guilty to counts 6 and 10.

"The Court: Has anybody forced you or persuaded you to plead guilty to those charges against your will and without your consent?

"Defendant Homer Snowden: No, sir.

"The Court: Has anybody given you any promise of reward or hope of immunity or lenience for pleading guilty?

"Defendant Homer Snowden: No, sir.

"The Court: And the People having indicated that is satisfactory, you may rearraign each[4] defendant as indicated, Mr. Lindley."

At the time of arraignment for judgment on August 10, 1956, the court pointed out to defendant Homer W. Snowden (hereinafter referred to as the defendant) that it is alleged in the indictment that "you were absent from the State of California for *the* period from November, 1952, to the date of the return of this indictment" (emphasis added) and inquired whether he admitted that allegation. Mr. Ehrlich responded:

"We will have to admit that we were not here under all those circumstances.

"The Court: Mr. Snowden, then do you admit the allegation that you were absent from the State of California for a period from November, 1952, to the date of the return of this indictment; is that correct, sir?

"Mr. Ehrlich: The answer is 'Yes,' Mr. Snowden.

"The Court: Do you answer that 'Yes'?

"Defendant Homer W. Snowden: Yes."

Thereafter, Mr. Ehrlich stated there was no legal cause for not disposing of the matter and addressed himself to the question of probation for his client.[5] Probation, however, was denied and the defendant was sentenced to the state prison, the sentences on the two counts to run concurrently. The remaining counts were dismissed.

On August 23, 1956, defendant filed a motion to vacate the judgment and to withdraw his plea of guilty, and to enter pleas of not guilty to counts 2 and 3, on the grounds that:

1. The court lacked jurisdiction over the offenses in question because it was alleged they were committed in November, 1951, and thus the statute of limitations had run.

2. He was never advised as to his rights relative to the application of the statute of limitations. Had he been advised, he would not have pleaded guilty.

3. He is innocent but pleaded guilty by reason of fraud exercised upon him, in that his attorney represented and the deputy district attorney concurred that if he pleaded guilty he would be pleading guilty to a misdemeanor, and that he would be placed on probation; and, relying on these representations, he pleaded guilty.

In an affidavit in support of his motion defendant stated, *inter alia,* that his attorney, Mr. Ehrlich, had advised him that if he pleaded guilty to counts 2 and 3 of the indictment he would be pleading guilty to misdemeanors[6] only and that he would get probation. This was on the morning of

4. The other defendant rearraigned at this time was W. Solon Snowden.

5. W. Solon Snowden, who was represented by Robert Eaton, Esq., was granted probation on this occasion.

6. The idea that these transactions were only misdemeanors, or might be so considered, is based on the provisions of section 1104 of the Insurance Code, which prohibits any one who is an officer of an insurance company, or who has authority in the management of its funds, from borrowing from the company. The theory is that defendant had such authority and that since the transactions here in question were in the form of loans to defendant the provisions of this section were thus violated; and that since no penalty is expressly provided therefor the violations would thus be classed as misdemeanors.

April 20, 1956, prior to the opening of court. Defendant further states in his affidavit: "That Mr. Ehrlich then called Mr. Logan Lindley, the Deputy District Attorney, over and stated to him in my presence that if I pleaded guilty to counts 2 and 3 of the indictment, the other charges would be dismissed and that the Deputy District Attorney would then submit a statement to the court that no one had lost any money as a result of the dealings that I was charged with, and that I would be pleading guilty to two misdemeanors and would receive probation. That at this time Mr. Lindley then replied, 'That is the understanding.'"

The defendant further stated that "at the time" he was feeling so weak and ill that he could hardly stand up and felt he was going to faint at any moment. However, he stated earlier in his affidavit that he told Mr. Ehrlich on that morning (April 20th) that he wished to go to trial, the case being set for trial on April 23rd. Other affidavits were filed on behalf of defendant detailing his physical disabilities and indicating that some of them were of a serious nature.

On this occasion in addition to Mr. Ehrlich the defendant had present two other lawyers—Lester May and Dan Gibbs, Esquires—from Texas. May had conferred with Ehrlich in San Francisco and, on April 19th, had telephoned defendant to be in court the next morning and had advised him of the purpose of this appearance.

Deputy District Attorney Lindley testified that he never told the defendant or his attorney that if the defendant pleaded guilty to two counts of the indictment they would be misdemeanors, or that the defendant would be given a county jail sentence or probation and Lindley further testified that he never heard Mr. Ehrlich make a statement to that effect or that the deputy district attorney would submit a statement to the court that no one had lost any money as a result of the dealings with which the defendant was charged. Nor, did he ever state to Mr. Ehrlich that it was his understanding that the defendant would be given probation.

Mr. Ehrlich did not testify at the hearing on the motion to vacate the judgment and to withdraw the pleas of guilty, nor did he file any affidavit in support of defendant's motion.

At the hearing on the motion the record preliminary to the defendant's change of pleas, as set out above, was read to the court.

No suggestion appears to have been made at the probation hearing or when the defendant was sentenced to the state prison that the offenses to which he had pleaded guilty and for which he was being sentenced were only misdemeanors.

In seeking a reversal defendant makes three contentions: (1) he was suffering from such physical and mental disabilities that his free will and clear judgment were overreached to such a point that he was incapable of having any free will; (2) he changed his plea to guilty on the representation of his attorney, corroborated by the deputy district attorney handling his case, that he would be pleading guilty only to two misdemeanors and would be granted probation; and (3) the statute of limitations had expired and the judgment was therefore void. None of these contentions warrant a reversal.

[1] Defendant's first and second contentions involve purely factual considerations which the trial court has resolved against him. Because of defendant's obvious interest in the outcome of this proceeding the trial court was not required to give full credence to his statements either in his affidavit or on the witness stand. It was also the trial court's responsibility to evaluate the opinions of the doctors who had examined the defendant, some of which were quite indecisive, as, e. g., that of Dr. Marcus Crahan who opined that defendant had "a complicated series of organic abnormalities which taken in combination present a picture of serious illness with the immediate as well as the remote prognosis *guarded*." (Emphasis added.)

[2] On this eventful occasion defendant not only had at his side eminent California counsel but also two lawyers from a sister state, one of whom had consulted with Mr. Ehrlich and had arranged the day before for defendant to be in court that morning and had explained to him the purpose of the court appearance which was undoubtedly to change his plea since the case was set for trial the following Monday. It does not appear that defendant made any complaint to the probation officer that he had been incapable of exercising his free will and forming an independent judgment at the time he entered his pleas of guilty on April 20th. No such suggestion was made by counsel at the probation hearing and pronouncement of judgment on August 10th. Ten days later, however, he signed an affidavit indicating he was too ill and too disturbed to exercise an independent judgment. In evaluating this plea the trial court was entitled to take into consideration these facts: The physical appearance of the defendant on April 20th when he pleaded guilty; that four months had gone by since the change of plea, probation had been denied, and a prison sentence pronounced without any suggestion on the part of defendant or his counsel that defendant was not capable of exercising an independent judgment. In these circumstances it cannot be said, as a matter of law, that the trial court abused its discretion in the premises.

[3] As to defendant's second contention; viz., that he was induced to change his pleas by reason of representations of his attorney,[7] concurred in by the deputy district attorney, that he would only be pleading to misdemeanors and would get probation, the evidence is in sharp conflict. Mr. Lindley, the deputy district attorney, denied making any such statements either to defendant or to Mr. Ehrlich, and denied hearing Mr. Ehrlich make any such statements to the defendant or otherwise.[8] The trial court resolved this conflict against the defendant and such resolution is binding on this court.

In summing up the factual aspects of the hearing the trial judge made the following pertinent observations:

7. If defendant changed his pleas solely on the advice of his counsel he clearly is not entitled to any relief. People v. Sciunzi, 140 Cal.App. 70, 71, 34 P.2d 1044; People v. Gottlieb, 25 Cal.App.2d 411, 415, 77 P.2d 489; People v. Ayala, 138 Cal.App.2d 243, 249–250, 291 P.2d 517.

8. On this phase of the hearing Deputy District Attorney Lindley testified, in part, as follows:

"Q. [By Mr. Stovitz] Did you ever tell Mr. Ehrlich that if the defendant pled guilty to two charges that they would be misdemeanors?

"* * * * * * *

"The Witness [Deputy District Attorney Lindley]: I did not.

"Q. By Mr. Stovitz: Did you ever tell Mr. Ehrlich that the defendant Homer W. Snowden or any of the defendants would be given a County Jail sentence? A. I did not.

"Q. Or that Mr. Homer W. Snowden would be given probation? A. I did not.

"* * * * * * *

"Q. Did you ever hear Mr. Ehrlich say that morning on April 20th either in the presence of Mr. Homer W. Snowden or out of the presence of Homer W. Snowden that if Homer W. Snowden pled guilty to counts two and three of the indictment the other charges would be dismissed and that the Deputy District Attorney would then submit a statement to the Court that no one had lost any money as a result of the dealings that Homer W. Snowden was charged with and that Homer W. Snowden would be pleading guilty to two misdemeanors and would receive probation? A. No, sir.

"Q. Did you overhear any portion of that statement? A. I overheard no portion of that statement.

"Q. Did you ever state to Mr. Ehrlich in the presence of Mr. Homer W. Snowden or any other time that it was your understanding that Homer W. Snowden would be given probation? A. I did not.

"Q. Or that it was your understanding that Mr. Homer W. Snowden was pleading guilty to two misdemeanors? A. I did not.

"Q. Now Mr. Lindl[e]y, did you at any time make any representations to Mr. Ehrlich or to anyone else as to what the punishment in this case would be? A. I did not."

"The Court: This is, as far as I can see, another case we run into occasionally where a person gambles and loses. * * * [T]his Court cannot find that there was anything done by the Court or any responsible officer of the Court that would overreach the free and unimpaired judgment of the defendant. I asked him at the time the plea was entered if it was done freely and voluntarily and because he believed he was guilty of the offense, and he said unequivocably [sic], 'Yes,' and all during the proceedings from the date of the plea on April 20 to the date of the sentence on August 10, not one word was indicated to the Court through the probation officer or through any other mediums that he was not entering that plea of guilty freely and voluntarily. Only after August 10 when he finds out that the gamble he took did not pay off, then he wants to come in and get his stakes back."

[4] There is no merit in defendant's final contention that the statute of limitations had run on these offenses and therefore the judgment was void. True, the offenses were alleged to have been committed in November, 1951, and the applicable statute of limitations is three years, Pen.Code, § 800. But the indictment contained the allegation: "That the defendants were absent from the State of California for the period from November, 1952, to the date of the return of this indictment."

[5] The time a defendant is absent from the state is excluded in determining whether the statute of limitations is a bar to his prosecution. Pen.Code, § 802; People v. Newell, 192 Cal. 659, 669–670, 221 P. 622; People v. Levine, 114 Cal.App.2d 616, 617, 250 P.2d 645.

In the instant matter, the defendant, in response to questions by the court, admitted the allegation in the indictment that he was "absent from the State of California for *the* period from November, 1952, to the date of the return of this indictment." (Emphasis added.)

[6] Defendant makes a quibbling argument based on the circumstances that when the trial judge repeated to defendant the inquiry whether he admitted he was absent from the state from November, 1952, to the date the indictment was returned he used the article "a" rather than "the" with reference to the period of such absence. Defendant replied in the affirmative. He now argues that such answer is not an admission that he had been absent from the state for *the* period from November, 1952, to the date the indictment was returned. When the judge asked the question initially he used the words "the period" in the context quoted in the preceding paragraph. Mr. Ehrlich said he understood the matter and proceeded to give an affirmative reply. The court however required the personal acknowledgment of the defendant and suggested that Mr. Ehrlich so advise the defendant. The court then repeated the question but used the article "a" instead of "the" before the word period. Mr. Ehrlich advised the defendant, "The answer is 'Yes,' * * *." The defendant then answered in the affirmative. In the context there is no reasonable basis for believing that either the defendant or his attorney was either misled or confused. At the time of the probation hearing and pronouncement of sentence there was no suggestion that defendant had not been absent from the state for *the* period in question.

The judgment and order are affirmed.

MOORE, P. J., and ASHBURN, J., concur.

149 Cal.App.2d 435

The PEOPLE of the State of California, Plaintiffs and Respondents,

v.

Jesse LAWRENCE, Defendant and Appellant.

Cr. 3285.

District Court of Appeal, First District, California.

March 26, 1957.

Hearing Denied May 22, 1957.

Defendant was convicted in the Superior Court of the City and County of San Francisco, C. Harold Caulfield, J., of sale and possession of narcotics, and he appealed. The Court of Appeal, Stone, J. pro tem., held that when an informant becomes a participant in crime charged against defendant, he and the people lose the right to keep his identity anonymous, either at trial or on voir dire hearing held out of jury's presence.

Reversed.

1. Criminal Law ⇐394
Telecommunications ⇐495

Where police officer listened to telephone conversation between defendant and an informant, relating to purchase of narcotics, by means of amplifier attached to telephone receiver and extension cord, and with informant's consent, there was no invasion of constitutional right of privacy or violation of statute, and officer's description of the conversation was admissible. West's Ann.Const. art. 1, § 19; West's Ann. Pen.Code, § 640.

2. Arrest ⇐63(4)

"Reasonable cause" for belief that person to be arrested without warrant has committed felony is shown where a man of ordinary care and prudence, knowing what the arresting officer knows, would believe or entertain a strong suspicion that the person is guilty. West's Ann.Pen.Code, § 836.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

3. Arrest ⇐63(4)

"Reasonable cause" justifying an arrest may be based upon information obtained from others and is not limited to evidence that would be admissible at trial on issue of guilt. West's Ann.Pen.Code, § 836.

4. Arrest ⇐63(4)

Evidence authorized finding that officers had reasonable cause for believing that defendant had committed felony of selling narcotics, as basis for arrest of defendant without warrant and admission of evidence found in subsequent search of defendant's apartment. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 836.

5. Arrest ⇐71

Where arrest without warrant was lawful, search without warrant incidental thereto was also lawful, whether it preceded or followed arrest. West's Ann.Pen. Code, § 836.

6. Arrest ⇐71

Where arrest without warrant on suspicion of sale of narcotics was lawful, search of apartment to obtain marked money with which informant had purchased narcotics just prior to arrest was proper though arrest itself was made in entry hall to apartment.

7. Arrest ⇐71

In making a search incidental to a lawful arrest, officer is not restricted to area immediately surrounding location of defendant at time of arrest, but law contemplates a reasonable search of the vicinity.

8. Arrest ⇐63(1), 71

Facts that officers gained admittance to entry hall of defendant's apartment by subterfuge and that defendant resisted arrest and search incidental thereto, did not affect the legality of either arrest or search. West's Ann.Pen.Code, § 836.

9. Arrest ⇐68

If reasonable or probable cause exists, officer has right and duty to use all force necessary to make a felony arrest. West's Ann.Pen.Code, § 836.

10. Criminal Law ⇐736(1)

Trial court was not required to submit to jury, on trial of defendant's guilt of sale of narcotics, evidence concerning the reasonableness or legality of arrest of defendant without warrant and seizure of evidence incidental thereto.

11. Criminal Law ⇐1168(1)

Refusal, at voir dire hearing to determine legality of arrest without warrant and search which resulted in discovery of evidence offered in narcotics prosecution, to permit questioning concerning name and identity of person upon whose information officers acted in making the arrest and search, was not prejudicial error where defendant claimed to know identity of informant and actually called such person as witness.

12. Criminal Law ⇐661

In prosection for sale and possession of narcotics, refusal to permit alleged purchaser of narcotics, upon whose information officers acted in making arrest of defendant without warrant and subsequent search of his apartment, to testify for defendant in denial of officers' description of events leading up to arrest, was error as denying right to produce witnesses on defendant's behalf. West's Ann.Const. art. 1, § 13; West's Ann. Pen.Code, § 686, subd. 3.

13. Criminal Law ⇐363

To deny defendant a right to examine an officer regarding the name of, or to ask other material questions concerning, an informant-participant in the offense, would be to suppress an essential element of res gestae.

14. Constitutional Law ⇐266

When defendant is not permitted to ask questions about a material element of the crime, such as those concerning feigned accomplice, he is being denied a substantial right which amounts to denial of due process.

15. Criminal Law ⇐627½

When an informant becomes a participant in crime charged against defendant, he and the people lose the right to keep his identity anonymous, either at trial or at voir dire hearing held out of jury's presence.

16. Constitutional Law ⇐257

The fact that hearing, such as one to determine reasonableness of arrest or search, is held before court in absence of jury, makes it no less a "criminal proceeding" to which due process applies and all rights defendant may have at trial proper apply with equal force and dignity.

See publication Words and Phrases, for other judicial constructions and definitions of "Criminal Proceeding".

17. Criminal Law ⇐1170½(5)

Error in refusing to permit cross-examination of police officers to determine name of informant-participant, or to permit such informant-participant to testify to impeach officers' testimony as to events leading to arrest and search, was prejudicial as to count charging possession of narcotics, in which informant did not participate, as well as to counts charging sale in which informant participated, where such counts were tried together and impeachment would have applied to officers' testimony concerning the count charging possession.

Arthur D. Klang, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of the State of Cal., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondents.

STONE, Justice pro tem.

Defendant was indicted on three counts of violation of section 11500 of the Health and Safety Code. Count I charged a sale of heroin on December 14, 1955; Count II charged a sale of heroin on January 19, 1956, and Count III charged possession of heroin on January 19, 1956. It was alleged that defendant had previously suffered three convictions, one for burglary and two for violations of section 11500. Defendant's motion to set aside the indictment was denied. Defendant initially

pleaded not guilty to all counts and previous convictions. Before selection of a jury, defendant admitted the prior convictions. Defendant was found guilty on all three counts.

The defendant has alleged seven grounds of appeal. They are (1) the court erred in admitting testimony of an officer concerning a telephone conversation between defendant and an informer which was overheard by means of an amplifier and extension cord; (2) that the arrest without a warrant was illegal; (3) that the search and seizure without a warrant was unlawful and within the exclusionary rule of the Cahan case, People v. Cahan, 44 Cal.2d 434, 282 P.2d 905; (4) that the court erred in not submitting the question of the reasonableness of the arrest and the legality of the search and seizure to the jury; (5) the court committed error in not requiring the officers to disclose the name of the informant during the voir dire examination; (6) the court erred in not requiring the officers to disclose the name of the informant at the trial before the jury; (7) it was error for the court to refuse to allow a witness produced by defendant, whom he alleged to be the informant, to testify. The numerous grounds of appeal require a rather detailed statement of the facts to provide proper background for a discussion of each question presented.

The Facts

Inspector George Olsen testified that he was present in the State Building on December 14, 1955, when a known informant placed a telephone call to Evergreen 6–5633. The party at the other end said, "Hello." The informant asked, "Hello, is this you, Jesse?" The other party said, "Yes". The informant said, "Is anything happening?" The other party said, "Yes." The informant said, "Can I get anything?" The other party said, "Yes, come on over." Inspector Olsen identified Jesse Lawrence as the recipient of the call, and recognized him by his voice. The informant was searched, his clothes removed, all pockets searched, and the linings removed from his trousers. Inspector Olsen, Inspector Noel and the informant proceeded to Spruce and Sacramento Streets where the informant was handed $200 in identified State funds. Then the inspector observed the informant walk directly to a green 1951 Packard, in which defendant was sitting behind the wheel. The informant and defendant conversed for approximately two minutes. Then, they went into 451 Spruce Street. Approximately one and one-half hours later defendant, his wife and the informer came out of 451 Spruce Street. Defendant and his wife got in their car. The informer headed north on Spruce. The informer met Inspectors Noel and Olsen at Sacramento and Spruce, and there surrendered to Inspector Noel a rubber container in which there was a white powder later identified as 210 grains of heroin. The inspectors returned the informant to the State Building. They searched him and found none of the money.

Inspector Louis Noel testified that he was present in a public telephone booth at Washington and Broderick Streets on January 19, 1956, when the informant called Evergreen 6–5633. Noel dialed the number. He monitored the conversation through an amplifier which he placed over "the listening end" of the receiver. The informant said, "Hello, is that you, Jesse?" The other party replied, "Yes." The informant asked, "Can I get anything?" The other party said, "Yes, come on by." Officer Noel identified the other party as Jesse Lawrence, the defendant. Then the informant was taken to a State vehicle and searched. No contraband was found. He was given $206 in marked State-identified bills. The informant and several officers proceeded to the vicinity of Sacramento and Spruce Streets. The informant went to 451 Spruce, in a building containing three flats. He went up the stairs to the door at 451 and stood for a moment or two. Defendant raised a window facing on Sacramento Street. The two men apparently conversed for a short while. The informant descended the stairs and defendant dropped what appeared to be a key down

to the informant. The informant picked up the key, went up to the doorway at 451 Spruce, opened the door and went in. Over an hour later, the informer came out of 451 Spruce Street. He entered a blue-colored taxi-cab which proceeded toward California Street. Noel contacted other State officers by radio and informed them of the direction the taxi was proceeding.

Officer Rinken testified that on January 19, 1956, he was in contact with Inspector Noel from the time the informer went into 451 Spruce Street. Sometime later, he was advised to look for the informant in a taxi-cab. He spotted him in a blue DeSoto cab near Spruce and California Streets. He followed the informer to the intersection of Euclid, where he got out of the taxi-cab and gave Rinken a rubber contraceptive containing a white powder which was identified as 190 grains of heroin.

Inspector Noel testified that after the informant left the defendant's premises he observed Gerald Williams and defendant's wife, Norvelle Lawrence, leave 451 Spruce Street. Noel radioed Officer Rinken to take Williams into custody. Noel searched Williams and found neither narcotics nor any of the marked bills given to the informer. The officers had Williams return with them to 451 Spruce and ring the door bell. Defendant opened the door. The officers identified themselves and announced that defendant was under arrest for sale of narcotics. Defendant tried to close the door and it was necessary to forcibly take him into custody. Inspector Noel testified that after subduing defendant, he proceeded up the stairs, where he was met by Inspector Chasten, who showed him a container full of white powder which contained 291 grains of heroin. Noel found a white paper containing one grain of heroin on a cocktail table, and $170 of the money which had been given to the informer in a small cardboard box on a dresser next to defendant's bed. Defendant admitted it was his money, and said he gambled. Defendant admitted that the container which Inspector Chasten had given to Noel was his, and that he used it for his asthma. Noel observed that the number of the telephone was Evergreen 6–5633.

Objection was sustained to questions by defense counsel seeking to elicit the name of the informant. Defendant then produced Willie Dandridge, an inmate at San Quentin prison, and alleged he was the informant. Dandridge was permitted to testify on voir dire and admitted that he was at defendant's house but was uncertain as to the date. He admitted that defendant threw a key out of the window to him; that he left defendant's premises in a blue DeSoto cab; he denied that he gave money to or purchased narcotics from the defendant. He denied he gave a package of narcotics to Inspector Noel on December 14, 1955, or to officer Rinken on January 19, 1956. He denied he had informed officer Noel or any other state officer that narcotics could be or had been purchased from defendant. On cross-examination Dandridge denied that he had ever been in the State Building or had agreed to help Inspector Noel. Dandridge did admit that Gerald Williams was at defendant's apartment the day he was there. The defendant asked to call Willie Dandridge as his witness at the trial before the jury but the district attorney objected and the court sustained the objection. The defendant testified on his own behalf and categorically denied any and all sales of narcotics. He denied any telephone conversations with the informant and he testified that the officers threatened him and actually used force on his person unnecessarily at the time of the arrest. Gerald Williams corroborated the defendant's testimony as to most of the events transpiring on January 19, 1956.

Admissibility of Telephone Conversation:

[1] Defendant charges the court erred in permitting an officer to relate a telephone conversation between the defendant and an informant. The officer listened to the conversation by means of an amplifier attached to the receiver and an extension cord. Defendant contends "the listening-in" by the officer was an invasion of defendant's right of privacy guaranteed by the Constitution

of the United States, by Article I, Section 19 of the California Constitution, and that it was a violation of Penal Code, § 640. The identical question was presented in the case of People v. Malotte, 46 Cal.2d 59, 292 P.2d 517, in which case the officers placed a recording device under a bed, connected it to an induction coil and recorded a telephone conversation. The court held 46 Cal.2d at page 63, 292 P.2d at page 519:

"Defendant contends, however, that the evidence was obtained in violation of the Federal Communications Act, 47 U.S.C.A. § 605, and section 640 of the California Penal Code and that it was, therefore, inadmissible under the rule of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905.

"Section 605 of the Federal Communications Act provides: '* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; * * *.' A majority of the federal courts define 'interceipt' as used in section 605 to mean 'to take or seize by the way, or before arrival at the destined place,' and hold that there is no interception when the intended receiver consents to or directs the overhearing of the communication at the moment it reaches him. [citations] The United States Supreme Court, approving this definition in the Goldman case, supra [Goldman v. United States], 316 U.S. 129, 134, 62 S.Ct. 993, 995, 86 L.Ed. 1322, went on to say: '[Intercept] does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver.' See Reitmeister v. Reitmeister, 2 Cir., 162 F.2d 691. Thus, as in the present case, where the conversation was recorded by the officers 'at the moment' it reached the 'intended receiver,' there was no interception within the meaning of section 605 of the Federal Communications Act. There was likewise no invasion of privacy in violation of section 640 of the Penal Code. There is no learning of the contents of a communication 'fraudulently, clandestinely, or in any unauthorized manner' when one of the participants to the conversation consents to or directs its overhearing or preservation. See, People v. Channell, 107 Cal.App.2d 192, 200, 236 P.2d 654."

The instant case clearly comes within the rationale of the Malotte case and the trial court properly permitted the officer to relate the conversation.

The Arrest and Search and Seizure:

Defendant contends the trial court erred in not excluding all evidence seized by the officers in his apartment because the officers had no search warrant. The defendant being well aware of the rule that a search without a warrant may be made incidental to a lawful arrest regardless of whether the search is made before or after the arrest, People v. Simon, 45 Cal.2d 645, 648, 290 P. 2d 531, contends additionally that the arrest was unlawful because the officers had no warrant. Defendant argues that the officers did not have reasonable cause to believe he had committed a felony to justify an arrest without a warrant.

[2–4] Penal Code, § 836 provides that a peace officer may without a warrant arrest a person "when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it." Reasonable cause is shown when under the state of facts of the particular case a man of ordinary care and prudence, knowing what the arresting officer knows, would believe or entertain a strong suspicion that the person is guilty. People v. Kilvington, 104 Cal. 86, 92, 37 P. 799; People v. Boyles, 45 Cal.2d 652–655, 290 P. 2d 535; People v. Moore, 141 Cal.App.2d 87, 89, 296 P.2d 91. Reasonable cause justifying an arrest may be based upon information obtained from others and it is not limited to evidence that would be admissi-

ble at the trial on the issue of guilt. People v. Boyles, supra; Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222; People v. Moore, supra; People v. Cannon, 148 Cal.App.2d 163, 306 P.2d 589. The record in this case discloses that one of the officers, Inspector Noel, testified that for over a year prior to the arrest, officers had been informed defendant had been using and selling narcotics. Defendant's home was placed under surveillance and for some time known suspects, peddlers and addicts were observed visiting the premises. In March 1955, defendant was arrested and charged with sale, possession and maintaining premises where narcotics are sold. That arrest was based upon surveillance, the purchase of heroin on the premises by an informant as well as the observation of known addicts frequenting the premises. On December 14, 1955, Inspector Noel was present when an informant was searched to be certain he had no narcotics on his person, given marked money, and taken to a rendezvous with defendant. While under surveillance informant and defendant went to defendant's apartment and when the informant left the premises he turned over to the officers a quantity of heroin and the marked money was not on his person. On January 19th, just preceding the arrest in this case, the same informant again purchased a quantity of heroin from the defendant, using the same procedure as that employed on December 14th. Before the informant made the purchase on January 19th, Inspector Noel and Inspector Olsen both listened to a telephone conversation between the informant and the defendant concerning the sale. Inspector Noel watched the informant dial defendant's number, heard the defendant answer, recognized his voice and heard the informant ask, "Is that you, Jesse?" The defendant answered, "Yes". He heard the informant ask, "Can I get anything," and the defendant answered, "Yes, come on over." The officers watched defendant toss a key to informant which was used to enter the premises. Later informant left the premises, turned a quantity of heroin over to an officer, whereupon the officers proceeded to arrest the defendant without a warrant. The officers gained entrance to defendant's premises by a subterfuge, getting a friend of defendant's to ring the door bell and ask admittance. When the defendant opened the door they arrested him without a warrant on the belief he had committed a felony, to wit, violation of section 11500 of the Health and Safety Code. The foregoing résumé was corroborated by all of the officers but it was denied by the defendant, by the person whom defendant alleged to be the informant, by defendant's wife, and by one Gerald Williams, who at the officers' request, induced the defendant to open the door to his apartment, and who had been in the apartment part of the time while the informant was there. The trial court believed the officers and viewing their testimony in the light of the entire transcript, the court was justified in doing so. The evidence in this case is much stronger than that in Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222, and People v. Gonzales, 141 Cal.App.2d 604, 297 P. 2d 50, as in each of these cases the court upheld an arrest made by an officer without a warrant, relying solely upon the "tip" of an informant. The information the officers had before the arrest in the instant case provided reasonable cause for the arrest without a warrant pursuant to Penal Code, § 836, subd. 3. People v. Boyle, supra; People v. Maddox, 46 Cal.2d 301, 294 P.2d 6; People v. Montes, 146 Cal.App.2d 530, 303 P.2d 1064; People v. Cannon, supra.

[5] The arrest was lawful and the search incidental thereto was also lawful, even though made without a search warrant, whether the search preceded or followed the arrest. People v. Simon, 45 Cal. 2d 645, 648, 290 P.2d 531; Willson v. Superior Court, 46 Cal.2d 291, 296, 294 P.2d 36; Trowbridge v. Superior Court, supra; People v. Montes, supra.

[6, 7] Defendant argues even though the arrest was lawful, it was made in the entry hall to defendant's apartment and the officers had no right to search the apart-

ment. This position is untenable. The marked money with which the informant purchased the heroin just prior to the arrest was a natural object of the search. It was a part of the res gestae, and the search of defendant's apartment to find it was incidental to the arrest and entirely reasonable. In any event in making a search incidental to a lawful arrest an officer is not restricted to the area immediately surrounding the location of the defendant at the time he is arrested. The law contemplates a reasonable search of the vicinity. In United States v. Pisano, 7 Cir., 193 F.2d 361–363, the court said:

"* * * Searches and seizures incidental to an arrest but without search warrants are not necessarily unreasonable but are, in the absence of unusual circumstances, entirely reasonable. The right to search the place where the arrest is made and to find and seize things connected with the crime as its fruits or as the means by which it is committed stems not only from the authority to search the person but also from the long standing practice of searching for other proofs of guilt within the control of the accused upon arrest. [Citation] Consequently the premises where a valid arrest is made, under the control of the person arrested, are subject to search without a search warrant. Such a search is not unreasonable. [Citation] The only essential of validity of a search incidental to an arrest is that it be made in connection with a valid arrest. If the arrest is valid then a search of the immediate premises where the defendant is arrested is reasonable. The decisive question is not whether a search warrant could have been procured but whether the search made was resonable and that, in turn, in the absence of exceptional circumstances, depends upon whether the arrest was valid."

See also Carroll v. United States, 267 U.S. 132, 147, 45 S.Ct. 280, 69 L.Ed. 543; Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 70 L.Ed. 145. In People v. Montes, 146 Cal.App.2d 530, 303 P.2d 1064, the defendant was arrested while in a station wagon in a driveway outside his home, and the court held a search of defendant's home was reasonable. The search in that case was made incidental to an arrest without a warrant.

[8, 9] The fact that officers gained admittance to the entry hall by subterfuge in order to make the arrest is immaterial. The officers had reasonable cause to believe defendant had committed a felony and the fact that they resorted to trickery to get the door to defendant's apartment open in order to arrest him has no bearing upon the justification for the arrest. People v. Sayles, 140 Cal.App.2d 657, 661, 295 P.2d 579; People v. Maddox, 46 Cal.2d 301, 294 P.2d 6. Nor does the fact defendant resisted both the arrest and the search incidental thereto affect the legality of either. A defendant may not thwart officers making a lawful arrest without a warrant by resistance. If reasonable or probable cause exists, an officer has the right, indeed the duty in the public interest, to use all force necessary to make a felony arrest. People v. Maddox, supra. It should not be overlooked that an officer also has the right to protect himself and his fellow officers while making a lawful arrest and search.

Submitting Question of Reasonableness of Arrest and Search and Seizure To The Jury:

[10] Defendant argues that the evidence concerning the reasonableness or legality of the arrest and seizure should have been presented to the jury on the trial of defendant's guilt. Defendant does not dispute the advisability of the court determining the reasonableness of the arrest and search and seizure outside the presence of the jury in the first instance. His position is that when the court determines that the arrest and the search and seizure were lawful, the court is then determining a question of fact. He contends the question of fact and

the evidence from which it was determined should then be presented to the jury for its determination in the trial proper. Defendant bases his argument on the procedure established to determine the admissibility of a confession. Even though the court determines its admissibility the jury ultimately passes upon the question of whether or not the confession was given voluntarily. This question was decided by the Supreme Court in People v. Gorg, 45 Cal.2d 776, at page 781, 291 P.2d 469, at page 472 where the court said:

"Defendant urges, however, that the same procedure should be followed as in the case of a confession, where the trial court initially determines the question of admissibility and then instructs the jury to disregard the confession if they find that it was not freely and voluntarily made. The rule of the confession cases is justified by the fact that the jury must necessarily be informed of the circumstances surrounding the confession properly to evaluate it. The probative value of evidence obtained by a search or seizure, however, does not depend on whether the search or seizure was legal or illegal, and no purpose would be served by having the jury make a second determination of that issue. Moreover, the legality of a search or seizure will frequently depend on whether the officer had reasonable cause to make an arrest, and since such cause is not limited to evidence that would be admissible at the trial of the issue of guilt, People v. Boyles, [45 Cal.2d 652] 290 P.2d 535, and cases cited, evidence that was otherwise inadmissible and prejudicial would frequently be presented to them if the jury were required to pass on the legality of the search or seizure."

The Gorg case prescribes the procedure to determine the admissibility of evidence when the question of reasonableness or legality of an arrest or search or seizure becomes an issue. The reasons given for adopting the procedure are unassailable.

Disclosure of The Name of Informant-Participant:

During the voir dire examination to determine the legality of the arrest and the search and seizure, defense counsel, upon the cross-examination of one of the officers, asked whether or not the same informant made the purchases on December 14 (Count 1) and January 19th (Count 2) and the officer answered, "Yes." Defense counsel then asked the informant's name and the district attorney objected upon the ground the name of an informant is confidential information. The court sustained the objection. Defense counsel then asked the witness to describe the informant. The district attorney objected upon the same ground. The court sustained the objection. The defendant then produced one Willie Dandridge, an inmate of San Quentin prison and stated that Dandridge was the informant. Dandridge was placed on the witness stand by defendant and testified he had been with the officers in January; that he had been in the defendant's apartment but that he had never purchased any narcotics from the defendant. He denied making any telephone calls to the defendant and he denied he had ever told the officers he had purchased narcotics from the defendant. The court disbelieved Willie Dandridge and the defendant, and ruled there had been probable cause for the arrest and that the search and seizure made incidental thereto were lawful. The trial then continued in the presence of the jury. Again, the officers testified that an informant had made the purchases on December 14th and January 19th and telephone calls on December 14th and January 19th. They again described the procedure followed in preparing the informant to make the purchases and identified the narcotics delivered to them by the informant on December 14th and January 19th. Upon his cross-examination of the officers during the trial before the jury defense counsel again asked the officers the name of the informant who made the purchases. The district attorney objected upon the ground that it was confidential informa-

tion and the court sustained the objection. Upon the completion of the people's case defense counsel called the witness Willie Dandridge. The district attorney objected to Dandridge testifying and moved the court for an order requiring defense counsel to make an offer of proof concerning the testimony of Willie Dandridge and to make the offer in the absence of the jury. The court granted the motion and the offer of proof was made in chambers. In substance, the offer of proof was that he would testify that he was the informant referred to by the officers in their testimony; that he did not purchase any narcotics from defendant on December 14th; that he did not make a telephone call to defendant on January 19th; that he was at defendant's apartment on January 19th but did not purchase any narcotics from defendant on that day. Generally, the offer of proof followed the testimony which Willie Dandridge had given at the voir dire examination earlier in the trial. He contradicted the testimony of the officers on most material points. After defense counsel made his offer of proof, the district attorney again objected to Willie Dandridge being called as a witness for defendant and the court sustained the objection. Later during the trial a witness who was present in defendant's apartment on January 19th testified that Willie Dandridge was also present. Defense counsel then renewed his motion to call Willie Dandridge as a witness on defendant's behalf. The district attorney objected and the court sustained the objection.

Counsel for appellant and respondent agree that there is no California decision determining whether or not the name of an informant who participates in the criminal action with which a defendant is charged comes within the purview of Code of Civil Procedure, § 1881, subdivision 5 which provides:

> "A public officer can not be examined as to a communications made to him in official confidence, when the public interest would suffer by the disclosure."

[11] The case of People v. Lazzara, 131 Cal.App.2d 663, 281 P.2d 4, parallels this case in that the informant was a participant in the crime and the court sustained the prosecution's objection to the questions concerning the name, whereabouts, and character of the informant. The question was not decided in that case however, as the court simply held that even had the ruling been error it was not prejudicial under the peculiar circumstances of the case because the defendant knew the identity of the informant; that defendant made no showing that he could not call him as a witness because of lack of such knowledge, or that he intended to call him as a witness, or that he was unable to locate him as a witness. Thus, in the instant case at the voir dire hearing there was no prejudicial error, even though the court sustained the prosecution's objections to defense counsel's questions concerning the name and identity of the informant. The defendant not only contended that Willie Dandridge was the informant so that he was not deprived of that knowledge, but he actually called Willie Dandridge as a witness and the court permitted him to testify.

[12] The trial before the jury on the question of defendant's guilt presents a different situation. The court not only sustained the prosecution's objections to defense counsel's questions concerning the name and identity of the informant, but when the defendant called Willie Dandridge as a witness and made an offer of proof, the court would not permit Willie Dandridge to testify. The offer of proof as well as Dandridge's testimony on voir dire was in conflict with the testimony given by the officers on many material points. The trial court erred by sustaining the district attorney's objections and in refusing to permit Dandridge to testify because it denied the defendant the right to produce witnesses on his behalf and defend himself as guaranteed by Article I, Section 13 of the California Constitution and by Penal Code, § 686, subdivision 3.

[13] The primary question presented, however, is whether or not an officer may withhold the name of an informer as a con-

fidential communication even though the informant is a participant in the crime charged. The question presents a conflict between two fundamental principles of justice. The name of an informant who cooperates with law enforcement officers has been held to be confidential upon the theory the informant performs a public service. He provides information which law enforcement officers are frequently unable to obtain by any other means. This is particularly true in narcotics cases. His service and his benefit to the public welfare would cease if his identity were disclosed. The courts have held this to be sufficient cause to protect the anonymity of the informant. People v. Gonzales, 141 Cal.App. 2d 604, 607, 297 P.2d 50. When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged. On the other hand, when an informant participates in the criminal act he is no longer simply an informer. He is a material witness to the criminal act, in fact, he is similar to a feigned accomplice. In most cases such as the one before us, only the informant and the defendant are present at the time the crime is committed (the sale is made). The officers are secondary witnesses not primary witnesses. Thus, when the informant becomes a participant, another principle of law embodied in Article I, Section 13 of the California Constitution and Penal Code, § 686, subd. 3, becomes applicable, namely, that a defendant shall be accorded a full opportunity to defend himself. It becomes more important to the administration of justice and the public welfare that a defendant be accorded this right than that an informant remain anonymous. To deny the defendant the right to examine an officer regarding the name of or to ask other material questions concerning an informant-participant would be to suppress an essential element of the res gestae. The crime is committed when the sale is made and not when the informant delivers the contraband to the officers and tells them about the sale. This view finds support in several federal decisions and is expressed in Portomene v. United States, 5 Cir., 221 F.2d 582, 583, in the following language:

> "When it comes, however, to the point mainly and most vigorously argued, that it was error to deny the defendant's request for the name of the informer to whom it was claimed the defendant had sold the narcotics, we are in no doubt that the appellant has the right of it. In Sorrentino v. United States, 9 Cir., 163 F.2d 627, the court pointed out the distinction between the case where the person called an informer is that and nothing more, in which case the defendant would not have been entitled to have his identity disclosed, and a case such as this one, where the informer is the person to whom the defendant is said to have sold and dispensed the opium described in the indictment. In such a case information as to this person's identity was material to the defense, and the denial of the requested information was error."

[14] See also Sorrenino v. United States, 9 Cir., 163 F.2d 627; United States v. Conforti, 7 Cir., 200 F.2d 365, and Parsons v. State, 251 Ala. 467, 38 So.2d 209. When the defendant is not permitted to ask questions about a material element of the crime such as those concerning the feigned accomplice, he is being denied a substantial right which amounts to a denial of due process of the law.

If the prosecution is not required to divulge the name of the buyer when a defendant is charged with a sale of narcotics on the ground it is confidential information, the way is left open for the "phantom" purchaser. The possibility is remote but the fact that the possibility exists at all when it can be eliminated violates the American concept of justice in a criminal trial.

[15, 16] We believe the same principle applies to a hearing on voir dire held out of the presence of the jury. Although the question of the guilt of the defendant is not before the court, nevertheless, the defendant has the same right to present his defense at the hearing to determine the reasonableness of an arrest or search as he does on the question of his guilt. The fact that the hearing is held before the court in the absence of the jury makes it no less a criminal proceeding. Due process applies and all the rights the defendant may have at the trial proper apply with equal force and dignity to the proceedings before the court sitting in the absence of a jury.

When an informant becomes a participant in the crime charged against the defendant, he and the people lose the right to keep his identity anonymous.

Error Affecting Count Three:

[17] Respondent contends that if there was error in the court's refusal to permit defense counsel to ask the officers the name of the informant-participant on cross-examination and to call Willie Dandridge to the witness stand to testify on defendant's behalf, such error goes only to counts 1 and 2, but not count 3. It is true counts 1 and 2 are based upon sales to the informant while count 3 is one of possession of narcotics, a crime in which the informant did not participate. Nevertheless, all three counts were tried together, the officers who testified regarding counts 1 and 2 were also the principal witnesses concerning count 3. Willie Dandridge on voir dire contradicted the testimony of the officers on most material points. The jury did not hear him testify but had he been permitted to testify and had the jury or any juror believed him, it would have impeached the testimony of the officers. What effect that impeachment would have had it is impossible to say, but if believed, it would have affected the credibility of the officers as to their testimony concerning count 3. Thus, when the court erred in refusing to permit Willie Dandridge to testify on defendant's behalf, it cannot be said the error was not prejudicial as to count 3.

Judgment is reversed as to all three counts.

KAUFMAN, P. J., and DOOLING, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.



149 Cal.App.2d 421

Charles E. McCAMMON and Theodore WUNDERLICH, doing business under the firm name and style of McCammon-Wunderlich Company, a copartnership, Plaintiffs and Appellants,

v.

The CITY OF REDWOOD CITY, a municipal corporation, S. D. Herkner, as Mayor of the City of Redwood City, a municipal corporation, E. A. Rolison, as City Manager of the City of Redwood City, a municipal corporation, William H. Royer, S. D. Herkner, Robert V. Shillers, Paul Jones, Floyd Granger, Hiram S. Stout and Carl A. Britschgi, as members of the City Council of the City of Redwood City, a municipal corporation, and S. D. Wood, as Chief of Police of the City of Redwood City, a municipal corporation, Defendants and Respondents,

Hamilton Morton, Whipple Road Quarry Company, a corporation, Palpar, Inc., a corporation, and Palomar Holding Company, a corporation, Defendants and Appellants.

Civ. 17101.

District Court of Appeal, First District, Division 1, California.

March 26, 1957.

Rehearing Denied April 25, 1957.

Hearing Denied May 22, 1957.

Action to enjoin enforcement of city ordinance prohibiting operation on certain city streets of any truck having a gross weight of over three tons. The Superior Court, County of San Mateo, Murray Draper, J., entered judgment denying injunction and owners and operators of quarry appealed. The District Court of Appeal,

Agee, J. pro tem., held that ordinance, although it had effect of increasing transportation charges for quarry located on edge of city, was a valid exercise of city's police power and the statutory authority conferred upon city by Vehicle Code.

Affirmed.

1. Injunction ⇐85(1)

Where city ordinance had effect of closing usual route to trucks from quarry and made necessary a longer and more expensive haul to reach highway, such curtailment of business operations was manifestly an irreparable injury justifying equitable remedy of injunction if all the other necessary elements were present. West's Ann.Vehicle Code, § 713.

2. Automobiles ⇐7

Where city ordinance enacted pursuant to statutory authorization, designates certain streets as closed to trucks having a gross weight in excess of a certain maximum limit, there must be an alternate route or otherwise the ordinance is unreasonable, but it is not required that such alternate route be entirely within the city limits. West's Ann.Vehicle Code, § 713.

3. Automobiles ⇐7

Where statute grants incorporated cities the power to enact ordinance designating certain streets as closed to operation of trucks weighing in excess of a certain maximum weight, city has power to enact ordinance even though it has an extraterritorial effect upon through traffic on county roads outside of city limits. West's Ann Vehicle Code, § 713.

4. Automobiles ⇐7

Statute providing that no ordinance shall prohibit any commercial vehicle from using any highway by direct route to or from a state highway for purpose of delivering or loading for transportation applies only to counties and does not establish a policy as to incorporated cities. West's Ann.Vehicle Code, §§ 713, 714(d).

5. Constitutional Law ⇐205(3), 292

City ordinance closing certain streets to operation of trucks having a gross weight in excess of 3 tons but excepting from the provisions thereof trucks delivering to points within the city and originating within the city, is not unconstitutional as a special privilege or immunity granted to certain truckers, and does not violate due process clause of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14, § 1; West's Ann.Const. art. 1, § 21; West's Ann. Vehicle Code, §§ 713, 714, 714.1.

6. Automobiles ⇐7

City ordinance prohibiting operation on certain city streets of trucks having a gross weight limit in excess of 3 tons which had effect of closing shortest access route to state highway for trucks from quarry located on edge of city and thus increasing transportation costs because of the longer haul necessitated, was a valid exercise of police power and of statutory authority conferred upon city by Vehicle Code. West's Ann.Vehicle Code, § 713.

G. H. Eckhardt, Jr., San Francisco, for appellants Charles E. McCammon and Theodore Wunderlich.

A. J. Harwood, San Francisco, for appellants Hamilton Morton, Whipple Road Quarry Co., Palpar, Inc., and Palomar Holding Co.

Pillsbury, Madison & Sutro, San Francisco, of counsel, for all appellants.

Currie, Lebsack & Hannig, Redwood City, for respondents.

AGEE, Justice pro tem.

This is an appeal from a judgment denying an injunction against the enforcement of an ordinance of the City of Redwood City which prohibits the operation on certain streets of any truck having a gross weight of over three tons.

Appellants collectively own, lease and operate the Whipple Road Quarry. Respondents are the city, its councilmen and other city officials. The ordinance was enacted by the city council, to become effective December 15, 1954. It established certain designated streets within the corporate

limits as routes over which could be operated trucks exceeding a maximum gross weight of three tons and prohibited such operation over any other streets. Certain exceptions were made as to trucks entering from the outside and having a destination point inside the city but these trucks were likewise required to *enter* the city only on an established truck route. (Another exception was made as to trucks on a trip originating inside the city.)

The quarry is located to the west of the city on Edgewood Road, in the unincorporated area of San Mateo County, and has been in operation for many years. Its products are transported by trucks, all of which exceed three tons in gross weight whether loaded or empty. Edgewood Road is a county highway and runs generally east and west. It intersects at its eastern terminus with El Camino Real (U. S. Highway No. 101) which runs through the city in a general northerly and southerly direction. From the quarry entrance, running easterly along Edgewood Road, to the city limits is a distance of 1.6 miles and from there to El Camino Real is a distance of 1.1 miles. The elevation of the quarry is 239 feet above sea level and that of the intersection of Edgewood Road and El Camino Real is 17 feet above sea level. Thus the route from the quarry to El Camino Real easterly on Edgewood Road is a distance of 2.7 miles on a downgrade. The only reason for selecting this particular intersection on El Camino Real is that it is the nearest to the quarry and at this point trucks coming from the quarry can either turn north or south on El Camino Real to delivery points up or down the peninsula. A substantial part of the trucking from the quarry had followed this route.

El Camino Real is a state highway and is designated in the ordinance as a truck route. Edgewood Road is not so designated nor is any other connecting street which would provide access to El Camino Real from that portion of Edgewood Road which is immediately outside of the city limits.

[1] The other route from the quarry to El Camino Real proceeds westerly on Edgewood Road to its intersection with Canada Road, a distance of 1.35 miles, from there southerly on Canada Road to its intersection with Woodside Road, a distance of 3.6 miles, and from there easterly to its intersection with El Camino Real, a distance of 4 miles. (Woodside Road is a state highway and also is designated in the ordinance as a truck route.) The intersection of Woodside Road and El Camino Real is 1.35 miles south of the intersection of Edgewood Road and El Camino Real. However, there is nothing in the record to indicate which intersection is nearer to most of the destination points of the quarry trucks. The important factor to appellants seems to be the difference in hauling distances from the quarry to El Camino Real. This is 2.7 miles on Edgewood Road as against 8.95 miles on the other route, a difference of 6.25 miles. In addition, the summit on Edgewood Road between the quarry and Canada Road is 549 feet above sea level and the resulting grade is a cost factor in trucking operations.

The points raised by appellants will be discussed in the order made. The first is whether the enforcement of the ordinance causes irreparable injury to appellants. The trial court found that it does not. This finding is inconsistent with the following findings: "[T]hat at all times prior to enforcement of Ordinance No. 781 a substantial number of trucks carrying rock and earth from said quarry proceeded from the quarry easterly on Edgewood Road and entered the city limits of Redwood City, and that a considerable portion of said trucks so entering Redwood City went through Redwood City to El Camino Real, a state highway; that some of said trucks so entering Redwood City made local deliveries in said city; * * *" Under these facts it is clear that the closing of the usual route to trucks from the quarry made necessary a longer and more expensive haul to reach El Camino Real. Such curtailment of appellants' business operations is manifestly an irreparable injury justifying the equitable remedy of injunction if all of the other necessary elements are present.

Greenfield v. Board of City Planning Com'rs, 6 Cal.App.2d 515, 518, 45 P.2d 219.

[2] The ordinance in question was enacted pursuant to section 713 of the Vehicle Code. This section authorizes incorporated cities to prohibit by ordinance the use of its streets which are designated therein by vehicles exceeding a specified maximum gross weight limit. If such an ordinance attempts to so restrict the use of a state highway, the section requires the city to designate an alternate route which is not so restricted and submit the ordinance and the designated alternate route to the Department of Public Works for its approval. The ordinance under consideration herein was submitted to and approved by the Department of Public Works although the City did not designate any alternate route therein. Inasmuch as the ordinance did not contain any restriction upon the use of any state highway it was not necessary to do so. However, appellants contend, and we think correctly, that there must in fact be such an alternate route or otherwise the ordinance is unreasonable. The extra hauling distance over such alternate route has already been discussed and this is the crux of this litigation.

It should be emphasized that the ordinance does not prevent trucks from the quarry from delivering to any point in the City or elsewhere. However, appellants contend that, as a practical matter, the ordinance has this effect because the increased distance makes the hauling so expensive that it is not economically feasible.

The justification of the city for the enactment of the ordinance is that none of its streets connecting with Edgewood Road at the point where it enters the city is so constructed as to bear weight in excess of the limitation specified therein. Also, that all of said streets pass through residential areas and the use thereof by heavy trucks constitutes a traffic hazard, particularly as to children.

Appellants argue that the alternate route must be entirely within the city limits. In other words, that there must be an alternate route commencing at the point where Edgewood Road reaches the city limits and extending therefrom to El Camino Real on streets entirely within the city limits. There is no such requirement in section 713 of the Vehicle Code or otherwise.

[3] Appellants also argue that a city does not have the power to enact an ordinance which has an extraterritorial effect, i. e., on through traffic on county roads outside of the city. However, this is not true where, as here, the State of California has expressly granted to incorporated cities the power to enact such an ordinance as to the use of the streets within its limits. Appellants rely heavily upon Ferran v. City of Palo Alto, 50 Cal.App.2d 374, at page 379, 122 P.2d 965, at page 968, but that case acknowledges the exception to which we have just referred, in the following language: "One of the limitations upon such ordinances is that they can have no extra-territorial force *unless by express permission of the sovereign power* * * *." (Emphasis added.) This express provision is contained in section 713 of the Vehicle Code.

[4] Appellants next argue that subdivision (d) of section 714 of the Vehicle Code establishes the policy of the State of California that all vehicles on county roads should have access to the state highways by the most direct route. This subdivision reads as follows: "No ordinance adopted pursuant to this section shall prohibit any commercial vehicle from using any county highway by direct route to or from a state highway for the purpose of delivering or loading for transportation goods, wares, or merchandise." Section 714 expressly applies only to counties, whereas section 713 expressly applies only to incorporated cities, including San Francisco as a city and county. If the Legislature desired to restrict the cities in the same manner as it has the counties, it would be a simple matter to amend section 713 accordingly. Until this is done it would seem clear that the policy of this State as to restrictions on the use of streets within incorporated cities is as stated in said section 713. The Legislature has been alert to needed changes in this field.

For example, it enacted section 714.1 of the Vehicle Code in 1955. The section is lengthy but may be epitomized by its title, "When Counties May Close Highways to Commercial Vehicles." It is a recognition of the necessity of allowing certain restrictions on the use of county highways located in unincorporated residential areas. The rapid growth of these areas in this State is a matter of common knowledge and the enactment of section 714.1 is evidence of the alertness of our Legislature to revise or enact legislation to meet new or changing conditions. Certainly, the Legislature has had the opportunity to also change or revise section 713, which was codified in 1935 and has its origin in the California Vehicle Act of 1923. Its failure to do so is significant.

[5] Appellants contend that the ordinance in question is violative of Section 21, Article I of the Constitution of California, and Amendment XIV, Section 1, of the United States Constitution, in that it discriminates against their trucks and in favor of other trucks. In Whyte v. City of Sacramento, 65 Cal.App. 534, 224 P. 1008, the ordinance in question restricted the trucking business by vehicles having a carrying capacity of one ton or over to certain designated streets. The decision points out that such an ordinance represents the exercise of the police power but that such power must be reasonably applied and cannot be invoked so as "to discriminate in favor of or against particular classes or persons as to whom no reasonable basis of discrimination can be said to exist." 65 Cal.App. at page 545, 224 P. at page 1013. The court concluded that there is no unlawful discrimination in such an ordinance. "The ordinance here does no more than what the statute expressly declares that municipal corporations may do with respect to the regulation of motortrucks of more than a ton carrying capacity used in such municipalities for the purpose of transporting as a business freight, merchandise or other articles from point to point therein. We do not think that any one would undertake to maintain that the statute vesting the city with this power violates any provisions of our own Constitution or any mandate of the federal Constitution." 65 Cal.App. at page 552, 224 P. at page 1015. "It is true that the plaintiffs and all others whose motor truck freight business comes within the terms of the ordinance will, by reason thereof, be subjected to more or less inconvenience and perhaps some extra expense. But, in the enforcement of nearly all regulatory provisions of police enactments there are added burdens or inconveniences. To these, when not so unreasonable as to be unnecessarily burdensome, all citizens must yield for the general or common good. The incidental and necessary burdens and inconveniences of the regulations do not of themselves render the regulation unreasonable. Nor will the extra expense which obedience to the terms of the ordinance may entail upon those whose business falls within the purview thereof itself stamp the ordinance as unreasonable. 65 Cal.App. at page 551, 224 P. at page 1015.

[6] In the instant case, as we have pointed out, appellants' trucks are not prevented from delivering to any point inside or outside of Redwood City. It is simply that the hauling distance to any point in the general area which is east, south or north of the quarry is thereby increased and results in increased expense. The reasonableness of the ordinance is based upon two factors, light construction of the streets so restricted and the traffic hazard through the residential district involved. In keeping with the principles stated in the Whyte case, supra, we hold that the ordinance is a valid exercise of the police power and the statutory authority conferred by section 713 of the Vehicle Code.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

149 Cal.App.2d 489

Stanley McCOSKER, Administrator of the Estate of James M. McCosker, Sr., and Alice Maude McCosker, Plaintiffs, Cross-Defendants and Respondents,

v.

Percy C. FREDERICKSEN and Marie B. Fredericksen, his wife, Defendants, Cross-Complainants and Appellants.

Percy C. FREDERICKSEN and Marie B. Fredericksen, his wife, Plaintiffs, Cross-Defendants and Appellants,

v.

Stanley McCOSKER, Administrator of the Estate of James M. McCosker, Sr., and Alice Maude McCosker, Defendants, Cross-Complainants and Respondents.

Civ. 8971.

District Court of Appeal, Third District, California.

March 27, 1957.

Rehearing Denied April 22, 1957.

Hearing Denied May 22, 1957.

Action by plaintiffs, husband and wife, for specific performance of contract to sell real property. Defendants cross-complained and sought to quiet their title to the real property. Defendants later instituted a proceeding against administrator of plaintiff-husband's estate and plaintiff-wife by which defendants sought to eject and oust the plaintiffs from the property. The plaintiffs cross-complained in that action for specific performance of the contract. The two cases were consolidated for trial and from judgment entered in Superior Court, Lake County, Benjamin C. Jones, J., decreeing specific performance of the contract, defendants appealed. The District Court of Appeal, Peek, J., held that where adequacy of consideration as to vendors at time contract for sale of realty was made was considered as an issue before the court by parties, and, although defendants offered no evidence on issue, court made findings in favor of plaintiffs on their evidence and entered decree awarding specific performance, allegations of complaint as to consideration and evidence in support thereof were sufficient, in absence of showing of prejudice.

Judgment affirmed.

1. Judgment ⇐707

Judgment quieting title to realty as against the parties named as purchasers in written agreement did not affect the interest of persons in possession of realty, whom vendors' transferees had excluded from participation in quiet title action, where the transferees were chargeable with notice that persons in possession were claiming title and right to complete title under recorded judgment against named purchasers and as purchasers at execution sale of named purchasers' interest under the written agreement.

2. Vendor and Purchaser ⇐231(3)

Owners of realty subject to written agreement by their predecessors in title to sell such realty to others were chargeable with notice that though not named as purchasers in agreement, parties in possession of realty under recorded judgment, showing that they were entitled to claim one-half of interest accruing to named purchaser by execution of agreement and part payment of purchase money and, as purchasers at execution sale of named purchasers' interest under agreement were claiming title and the right to complete title under such agreement.

3. Specific Performance ⇐121(3)

In action against vendors for specific performance of contract to sell realty, where copy of contract was the only evidence of value, evidence was sufficient to support finding that consideration as to vendors at time contract was executed was reasonable and adequate.

4. Appeal and Error ⇐1032(1)

Where adequacy of consideration as to vendors at time contract for sale of realty was made was considered as an issue before the court by parties to action for specific performance brought by persons claiming through purchasers named in contract, and, although defendants offered no evidence on issue, court made findings in favor of plaintiffs on their evidence and entered decree awarding specific performance, allegations of complaint as to consideration and evidence in sup-

port thereof were sufficient, in absence of showing of prejudice.

5. Specific Performance ⇐99

Although contract for sale of realty made time of the essence and provided for forfeiture in case of default, trial court did not abuse its discretion, under circumstances, in relieving persons who claimed through purchasers named in contract from default under statute authorizing such relief if breach of duty was not grossly negligent, wilful or fraudulent, in action against vendors for specific performance. West's Ann.Civ.Code, § 3275.

Lovett K. Fraser, Bruce B. Bruchler, Frederic S. Crump, Lakeport, for appellants.

Phil N. Crawford, Lakeport, for respondents.

PEEK, Justice.

This appeal arises out of an action originally instituted by James M. McCosker, Sr., and his wife against the defendants Fredericksen wherein specific performance was sought of a contract to sell certain real property in Lake County. The Fredericksens cross-complained and sought to quiet their title to the property. Additionally the Fredericksens instituted a second proceeding against Stanley McCosker as administrator of the estate of James M. McCosker, Sr., and his wife by which the Fredericksens sought to eject and oust the McCoskers from the property. The McCoskers cross-complained and again asked for specific performance of the contract upon which they had relied in the previous action. The two cases were consolidated for trial, and at the conclusion thereof judgment was entered in favor of the McCoskers, decreeing specific performance of the contract.

This is the third appeal which has been before this court involving the same parties and the same property. The controversy originally stems from a contract of purchase entered into in September of 1944 wherein James M. McCosker, Jr., and his wife agreed to buy, and Bert R. Hand and his wife agreed to sell for $16,000 the property involved herein. This agreement is referred to by all of the parties as the Hand contract. Under the terms of that contract the purchasers made a down payment of $6,000 and agreed to pay the balance of $10,000 on or before seven years from the date thereof, or September 5, 1951. Thereafter, on April 16, 1946, the Hands discounted the contract, assigned their interest thereunder to the Fredericksens for the sum of $8,000, and executed a deed of the property to the Fredericksens subject to their contract with the McCoskers, junior. Subsequently James M. McCosker, Sr., and his wife brought an action against the McCoskers, junior, which resulted in a judgment decreeing the McCoskers, senior, to own an undivided one-half interest in the property and awarding damages of more than $9,000 pursuant to an accounting concerning the profits taken by the McCoskers, junior. That judgment was affirmed by this court in McCosker v. McCosker, 122 Cal.App.2d 498, 265 P.2d 21. An abstract of judgment in that case was recorded on August 28, 1951. On September 27, 1951, the McCoskers, senior, purchased at a sheriff's sale all of the interest of the McCoskers, junior, in the Hand property.

On October 2, 1951, the Fredericksens instituted a quiet title action wherein the McCoskers, junior, and several fictitious persons were named as defendants, but only the McCoskers, junior, were served. The McCoskers, senior, made an abortive attempt by answer to become parties to that action by appearing therein as two of the fictitious persons named as defendants and set forth their claim to the property and alleged tender of the balance due. The Fredericksens demurred to said answer and later, at the time of trial, dismissed the action as to them. The McCoskers, junior, defaulted, and judgment was entered in favor of the Fredericksens.

It is that judgment upon which the Fredericksens primarily rely in this proceeding.

In fact, at the time of trial, they introduced the record thereof and then rested, offering no other evidence. On October 11, 1951, the McCoskers, senior, by letter tendered to the Fredericksens the balance then due on the contract, plus costs, interest and attorneys fees. The McCoskers' tender was refused, and shortly thereafter a second tender of $10,500 was made, but it was likewise rejected by the Fredericksens. Subsequently the McCoskers paid into court the sum so tendered. No demand has ever been made upon the McCoskers, senior, by the Fredericksens, nor have the Fredericksens ever given the McCoskers, senior, any notice of forfeiture of their interest in the land.

In the meantime other actions were instituted by the Fredericksens; one an unlawful detainer action resulting in a judgment in favor of the McCoskers which this court affirmed on appeal, 143 Cal.App.2d 114, 299 P.2d 908; another in which the trial court issued an alias writ of possession now before this court and appearing in 308 P.2d 840; and the third, a proceeding in prohibition which was heretofore denied by this court and by the Supreme Court.

[1, 2] It is the Fredericksens' first contention that the judgment which they obtained quieting their title against the McCoskers, junior, and terminating the latters' interest in the property also terminated any interest the McCoskers, senior, may have had in the property. No appeal was taken in that action. However when the judgment in the unlawful detainer action was before this court, a like contention was made and we there held: "The judgment terminated the contract as to the McCoskers, junior, but had no effect as to the interests of the McCoskers, senior, who were in possession under a recorded judgment showing that, notwithstanding they did not appear to have been named in the contract as purchasers, they were in fact parties thereto entitled to claim one-half interest accruing to the McCoskers, junior, by the execution of that contract and the part payment of the purchase money. This record of the judgment between the McCoskers, with the possession of the McCoskers, senior, under that judgment, gave notice to appellants that they were claiming title and the right to complete title under the Hand contract. Proper inquiry under such constructive notice would have revealed to appellants the proceedings in execution of the McCosker v. McCosker judgment, whereby the McCoskers, senior, purchased the remaining interest of the McCoskers, junior; and though they began their action just before the recordation of the certificate of sale, yet under the circumstances they were charged with knowledge of the interest of the McCoskers, senior, passing by the sale. When, therefore, they omitted the McCoskers, senior, in their action they brought against the McCoskers, junior, they did so, knowing that any judgment that they might obtain in such an action would not foreclose the rights of the McCoskers, senior, whom they had not only omitted to name as parties, but whom they had excluded from participation in the litigation. Having thus achieved their exclusion, they cannot thereafter be heard to claim that the McCoskers, senior, were in anywise affected or their interest terminated by the judgment they thereafter procured." 143 Cal.App.2d 114, 299 P.2d 908, 910. What we held in that case is equally applicable to the contention now made by the Fredericksens.

[3, 4] It is next contended that in the present case the McCoskers failed to plead or prove, and the court failed to find, any facts from which the fairness or reasonableness or adequacy of consideration as to the appellants could be ascertained. The record in this regard shows that the second amended complaint of the McCoskers alleged "that said contract, a copy of which is hereto attached and made a part hereof, is fair and reasonable, and is supported by an adequate consideration"; that the demurrer of the Fredericksens on the ground that said complaint did not state sufficient facts to constitute a cause of action, in that it failed to allege with particularity the fairness, reasonableness and

adequacy of consideration was overruled by the court; that the answer of the Fredericksens denied generally the fairness, reasonableness and adequacy of the consideration and set up as an affirmative defense the judgment obtained by them in the quiet title action against the McCoskers, junior, as a bar to this proceeding. Thereafter on motion the McCoskers filed an amendment to their second complaint wherein the facts were set forth in greater detail. No demurrer was filed thereto, and by stipulation of the parties it was agreed that all defenses pleaded by the Fredericksens should, in their answer to the second amended complaint, be deemed pleaded as against the amended complaint. Thus at the trial there was before the court the original contract which provided for an overall purchase price of $16,000, $6,000 of which was paid in cash and the balance to be due seven years thereafter with interest at 5 percent; that the Hands, the original sellers, discounted the balance of $10,000 and conveyed their interest in the property, subject to the rights of the purchasers, for the sum of $8,000; that thereby the Fredericksens received 6.25 percent on their investment rather than the 5 percent as set forth in the contract; and that the contract was purchased by the Fredericksens as an investment. All of this evidence was noted by the trial judge in his memorandum opinion and the court so found. Although, as the trial court noted, this was the only evidence of value at the time of the execution of the agreement, we believe it was ample to support the findings of the court as to reasonableness and adequacy of consideration at that time. Drullinger v. Erskine, 71 Cal.App.2d 492, 163 P.2d 48.

The fact that the value of the land rose appreciably from the date of the original agreement, 1944, to the date of the hearing, ten years later in 1954, is not material when consideration is given to the generally great increase in land values.

Even if we assume that defendants' demurrer to the second amended complaint should have been sustained, and even if we assume that defendants' general denial of plaintiffs' allegation of fairness, reasonableness and adequacy raised an issue in that regard, see Foley v. Cowan, 80 Cal. App.2d 70, 181 P.2d 410; nevertheless we cannot say that a miscarriage of justice resulted. Baker v. Miller, 190 Cal. 263, 212 P. 11; Bonney v. Petty, 125 Cal.App. 527, 13 P.2d 969. There can be no question but that the parties considered the issue as one before the court, although no evidence was offered on the issue by the defendants. Furthermore findings in this regard were made by the court in favor of plaintiffs and were entered. Under such circumstances, and in the absence of any showing of prejudice, the plaintiffs' complaint and the evidence in support thereof must be held to have been sufficient.

[5] It is next contended by the Fredericksens that the finding that they had waived the provisions of the contract, making time of the essence and providing for a forfeiture in case of default, is unsupported. Although the finding in this regard may be questioned, it does not appear that the trial court abused its discretion in relieving the McCoskers from default under the provisions of section 3275 of the Civil Code, nor do the Fredericksens challenge the findings which the court made on this issue.

Appellants finally contend that the finding that the McCoskers were the owners of the property is likewise open to criticism; however, since such finding was unnecessary to a determination of the case, it cannot be said that it was prejudicial to the Fredericksens.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

149 Cal.App.2d 877

Percy C. FREDERICKSEN and Marie B. Fredericksen, his wife, Plaintiffs and Respondents,

v.

James M. McCOSKER, Jr., et al., Defendants,

Alice Maude McCosker and Stanley McCosker, Defendants and Appellants.

Civ. 8953.

District Court of Appeal, Third District, California.

March 27, 1957.

Rehearing Denied April 22, 1957.

Hearing Denied May 22, 1957.

Appeal from Superior Court, Lake County; Hugh H. Donovan, Judge.

Phil N. Crawford, Lakeport, for appellants.

Lovett K. Fraser, Bruce B. Bruchler, Lakeport, for respondents.

PEEK, Justice.

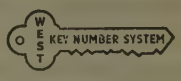
This is an appeal by Alice Maude McCosker and Stanley McCosker from an order granting the issuance of an alias writ of possession and directing the sheriff to remove Alice M. McCosker and Stanley McCosker from the property which is the same as that involved in the proceeding appearing herein 308 P.2d 836.

The order granting said alias writ of possession recites in part that on December 10, 1951, a judgment was entered which quieted the Fredericksens' title in the Hand property against James M. McCosker, Jr., and Helen McCosker, his wife, as defendants; that on April 26, 1954, a writ of possession issued on said judgment, which on April 28, 1954, was served and returned by the sheriff with the notation that Alice M. McCosker and Stanley McCosker were served with said writ as the persons in possession of the real property, that they refused to deliver the possession thereof and denied claiming under James M. McCosker and Helen McCosker, his wife; and that thereafter an order to show cause why an alias writ of possession should not issue was made and served on Alice M. McCosker and Stanley McCosker, and a hearing thereon was held, following which the order under attack herein was issued.

The issue whether the decree quieting the Fredericksens' title to this property against James M. McCosker, Jr., and Helen McCosker, his wife, was binding upon the McCoskers, senior, was considered by this court in Fredericksen v. McCosker, 143 Cal. App.2d 114, 299 P.2d 908 (hearing in Supreme Court denied). As noted in the opinion appearing in 308 P.2d 836, this court held that such judgment could have had no effect as to the interest of the McCoskers, senior. We again hold that what was therein expressed conclusively determines the sole issue herein. It necessarily follows that the trial court's order granting the alias writ of possession was improper. Section 380, Code of Civil Proc.

The order is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



149 Cal.App.2d 495

Eric J. MORTIMER, Plaintiff and Appellant,

v.

Olive MARTIN et al., Defendants,

Olive B. MARTIN and William A. Reed, II, and Franklin McCauley, d/b/a Reed and McCauley, Defendants and Respondents.

Civ. 16956.

District Court of Appeal, First District, Division 1, California.

March 28, 1957.

Rehearing Denied April 26, 1957.

Action for personal injuries sustained by grocery salesman when he slipped and fell on a ramp descending from a doorway to level of defendants' market floor. The Superior Court, Santa Clara County, Byrl R. Salsman, J., entered judgment adverse to salesman and he appealed. The District

Court of Appeal, Agee, J. pro tem., held that failure of trial court to admit in evidence a city ordinance requiring that a ramp shall not have a slope greater than one foot in eight feet was prejudicial error, in view of issue raised by salesman's special pleading that defendants were negligent in maintaining ramp in question in a steep condition, and in view of testing that slope of ramp was greater than that authorized by such ordinance.

Judgment reversed.

Opinion, 303 P.2d 822, vacated.

1. Negligence ⇐119(2)

Where, in action by salesman for personal injuries sustained when he slipped on a ramp leading from an entrance way to the level of defendants' market floor, negligence was pleaded specially, and no issue was raised as to negligence of defendants in failing to provide a handrail for such ramp, trial court did not err in excluding from evidence portion of city ordinance providing that ramps shall be equipped with a handrail if they have a slope greater than one foot in 10 feet.

2. Appeal and Error ⇐1056(1)
Negligence ⇐119(2)

In action for personal injuries sustained by grocery salesman when he slipped and fell on a ramp descending from a doorway to level of defendants' market floor, failure of trial court to admit in evidence a city ordinance requiring that a ramp shall not have a slope greater than one foot in eight feet was prejudicial error in view of issue raised by salesman's special pleading that defendants were negligent in maintaining ramp in question in a steep condition, and in view of testimony that slope of ramp was greater than that authorized by such ordinance.

3. Appeal and Error ⇐1067

In action for personal injuries sustained by grocery salesman when he slipped and fell on a ramp descending from a doorway to level of defendants' market floor, failure of trial court to give a requested standard instruction on expert testimony was not prejudicial error in view of fact that only expert who testified was physician who treated salesman for his injury, and such testimony did not bear upon or relate to issue of liability.

Goldstein, Barceloux & Goldstein, Chico, Merton A. Jacobs, Harvey W. Hoffman, San Francisco, for appellant.

Pelton, Gunther, Durney & Gudmundson, San Francisco, William B. Boone, San Francisco, of counsel, for respondent.

AGEE, Justice pro tem.

Plaintiff appeals from a judgment entered upon an adverse jury verdict in an action for damages for personal injuries.

The respondents (Reed, McCauley and Richard) are partners doing business as Reed and McCauley Food Mart and are the lessees of the premises in question. The owner of the premises, defendant Olive B. Martin, was granted a nonsuit and no appeal was taken from the judgment entered in her favor. Nonsuits were also granted to the sublessees operating various departments and no appeal was taken from the resulting judgments in their favor.

Appellant is a wholesale grocery salesman. On December 3, 1951, about 11:30 A. M., he parked his car at the rear of the store adjacent to the market and started to enter the market by way of the rear doorway. This entry way was customarily used by tradesmen and appellant had been using it at least once every three weeks for over ten years. A concrete strip runs across the threshold and forms the bottom part of the doorsill. It is two and one-half inches wide and its surface is one inch above the level of the alley which adjoins the rear of the premises. At its inside edge it drops down two and three-quarters inches to the top of a concrete ramp or walkway which is five feet long and which descends to the level of the market floor. The total incline from the top to the bottom of the ramp is approximately ten inches and the maximum deviation from the horizontal is less than

two and one-half inches to one foot. The ramp was not equipped with a handrail.

Appellant testified that as he was walking down the ramp, he slipped and fell. In his complaint for damages for the injuries thereby sustained, appellant alleged in his charging paragraph: "That defendants were negligent in the following particulars: (a) In keeping an incline entrance to a store in a steep and slippery condition where it was known to defendants that said entrance was commonly used by business invitees and business visitors. (b) In failing to keep said incline clear of mud and water and other slippery substances and permitting water and mud to remain thereon in such a condition as to cause it to be dangerous to persons walking over and upon it. (c) In failing to give plaintiff and other persons any signal or warning of the slippery and dangerous condition of the incline at the time. (d) In failing, after defendants knew the dangerous condition of the incline, to remove the mud or water or to take such other action as was necessary to remove the dangerous condition in which the incline was." The next paragraph of the complaint alleges: "That said negligence of defendants, as aforesaid, was the proximate cause of the plaintiff slipping and falling upon the incline as aforesaid, whereby he was injured in the respects hereinabove alleges (sic)."

[1] The evidence as to whether there was any mud or water on the ramp was conflicting. There was also evidence which would support a finding of contributory negligence by appellant. Appellant does not question the sufficiency of the evidence to support the verdict as the record was presented to the jury. His contention is that the court erred in refusing to admit in evidence an ordinance of the City of Palo Alto, based upon the Uniform Building Code, which required that ramps shall not have a slope greater than 1 foot in 8 feet and shall be equipped with a handrail if the slope is greater than 1 foot in 10 feet.

The trial court apparently excluded the ordinance on the ground that the handrail requirement only applied to a stairway and this was not a stairway. So far as the requirement of a handrail is concerned, we deem it unnecessary to discuss the point because it was not an issue raised by the pleadings. "Where negligence is pleaded specially, proof must be confined to the acts pleaded; evidence and instructions relating to acts not specifically mentioned in the complaint are variant and not within the issues." 19 Cal.Jur. p. 691. We have set forth in their entirety the specific acts of negligence claimed by appellant. Nowhere is there any issue raised as to the lack of a handrail.

In Seamans v. Standard Hotel Corp., 78 Cal.App.2d 818, 178 P.2d 514, a hotel guest sued the hotel for injuries sustained when she fell while descending a stairway. Her complaint alleged that there was a dangerous drop-off from the level of the patio to the level of the basement corridor, which she was attempting to reach. On the trial, her counsel moved to amend the complaint to add that the hotel negligently failed to illuminate the drop-off. This motion was denied. Judgment in favor of the hotel was reversed on the ground that a second charge in the complaint, i. e., failure to warn guests of the drop-off, was sufficiently broad to cover failure to illuminate, since illumination would be one way of warning. However, the plain implication of the decision is that if the complaint had been confined to the first charge, evidence of any other defect would have been outside of the issues. This charge was stated by the court to be pleaded as follows, 78 Cal.App. 2d at page 820, 178 P.2d at page 515: "* * * that while plaintiff was descending the steps, leading from the patio into the hotel building, she passed over the perpendicular drop-off which is adjacent to said doorway, and as a proximate result of defendants' negligence slipped and fell headlong and was severely injured; that the defendants negligently 'permitted the said entrance and or doorway and or perpendicular drop-off to be and remain in said dangerous, defective, and hazardous condition; * * *.'" The second charge was stated

to be as follows: "that said defendants at said time and place as aforesaid carelessly and negligently *failed to warn* and advise guests and patrons and business invitees of said hotel among whom was the plaintiff, of the existence and presence of said perpendicular drop-off * * *". (Emphasis added.) The court states the basis of its ruling, 78 Cal.App.2d at page 824, 178 P.2d at page 517, as follows: "It is true, as defendant asserts, that if specific acts of negligence are alleged, rather than negligence generally, evidence of acts of negligence other than those specifically alleged would be immaterial and not within the issues. Plaintiff made a specific allegation concerning the alleged structural defect in the stairway and doorway, namely, the drop-off, but she made a general allegation as to negligence in failing to warn the guests of the existence of the alleged structural defect, that is, she did not specify in what particular manner defendant failed to warn them. Evidence regarding a structural defect other than the one alleged would have been immaterial and not within the issues, but evidence to the effect that defendant failed to warn the guests of the existence of the alleged defect, by reason of a lack of illumination in a dark hallway, was material and within the issues. A warning that a six-inch step-down exists in a dark hallway just inside an inward swinging door which is at the bottom step of an entrance stairway to a public building might be given in various ways. Illuminating the perpendicular drop-off would have been one way to warn the guests. Plaintiff was not required to designate specifically in her complaint the various ways in which such a warning could properly be given, and then allege particularly as to each kind of warning so designated that defendant failed to give it. Plaintiff's cause of action included a combination of the alleged negligence of defendant in permitting a specifically described hazardous defect in the building to exist and of his alleged negligence in failing to warn the guests of its existence. The evidence regarding a lack of illumination was material and within the issues presented by the complaint, and should have been considered by the court."

We conclude that the absence of a handrail was not within the issues raised by the pleadings and that the ordinance, insofar as it pertains thereto, was therefore inadmissible in evidence.

[2] However, the ordinance should have been admitted as to the issue raised by the charge that the respondents were negligent in maintaining the ramp "in a *steep* * * condition where it was known to defendants that said entrance was commonly used by business invitees and business visitors." (Emphasis added.) The same identical sections of the ordinance involved herein were involved and discussed in Marshall v. Lyon, 77 Cal.App.2d 905, 177 P.2d 44. In that case there was a cement ramp descending from the floor of a market to the public sidewalk in front. The ramp was 7 feet, 4 inches, in length and the drop in elevation from the floor of the market to the sidewalk was 12⅜ inches. The slope of the ramp was therefore approximately 1 foot in slightly over 7 feet. The plaintiff therein slid and fell as she was walking down the ramp. The court held that the sections of the Uniform Building Code embodied in an ordinance of the City of Monrovia, which sections are the same as those involved herein, required that the ramp in question should not have a slope greater than 1 foot in 8 feet and that such ordinance was properly received in evidence.

In the instant case the slope was 10 inches in 5 feet or, in the terms of the ordinance, 1 foot in 6 feet. The refusal of the trial court to admit the offered ordinance in evidence was materially prejudicial to appellants and requires a reversal.

[3] Appellant also complains of the failure to give some 15 proposed "usual and ordinary preliminary instructions." We have examined the entire charge to the jury and conclude that there is no merit in any of these complaints. The subject matter in each of these proposed instructions was either adequately covered in the in-

structions given or properly refused as not being applicable or material to the present case. One exception should be noted. Appellant offered, but the court did not give, the standard instruction on expert testimony. (BAJI No. 33.) However, the only expert who testified was the physician who treated appellant's injuries and his testimony did not bear upon or relate to the issue of liability. Therefore, appellant was not prejudiced by the failure to give the expert witness instruction.

The judgment is reversed on the ground stated herein.

PETERS, P. J., and FRED B. WOOD, J., concur.



149 Cal.App.2d 600

Bernice Ann MOLDOVAN et al., Plaintiffs and Respondents.

v.

Rosa E. FISCHER et al., Defendants and Appellants.

Rosa E. FISCHER, Plaintiff and Appellant,

v.

Bernice Ann MOLDOVAN et al., Defendants and Respondents.

Civ. 17076.

District Court of Appeal, First District, Division 1, California.

April 1, 1957.

Forcible entry and detainer action by general partner, in rest home business, against her limited partner who was named tenant in lease of premises, and against landlords, based on defendants' entering and taking possession of premises, after cancellation of lease and termination of partnership agreement. From adverse judgments rendered by the Superior Court, County of Alameda, Richard H. Chamberlain, J., the general partner appealed. The District Court of Appeal, Peters, P. J., held that where terms of partnership agreement conferred upon limited partner right to terminate partnership either if general partner defaulted in financial obligations or failed to comply with terms of lease, and after she both defaulted and failed to comply with terms of lease and limited partner cancelled agreement, landlords and limited partner took possession of premises and refused her demand to vacate, neither their entry nor possession was unlawful within meaning of forcible detainer statute.

Judgments affirmed.

1. Forcible Entry and Detainer ⇐29(4)

In forcible entry and detainer action by partner, in rest home business, against her partner who was named tenant in lease of premises and against landlords, based on defendants' entering and taking possession of premises, after cancellation of lease and termination of partnership agreement, and while plaintiff was absent from premises, evidence sustained trial court's finding that defendants had entered premises peacefully and without fraud or deceit. West's Ann. Code Civ.Proc., § 1159, subd. 2.

2. Forcible Entry and Detainer ⇐29(1)

In forcible detainer action, plaintiff had burden of proving her allegations that defendants had, after taking possession, kept it by means of threats or violence and intimidation. West's Ann.Code Civ.Proc., § 1160, subd. 1.

3. Evidence ⇐87

Forcible Entry and Detainer ⇐29(4)

In forcible entry and detainer action by partner, in rest home business, against her partner who was named tenant in lease of premises and against landlords, based on defendants' entering and taking possession of premises, after cancellation of lease and termination of partnership agreement, and while plaintiff was absent from premises, presumption that law has been obeyed and evidence sustained finding that defendants had used no force and had threatened no injury upon entry, upon turning out occu-

pants, or in retaining possession of premises. West's Ann.Code Civ.Proc., §§ 1160, subd. 1, 1963, subd. 33.

4. Forcible Entry and Detainer ⇐8

Under statute providing that any one who, in absence of occupant of lands, enters unlawfully thereupon and refuses to surrender possession to former occupant, after five days' notice, is guilty of unlawful detainer, to maintain unlawful detainer action, plaintiff need only be an occupant of the premises and not the rightful owner. West's Ann.Code Civ.Proc., § 1160, subd. 2.

5. Forcible Entry and Detainer ⇐8

Purpose of rule allowing a mere occupant of lands to maintain forcible detainer action is to prevent even rightful owners or possessors from taking law into their own hands and thereby contributing to breaches of peace. West's Ann.Code Civ. Proc., § 1160, subd. 2.

6. Forcible Entry and Detainer ⇐9(8)

For purposes of statute allowing occupant of lands to maintain forcible detainer action, occupant may be in possession through servants or agents and fact that she is temporarily absent from premises when defendants take possession does not bar her right to maintain action. West's Ann.Code Civ.Proc., § 1160, subd. 2.

7. Forcible Entry and Detainer ⇐9(3)

General rule is that, in order to maintain forcible detainer action, plaintiff's possession must be exclusive to that of defendant. West's Ann.Code Civ.Proc., § 1160.

8. Forcible Entry and Detainer ⇐14

Where, under terms of partnership agreement for operation of rest home, general partner was given exclusive right to operate business, she was the "occupant" of premises within meaning of statute allowing occupant to maintain forcible detainer action, and could maintain such action against limited partner and landlords of premises on which business was conducted, irrespective of facts that limited partner was only named tenant under lease and that lease had not been assigned and premises had not been sublet to general partner. West's Ann.Code Civ.Proc., § 1160.

See publication Words and Phrases, for other judicial constructions and definitions of "Occupant".

9. Forcible Entry and Detainer ⇐5

Where contractual relations exist between parties whereby the right to possession has been given to one taking possession by means of peaceable entry, neither entry nor detention of property is "unlawful" within meaning of statute authorizing actions for forcible detainer upon such unlawful entry and detention. West's Ann.Code Civ.Proc., § 1160, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Unlawful".

10. Forcible Entry and Detainer ⇐5

Where terms of partnership agreement for operation of rest home on premises leased from landlords by limited partner conferred upon limited partner right to terminate partnership either if general partner defaulted in financial obligations or failed to comply with terms of lease, and after she both defaulted and failed to comply with lease, landlords and limited partner took possession of premises after limited partner cancelled agreement and refused demand to vacate, neither their entry nor possession was "unlawful" within meaning of forcible detainer statute. West's Ann.Code Civ. Proc., § 1160, subd. 2.

11. Forcible Entry and Detainer ⇐28

In forcible entry and detainer action by partner, in rest home business, against her partner who was named tenant in lease of premises and against landlords, plaintiff's pleading that she had invested stated sum and prayer that damages therefor be trebled was simply one for triple damages and did not raise contention that adverse judgments would operate to forfeit her investments contrary to law or that she was entitled to an accounting and where she did not otherwise plead or prove such issues, she was not entitled to have them passed upon. West's Ann.Code Civ.Proc., §§ 1159, 1160, 1174.

12. Partnership ⇐297

Provision in partnership agreement denying general partner right to accounting and forfeiting her investment on termination of agreement was unenforceable.

Wagener, Brailsford & Knox, Francis C. Starr, Oakland, for appellants.

Harris, Darter & Older, Oakland, Cyril Viadro, San Francisco, of counsel, for respondents Moldovans.

Harpham & Holt, Wilfred J. Harpham, Howard C. Harpham, Albany, for respondent Mary E. Hauschildt.

PETERS, Presiding Justice.

Bernice and David Moldovan and Mary Hauschildt brought an action against Rosa Fischer to determine their right to possession of certain realty, for declaratory relief, for an injunction, and for damages. Rosa Fischer then brought an action against the Moldovans and Mary Hauschildt involving the same property for forcible entry, forcible detainer, and for fraud, praying for restitution of the realty and for damages. The actions were consolidated for trial. The trial court decided in favor of the Moldovans and Mary Hauschildt in both actions, and judgments were entered accordingly. Rosa Fischer appeals from both judgments.

The Moldovans own a building and equipment in Oakland suitable and licensed by the state for the operation of a rest home for the aged. On January 2, 1954, they leased this building, its fixtures, furniture and equipment to Mary Hauschildt for 5 years, the lessee paying the last year's rent of $7,200 in advance. Mary Hauschildt operated the premises as a rest home until January 2, 1955. The lease contained a clause prohibiting its assignment or subletting the premises without the written consent of the lessors, the lessees agreeing that they would "not unreasonably withhold their consent." It was also provided that the "taking a partner or partners by Lessee shall not be deemed an assignment or a sub-letting within the meaning of this paragraph."

In November of 1954 Rosa Fischer came upon the scene. In that month she and Mary Hauschildt executed a limited partnership agreement, and filed with the county their certificate of limited partnership. By the terms of the limited partnership agreement the partnership was to commence January 2, 1955, and to terminate January 2, 1959, the date of termination of the Moldovan-Hauschildt lease. Rosa Fischer was made the general partner and Mary Hauschildt the limited one. Both partners knew of the restrictions in the lease against assignment or subleasing, and there is testimony that the Moldovans refused to consent to an assignment or sublease to Rosa Fischer. However, in the partnership agreement, the continuing existence of the Moldovan-Hauschildt lease was recognized in at least six separate paragraphs. (Paragraphs 9, 11, 14, 17, 19 and 21.)

The partnership agreement conferred on the limited partner the power to terminate the partnership. Paragraph 19 of the agreement provided in part:

> "The Limited Partner is hereby given the right to terminate this limited partnership and;
>
> "(a) To resume complete ownership and assume management of the business, * * *"

Paragraph 20 provided: "Termination of the Limited Partnership under the above paragraph 19 shall be effective upon the Limited Partner giving the General Partner notice thereof, and the General Partner shall not be entitled to an accounting or to reimbursement of any payments made under this agreement to the Limited Partner."

Pursuant to the terms of the partnership agreement Rosa Fischer paid Mary Hauschildt $1,000 on the date of the execution of the agreement, and on January 2, 1955, paid her a second $1,000,[1] and began opera-

1. After one dishonor the bank paid this check when presented for the second time.

tion of the business.[2] Almost immediately the Moldovans and Mary Hauschildt became dissatisfied with the way Rosa Fischer was operating the business. That this dissatisfaction was reasonable was shown by evidence that in violation of law more patients were accepted than the state license permitted, that patients were given inadequate care, and that Rosa Fischer refused to allow the Moldovans or Mary Hauschildt entry to the premises. The situation got so bad that Moldovans threatened to terminate their lease with Mary Hauschildt. In fact, on January 26, 1955, by written agreement, these parties "cancelled, terminated and rendered null and void and of no effect" this lease. As part of this termination agreement the Moldovans agreed to refund to Mary Hauschildt the $7,200 she had paid them in advance for the last year's rent under the lease. Then by a letter dated January 26, 1955, and personally delivered to her on the 27th, Rosa Fischer was formally notified by the Moldovans that the Moldovan-Hauschildt lease had been cancelled, that Fischer's right to possession of the premises had terminated, and that she should vacate the premises before January 27, 1955, at 3:30 p.m. By a letter from Mary Hauschildt dated January 27, 1955, and received January 29th, Rosa Fischer was formally notified that "by reason of your activities in the Rest Home which have exposed me to great liability under the lease and because of your failure to permit me entrance or to cooperate with me in any other way, I am obliged to terminate our partnership."

On January 27, 1955, at about 3 p.m., while Rosa Fischer was temporarily absent from the premises, the Moldovans and Mary Hauschildt retook possession and control of the property. These actions then followed, resulting in judgments for the Moldovans and Mary Hauschildt. In the action brought by the respondents it was decreed that the Moldovans owned the property and business in question; that the Moldovan-Hauschildt lease was lawfully terminated January 26, 1955; that the limited partnership was lawfully terminated January 27, 1955; that the lease was not assigned to the partnership; that Mary Hauschildt at all times prior to the termination of the lease was in lawful possession of the premises and that she had duly and regularly delivered possession of the premises and business to the Moldovans. In the action by appellant the decree was in substantially the same terms, plus the order that appellant was entitled to nothing under her complaint.

On these appeals appellant makes two main contentions: That respondents, as a matter of law, were guilty of a forcible entry and a forcible detainer, and that the judgments unlawfully forfeited her investment and earnings in the business. These arguments are directed mainly to the action in which appellant was plaintiff.

The first question presented is whether the evidence, as a matter of law, shows a forcible entry. It does not.

The civil offense involved is defined in section 1159 of the Code of Civil Procedure as follows:

> "Every person is guilty of a forcible entry who either:
>
> "1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property; or,
>
> "2. Who, after entering peaceably upon any real property turns out by force, threats or menacing conduct, the party in possession."

[1] The trial court found that the respondents entered the premises peacefully and without fraud, deceit, force, threat or intimidation of any kind. This finding is amply supported by the testimony of the three respondents that they used no force

2. There is a conflict as to the nature of Rosa Fischer's presence on the premises. Appellant claims that she "took possession" of the leased premises, whereas respondents assert that appellant only "assumed management and control of the business."

or intimidation in resuming control of the premises, by the testimony of a police officer present at the time, and by the testimony of three of Rosa Fischer's employees.

The trial court made no express finding in reference to subdivision 2 of section 1159. However, the trial court did find that all of the allegations in appellant's first cause of action were untrue. One of those allegations was that "the defendants * * * with sundry and blasphemous threats of bodily harm, * * * ordered all of plaintiff's employees from said property." Although at the trial the evidence was not specifically directed towards this aspect of the forcible entry cause of action, it is a fair inference from the evidence that the occupants of the premises were not forcefully removed after a peaceable entry.

Thus, appellant has failed to establish the essential element of the claim unlawful entry. Edwards v. Bodkin, 43 Cal.App. 405, 185 P. 423; San Francisco, etc., Soc. v. Leonard, 17 Cal.App. 254, 119 P. 405.

The next question presented is whether the evidence, as a matter of law, shows a forcible detainer. It does not.

This civil offense is defined in section 1160 of the Code of Civil Procedure as follows:

"Every person is guilty of a forcible detainer who either:

"1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

"2. Who, in the night-time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant.

"The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands."

[2, 3] So far as subdivision one is concerned, the gist of the offense is retention of the property by force or threats of force. The trial court found that following the peaceable entry by respondents, Mary Hauschildt properly turned the property over to the Moldovans and that the Moldovans remained in peaceable possession "without the use of force, threat, fraud, deceit or intimidation of any kind whatsoever." The court also found to be untrue the allegation of appellant's complaint that the respondents, after taking possession, "by means of threats of violence and intimidation, unlawfully hold and keep possession of said real property to the exclusion" of appellant. Appellant points to no evidence concerning the nature of the holding during the period following January 27th. The burden was on her. The findings quoted are at least supported by the disputable presumption that "the law has been obeyed." Code Civ. Proc., § 1963, subd. 33. Moreover, the findings are supported by the testimony already referred to as to what happened on the afternoon of January 27th. While, as already pointed out, that testimony was directed mainly towards the nature of the entry, the questions and answers were sufficiently comprehensive to encompass the whole transaction on that afternoon, including the peaceable detention of the property after a peaceable entry had been made. See Baxley v. Western Loan & Bldg. Co., 135 Cal.App. 426, 27 P.2d 387. Indulging in proper inferences in support of the findings, the evidence shows that no force was used or threatened upon entry, nor in turning out the occupants, nor in retaining possession of the premises. Thus, so far as subdivision one of section 1160 is concerned, the appeal must fail.

The problem as to whether there was a "forcible detainer" under subdivision 2 of the section presents a more complex question. Under this subdivision no force is required. Admittedly, Rosa Fischer caused to be served on all respondents the demand for a surrender of the premises mentioned in the section. The question is whether respondents' failure to comply with this de-

mand violated this subdivision of the section.

The trial court found that the lease was never assigned to the partnership and that at all times prior to the termination of the lease and "re-delivery" of the premises to the Moldovans, Mary Hauschildt was "in possession of said premises and was the sole owner of all rights and benefits of said lease, and was solely subject to all the duties and obligations of said lease." The allegation found in appellant's complaint that respondents, during appellant's absence, "unlawfully" entered the premises was found to be untrue. Whether these findings are supported turns, in part, upon the proper meaning of the terms "occupant" and "unlawfully enters" as those terms are used in the section.

[4, 5] Subdivision 2 of the section defines "occupant" as "one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands." Thus, in order to maintain such an action the plaintiff need only be an "occupant" of the premises as so defined, and be in peaceable possession of the premises. Questions of title and right to possession are not usually involved in such an action. See Bank of California v. Taaffe, 76 Cal. 626, 18 P. 781; Eichhorn v. De La Cantera, 117 Cal.App.2d 50, 255 P.2d 70; California Products, Inc., v. Mitchell, 52 Cal.App. 312, 198 P. 646; Ingram v. Slayton, 33 Cal.App. 630, 165 P. 1026; Dutcher v. Sanders, 20 Cal.App. 549, 129 P. 809. As some of these cases point out, the rule is designed to prevent even rightful owners or possessors from taking the law into their own hands and thereby contributing to breaches of the peace.

[6] In the present case the evidence shows that Rosa Fischer, as the result of the agreement with Mary Hauschildt, had actual possession of the premises. The Moldovan-Hauschildt lease expressly contemplated that Mary Hauschildt might take a partner, and it is reasonable to expect that such a partner might occupy the place of business. Under the partnership agreement Rosa Fischer was required to perform all the terms and conditions of the lease, and was "entitled to receive all of the benefits of said lease in every respect" as though she were the lessee thereunder. The agreement further provided that Mary Hauschildt agrees to "execute any instruments or do any other act necessary in order for * * * [Rosa Fischer] to acquire the benefits of said lease." The fact that there was no assignment or sublease does not negative the fact that Rosa Fischer was in actual physical possession of the premises. Of course, the fact that Rosa Fischer was temporarily absent from the premises when respondents took possession, did not prevent her from being the "occupant" of the premises, because possession through servants or agents is sufficient. Baker v. Dickson, 62 Cal. 19.

[7, 8] Respondents argue that Rosa Fischer was the agent and general partner of Mary Hauschildt and, therefore, did not have exclusive possession of the premises. It is the general rule that in order to maintain the action plaintiff's possession must be exclusive of that of defendant. Bittman v. Courington, 86 Cal.App.2d 213, 194 P.2d 43. Thus, an employee generally does not have such possession as will permit him to maintain such an action against his employer. See generally 22 Am.Jur. p. 922, § 23. The question is, does this rule preclude a general partner from suing a limited partner in reference to the property where the partnership business is conducted? We think not, under the circumstances of this case. Appellant had the exclusive right to conduct the business. She was granted all the benefits of the lease. In such a case, the policy behind the statute of preventing possible breaches of the peace should extend to this case.

Thus, on this phase of the case, we conclude that appellant was an "occupant" of the premises, and that she had the legal capacity to bring this action against her limited partner and the owners of the property. However, in the absence of a "forceful" entry within the meaning of Code of Civil Procedure, sections 1159 and 1160,

subdivision 1 (and we have held that the finding of no forceful entry is supported), and in the absence of an "unlawful" entry within the meaning of section 1160, subdivision 2, the appeal on this issue must fail.

[9] As already pointed out, questions relating to the right to possession are not usually considered in such actions in determining whether the one resuming possession did so lawfully or unlawfully. But to this rule there is at least one exception. This exception was defined at length in the well reasoned case of Baxley v. Western Loan & Bldg. Co., 135 Cal.App. 426, 27 P. 2d 387. That case stands for the proposition that where there is no force involved in the entry, and where the entry is pursuant to a contract between the parties, the entry is lawful, and no violation of section 1160, subdivision 2, has occurred. In that case the defendant was a corporate vendor of realty. Plaintiff's predecessor in interest was the vendee. The installment contract gave the vendor the right to reenter and to resume possession of the premises upon default of the vendee. The vendee did default in certain installment payments. While the vendee was in default he assigned his contract to the plaintiff. Plaintiff took possession of the property through a manager. This manager was informed of the default and an agent of defendant, Campbell by name, informed the manager that he was taking possession on behalf of defendant. The manager cooperated, and installed Campbell in an apartment, and agreed to manage the property for defendant. Campbell remained on the premises. Plaintiff did not approve these arrangements, and demanded that Campbell leave the premises. He refused. The discussion became acrimonious, and force and threats of force were used by both parties. Plaintiff, after written demand on defendant for possession, brought an action for forcible entry and forcible detainer. It was first held that the entry was peaceable, possession having been secured in a peaceable manner, and the subsequent force and threats of force did not make the entry forcible. In reference to the forcible detainer action the court held that, although the general rule was that the right to possession would not be passed on in such cases, the instant case presented an exception to that rule. At page 430 of 135 Cal.App., at page 389 of 27 P.2d the court stated: "There is an exception, however, to the general rule in actions charging *forcible detainer*. When contractual relations exist between the parties whereby the right to possession has been given to the one taking possession by means of the peaceable entry, then neither the entry nor detention of the property is 'unlawful' within the meaning of said section 1160 dealing with *forcible detainer*."

The court elaborated on the exception in 135 Cal.App. at page 431, 27 P.2d at page 390 in the following language: "Upon default in the payments, respondent was entitled to possession under the contract between the parties and could take possession if it could be done peaceably. * * * We are of the opinion that when respondent, acting under its right conferred upon it by the contract between the parties, obtained possession of the premises by means of a peaceable entry, neither the entry upon nor the detention of the premises was 'unlawful' within the meaning of the subdivisions of said section 1160, relating to *forcible detainer*."

The principles upon which the exception is based have been recognized in other cases, California Products, Inc., v. Mitchell, 52 Cal.App. 312, 198 P. 646; Dutcher v. Sanders, 20 Cal.App. 549, 129 P. 809; Lydon v. Beach, 89 Cal.App. 69, 264 P. 511, and apparently are in accord with the general rule in other jurisdictions. See annotations 45 A.L.R. 313; 49 A.L.R. 517; 60 A.L.R. 280.

[10] The instant case clearly falls within the rule of the Baxley case. The partnership agreement conferred upon Hauschildt the right to terminate the partnership and to resume complete ownership and management of the business. This right could be exercised if Rosa Fischer defaulted for more than 10 days in any of her financial obligations assumed under the

agreement, or failed to comply with the terms of the lease. The trial court found that both conditions existed. These findings are supported. There is ample evidence that a payment due from Rosa Fischer of $400 on January 16, 1955, was not paid within 10 days or at all. There was also ample evidence that Rosa Fischer violated the terms of the lease. This evidence has already been referred to in another connection and need not be repeated. Thus, Mary Hauschildt and the Moldovans had contractual rights to enter the premises and to resume possession of the business. Thus, both the entry and retention of possession were lawful. Therefore, the trial court properly held that no cause of action under section 1160, subd. 2, of the Code of Civil Procedure existed.

[11] The last contention of appellant is that the judgments operate to forfeit her investment and earnings in the enterprise, and, as such, are contrary to law. The difficulty with this argument is that there is neither pleading nor proof on this issue. In her brief appellant claims that she was entitled to an accounting of the partnership affairs and a return, at least, of her $2,000 payments. But she did not ask for an accounting or for relief from the claimed forfeiture in her complaint. Appellant points to no evidence in the record whereby these issues were raised and her right to relief established. All of the cases on this problem emphasize the necessity of the party seeking such relief to plead and prove facts that will justify the court in granting it. See Freedman v. Rector, 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1, cited by appellant; Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367; Petersen v. Ridenour, 135 Cal.App.2d 720, 287 P.2d 848. In Bird v. Kenworthy, 43 Cal. 2d 656, 659, 277 P.2d 1, 2, the Supreme Court stated: "To have the benefit of the rule against unjust enrichment, the burden of proof is upon the defaulting vendee to show that the payments made by him exceed the vendor's damages." In Palo & Dodini v. City of Oakland, 79 Cal.App.2d 739, 749, 180 P.2d 764, 770, this court pointed out: "An examination of plaintiffs' complaint leaves considerable doubt as to on just what theory plaintiffs are proceeding. They nowhere allege facts upon which they might ask for relief from forfeiture nor do they offer to make 'full compensation to the other party' as required by section 3275 of the Civil Code for relief in case of forfeiture." In the present case appellant simply pleaded that she had invested $4,117.92 in the business and prayed for judgment in that sum and that the damages be trebled. Thus, the complaint was simply one for triple damages under section 1174 of the Code of Civil Procedure.

[12] It is undoubtedly true that the provision of the partnership agreement (Par. 20 above quoted) denying to the general partner the right to an accounting and forfeiting her investment in the event of a termination of the partnership agreement is unenforceable. Hill v. Hearron, 113 Cal. App.2d 763, 249 P.2d 54. But in the absence of a request for an accounting and for relief from forfeiture, and proof on those issues, the court was without power to grant such relief. It may be that Rosa Fischer, if an unlawful forfeiture has here occurred (a point on which we express no opinion), may bring an independent action for an accounting of the partnership affairs. In such an action Mary Hauschildt could raise any defenses such as that her damages exceeded those of Fischer, illegality, unclean hands, statute of limitations, etc., that may be available to her. On these questions we also express no opinion. But it certainly was not error to fail to grant such relief in these proceedings where the issues were not raised.

The judgments appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

149 Cal.App.2d 395

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank CARSWELL, Defendant and Appellant.

Cr. 3245.

District Court of Appeal, First District, Division 2, California.

March 25, 1957.

Prosecution for burglary together with a prior felony conviction. The Superior Court, County of Alameda, James R. Agee, J., entered judgment of conviction and defendant appealed. The District Court of Appeal held that admission of stolen property seized in defendant's room by officers who had procured a search warrant after having previously noticed property in room when painter working in building allowed inspection without a search warrant and in defendant's absence, constituted reversible error.

Reversed.

1. Searches and Seizures ⇐3(2)

Where conduct of officers in entering or searching is unlawful, search warrant subsequently obtained based on their prior observations in unlawful search is invalid.

2. Criminal Law ⇐395

Where police officers without taking any illegal action happen to see incriminating evidence, and procure a search warrant and seize such evidence, evidence would be admissible.

3. Criminal Law ⇐394

If police officers' presence at door of defendant's apartment was not in violation of defendant's own constitutional rights but only in violation of those of landlord, and they caused defendant's apartment door to be opened for them by person of whom they had no reason to believe had authority to do so, knowledge obtained by search could not be used as evidence or as basis to obtain further evidence against defendant.

4. Criminal Law ⇐394

Where question of legality of an arrest or of a search and seizure is raised either at preliminary hearing or at trial, defendant makes a prima facie case of illegality when he establishes that the arrest was made without a warrant or that private premises were entered or a search made without a search warrant, and burden is then upon prosecution to show proper justification.

5. Criminal Law ⇐395

In prosecution for burglary, admission into evidence of stolen property seized in defendant's room by officers acting under search warrant procured after they had noticed property in room when painter on premises allowed their inspection of room without a search warrant and in defendant's absence, constituted error.

6. Criminal Law ⇐1158(4)

Function of District Court of Appeal is to determine correctness of rulings made on admission and rejection of evidence and to determine whether rulings adverse to appellants were erroneous and, if erroneous, whether rulings operated to the prejudice of appellants' rights.

7. Criminal Law ⇐1169(1)

In prosecution for burglary, erroneous admission into evidence of stolen property seized illegally in defendant's room and forming substantial corroborating evidence, was prejudicial.

8. Burglary ⇐42(1)

If possession of stolen goods soon after a burglary is unexplained or the attempted explanation is rejected by the jury, such alone is sufficient corroboration.

9. Criminal Law ⇐780(1), 829(10)

Where chief state witness was an accomplice of defendant who had pleaded guilty, defendant was entitled as a matter of law to an instruction that witness was an accomplice but error was not clearly prejudicial where court correctly instructed jury on definition of an accomplice in such manner as to leave no doubt as to witness being an accomplice.

James M. Dennis, Redwood City, for appellant.

Edmund G. Brown, Atty. Gen. of California, Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

PER CURIAM.

Defendant was found guilty by a jury on an information accusing him together with Andrew White and Robert Hunter of burglarizing the store of Markus Hardware Company at 628 Washington Street in Oakland, and charging him with a prior felony conviction. His motion for a new trial was denied and he appealed from the judgment of conviction and from the order denying his motion for a new trial.

The main witness for the prosecution was Charles E. Holmes who prior to the trial had pleaded guilty to the same burglary. Defendant White changed his plea to guilty early in the trial but did not testify. Holmes, White and Hunter lived at the Magnolia Hotel on 7th Street near Washington Street adjacent to the store of the Marcus Hardware Company. Holmes testified at length to the discussion of the job by all four men in the hotel on Sunday, November 20th, their going down a fire escape to the roof of the store and the entry of all four through a skylight, the taking of guns, the return to White's room in the hotel where the loot was divided among them, and the bringing of part of the guns outside the hotel wrapped in sheets, by Carswell, White and Hunter at or about 8 or 9 o'clock that evening. The department manager of the store testified that when he came to work on the next Monday morning, 27 of the guns on a rack, which he had checked on Saturday evening, were missing. Of these 19 were recovered by the police partly in locations indicated by Holmes. Nine were found in a room rented by defendant on the upper floor of a duplex at 800–11th Street in Oakland.

Appellant's primary grievance is the admission into evidence over objection of the guns found in his room and of testimony regarding their finding, which he contends was the result of an illegal search. It is conceded that the original entry of the police into 800–11th Street was without a search warrant and that the burden rested on the prosecution to show proper justification. Badillo v. Superior Court, 46 Cal.2d 269, 272, 294 P.2d 23; People v. Bock Leung Chew, 142 Cal.App.2d 400, 402, 298 P.2d 118. The question presented is whether the trial court could hold under the evidence produced on voir dire that the prosecution had sustained said burden. The following occurred:

When Inspector Richardson testified that on November 21, 1955 he went with one police lieutenant and three other inspectors to the premises at 800–11th Street, that he went upstairs there and observed some guns, counsel objected and asked that voir dire relating to the Cahan rule be allowed. Under questioning by counsel the inspector testified that he entered the premises at 800–11th Street on November 21st, that they did not search it, and that at the time they had no search warrant. The court then directed the prosecution to develop the matter. Under questioning by the district attorney the inspector testified further: "We knocked on the door and were admitted by a man who was painting the premises * * * We found the upstairs portion to be vacant * * * with the exception of one room. The painter opened this door and we were able to observe one of the guns." On questions by the court the inspector stated that he did not see anyone else on the premises at the time, "just the painter", that there was no objection whatsoever on his part to admitting him to the premises and that the door was opened by the painter, after which testimony the objection was overruled. The testimony then continued to the effect that the witness "did not enter and take anything from there at that time." The premises were a two family dwelling, a duplex, the bottom half of which was occupied by the owner and his family. The upper portion was at the time vacant with the exception of this one room. "This one room proved to be Mr. Carswell's room. The following day they obtained a

search warrant. (This search warrant was admitted into evidence over objection for the limited purpose of proving that the subsequent entry was legal, and with instruction to the jury that the facts recited in the affidavit attached to it were not proof of the facts stated.) On the 22nd the witness and other officers entered Mr. Carswell's room and removed the guns, one gun that was lying across the foot of the bed and eight that were stacked in the closet. They matched the described stolen guns from Markus Hardware and were received into evidence as exhibits. Carswell was not in custody at the time.

[1] "It is, of course, settled that if the conduct of the officers in entering or searching was unlawful, the search warrant subsequently obtained based on their observation in the apartment was invalid." People v. Roberts, 47 Cal.2d 374, 303 P.2d 721, 722. It must also be noted that the People do not contend that the entry into the building was made with relation to any arrest or that there was any probable cause for an arrest or search.

[2, 3] If the officers, without taking any illegal action, happened to see incriminating evidence in defendant's room, then there is no reason for excluding such evidence. People v. Roberts, supra, 47 Cal.2d 374, 303 P.2d 721; People v. Martin, 45 Cal.2d 755, 761 et seq., 290 P.2d 855; People v. Chin, 145 A.C.A. 703, 707. However, if the officers were illegally at the door of the room of defendant in the duplex, even if their presence was not in violation of defendant's own constitutional rights but in violation of those of the landlord, People v. Martin, supra, 45 Cal.2d at page 761, 290 P.2d at page 857 or if they illegally caused the door to be opened for them by a person of whom they had no reason to believe that he had authority to do so, People v. Roberts, supra, 47 Cal.2d at page 376, 303 P.2d at page 722, then the knowledge so obtained could not be used as evidence or as the basis to obtain further evidence. The incomplete and vague evidence offered by the prosecution is wholly inconclusive as to which of the above two situations was present. It is not shown for what purpose, if not for a search, the officers went to the address, whether they asked permission to enter or asserted that they had a right to enter, see People v. Kitchens, 46 Cal.2d 260, 263, 294 P.2d 17, whether they asked for any person they were interested in or not; whether the painter who opened the door was authorized to permit them to walk through the house and to open the door of defendant's room in their sight, or whether and why they in good faith believed that he was so authorized, People v. Roberts, supra, 47 Cal. 2d at page 376, 303 P.2d at page 722, what ground they gave to the painter for wishing to enter the house and go to the second floor, (a circumstance on which may depend whether they could in good faith believe that he was authorized to permit them to do so), whether they requested or ordered the painter to open the door of defendant's room or whether he opened it of his own initiative; whether the door to the room was locked and the painter used a key or not. Without knowledge of such further circumstances, which were necessarily known to the witness and available to the prosecution on whom the burden of proof was imposed, there was no basis for any inference as to whether the action of the public officers was lawful or unlawful in relation to the rule of the Cahan case, People v. Cahan, 44 Cal.2d 434, 282 P.2d 905.

[4] Respondent contends that, although where it was shown that the officers did not have a search warrant the burden of showing justification for the entry was on the prosecution, after it had offered some evidence (held by us to be wholly inconclusive) the missing evidence should be considered to be in its favor on the basis of the rule quoted from People v. Farrara, 46 Cal.2d 265, 269, 294 P.2d 21, 23, that "in the absence of evidence to the contrary it must * * * be presumed that the officers regularly and lawfully performed their duties." We understand both the Badillo case, supra, and the Farrara case itself to

hold that this presumption has been prima facie rebutted when defendant has shown that the entry was made without a search warrant and that then the burden is on the prosecution to prove justification without the benefit of said presumption. In the Badillo case it is said, 46 Cal.2d at page 272, 294 P.2d at page 25, "In the absence of evidence to the contrary, it is presumed that the officers acted legally (see People v. Farrara, [46 Cal.2d 265] ante, 294 P.2d 21, and if the issue is raised for the first time on a motion to set aside the information, the motion should be denied unless the evidence before the committing magistrate establishes that essential evidence was illegally obtained. When, however, the question of the legality of an arrest or of a search and seizure is raised either at the preliminary hearing or at the trial, the defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant, and the burden then rests on the prosecution to show proper justification." In the Farrara case, 46 Cal.2d at page 268, 269, 294 P.2d at page 23, it is stated: "In Badillo v. Superior Court, [46 Cal.2d 269] 294 P.2d 23, we held in this respect that 'the defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant, and the burden then rests on the prosecution to show proper justification. [Citations.]'

"In the present case, on the contrary, there is no such evidence, and to reverse the judgment it would be necessary to presume that the officers acted illegally and that the trial court erred in admitting the evidence so obtained. It is settled, however, that error will not be presumed on appeal [Citations], and in the absence of evidence to the contrary it must also be presumed that the officers regularly and lawfully performed their duties. [Citations]". Clearly, both cases contrast the presumption in behalf of the officers when there is no evidence at all, with the burden on the prosecution to prove justification when it has been shown that private premises have been entered without a warrant. The rule of the Badillo case would hardly have any meaning, if, as soon as any evidence whatever was introduced by the prosecution for the purpose of justification, the presumption of lawful conduct of the officers was revived, relieving them from the necessity of making an actual showing of the justifying facts.

[5] Independent from the presumption the respondent has not sustained the burden of justification. It cannot be said that the fact alone that a painter opened the street door when the officers knocked, that he did not object to their entry and that he opened the door of defendant's room in itself, without the presumption, shows a justification of the conduct of the officers because of permission granted by a person authorized to give such permission or whom the officers in good faith and reasonably believed to be authorized. There is no reasonable basis for a general assumption that every person who happens to be in a house has authority to permit police officers to do acts on the premises which they could not legally do without such permission. In People v. Jennings, 142 Cal.App.2d 160, 168–167, 298 P.2d 56, it was held that the fact that two daughters of defendant, age 15 and 17, admitted the police officers to defendant's home and that the elder one accompanied the officer to the basement, where he found material evidence, did not constitute justification by consent. People v. Gorg, 45 Cal.2d 776, 291 P.2d 469 and People v. Caritativo, 46 Cal.2d 68, 292 P.2d 513 on which respondent relies are not in point. They were distinguished in People v. Roberts, supra, 47 Cal.2d at page 377, 303 P.2d at page 722, as follows: "In both of those cases the premises searched were part of a private home, it was unclear whether the defendant was a guest, tenant or servant, and the officers had the consent of the owner who purported to have authority to authorize the search. In the present case Mrs. Higgins was a tenant of an apartment, and

there is no evidence that the officers had reason to believe that the manager had authority to consent to their entry. * * * Moreover, although the burden is on the prosecution when it seeks to justify an entry on the ground that the officers reasonably believed in good faith that they had the consent of an authorized person [citation] no attempt was made to establish such a belief * * *." Neither was any such attempt made in this case. We hold that the admission of the evidence relating to the guns found in the room rented by appellant including the guns themselves was error.

[6–8] Respondent contends that even if the evidence held to be erroneously received is disregarded there remains sufficient evidence of appellant's guilt and sufficient corroboration of the testimony of Holmes. Such is not the decisive question on appeal when inadmissible evidence has erroneously been received. "Our function is to determine the correctness of the rulings made on the admission and rejection of evidence and to determine whether rulings adverse to the appellants were erroneous and, if erroneous, operated to the prejudice of appellants' substantial rights." People v. Zammora, 66 Cal.App. 2d 166, 204, 152 P.2d 180, 199. In People v. Tarantino, 45 Cal.2d 590, 290 P.2d 505, illegally obtained recordings had been played to the court and jury. The Supreme Court reversed the conviction on the counts to which the recordings related stating, 45 Cal.2d at pages 595–596, 290 P.2d at page 509: "Since the recordings clearly constituted a substantial and important part of the evidence pertinent to the last mentioned counts, it cannot be said that the verdicts as to those counts rested on evidence independent of them. [Citation.] Accordingly their admission in evidence deprived the defendant of a fair trial and resulted in a miscarriage of justice which necessitates a new trial as to such counts." In this case the evidence as to the guns found in appellant's room, although not the only corroborating evidence implicating him, was certainly a substantial and important part of it. If possession of stolen goods soon after a burglary is unexplained or the attempted explanation rejected by the jury, such alone is sufficient corroboration. People v. Miller, 54 Cal.App.2d 384, 386, 128 P.2d 785; People v. Haughey, 79 Cal.App. 541, 543, 250 P. 406; People v. Rice, 29 Cal.App.2d 614, 620, 85 P.2d 215. The further corroborating evidence[1] was not of such force that the jury could not have come to a different verdict as to appellant if no evidence as to the guns had been introduced. Hence, we cannot say that the error was not prejudicial and the judgment must be reversed.

After this conclusion the other contentions of appellant require at most cursory mention.

The voir dire examination in the presence of the jury and the admission in evidence of the search warrant for the limited purpose stated has no separate importance because they did not add anything to the evidence before the jury, as the evidence concerning the guns themselves was admitted. We therefore need not decide whether appellant could complain of the presence of the jury, although his counsel took part in the voir dire examination without requesting that the jury be excused and whether the admission of the search warrant could be prejudicial notwithstanding the extensive instruction of its limited purpose and effect given by the court.

1. The witness Melinda Orndoff testified that she saw Carswell, Hunter, and White coming down the stairs of the Magnolia Hotel on November 20th at 7:20 p.m. each carrying a long package wrapped in sheets (the time does not quite harmonize with the testimony of Holmes) and discrepancies were shown between the story told by appellant to the police and the one he testified to at the trial (they related mainly to which of the burglars had a key to his room and could have placed the guns there and to the manner in which appellant said to have handled the guns before they were in his room, explaining possible finger prints.)

[9] Although an instruction that Holmes was an accomplice as a matter of law should have been given, People v. Dobkin, 74 Cal.App.2d 269, 273, 168 P.2d 729, the error was clearly not prejudicial because the court correctly instructed the jury on the definition of an accomplice, Holmes' testimony did not leave any possible doubt as to his being an accomplice under said definition, and the District Attorney in his opening statement expressly explained that Holmes was an accomplice of the defendants and that his testimony required corroboration. People v. Barclay, 40 Cal.2d 146, 152, 153, 252 P.2d 321.

Appellant complains of an instruction given regarding sufficiency of corroboration of testimony of accomplices which differs on one respect from the accepted instruction CALJIC 830, which states the rule of law as upheld in many cases among which People v. Hoyt, 20 Cal.2d 306, 312, 125 P.2d 29. The CALJIC instruction accordingly directs the jury for purpose of testing the corroboration to exclude from consideration "the testimony of the accomplice(s)" and then to decide whether the remaining evidence tends to connect the defendant with the commission of the offense. The instruction here given directs to eliminate for that purpose "such testimony, if, any, of the accomplice or accomplices which tends to connect the defendant in question with commission of the offense charged and shown by the evidence to have been committed by someone." An instruction formulated in a similar manner was upheld in People v. Keene, 128 Cal. App.2d 520, 528, 275 P.2d 804. The result will be the same as that of the CALJIC instruction if the quoted phrase is understood by the jury to mean "which directly or indirectly may tend to connect the defendant with the commission of the offense"; it will, however, lead to a different result if understood to mean "which in itself tends to connect the defendant with the commission of the offense." Suppose one of the men who have taken part in a burglary testifies that in entering the premises a green rope was used, a fact not otherwise shown. This in itself does not tend to connect any defendant with the burglary. If, however, a green rope is found in the home of a suspect the testimony of his accomplice will indirectly connect him with the offense. Under the CALJIC instruction such evidence cannot be used as corroboration. As under the formulation used in this case it is not quite certain whether such corroboration may be used or not such formulation may be confusing and it seems undesirable to give it because it has no advantage over the simpler CALJIC instruction, which is considered correctly to state the law. Whether the giving of the instruction was prejudicial error need not be decided because the judgment and order appealed from must at any rate be reversed because of the error in admitting the illegally obtained evidence.

Judgment and order reversed.



Jesus VASQUEZ, Plaintiff and Appellant,

v.

Robert ALAMEDA, Martin Produce Co., Adam E. Rutkowski, Gilboy Transportation Co., Daniel L. Greenley, Defendants and Respondents.*

No. 16964.

District Court of Appeal, First District, Division 1, California.

March 28, 1957.

Hearing Granted May 27, 1957.

Action to recover for injuries sustained in an automobile accident. From a judgment of the Superior Court, Monterey County, Stanley Lawson, J., after a jury verdict in favor of defendants, the plaintiff appealed. The District Court of Appeal, Bray, J., held, inter alia, that in action for injuries to pedestrian who, after having assisted in pushing stalled automobile

* Opinion vacated 321 P.2d 1.

onto southerly lane of three-lane highway, and after he had flagged automobile which stopped partially in center lane preparatory to pushing stalled automobile, found himself under truck which came on scene from the rear after third automobile struck the flagged automobile, giving instruction that because of position of stalled automobile pedestrian was guilty of negligence as matter of law was prejudicial error even though jury, had it been left to determine question as one of fact, might have found pedestrian to be contributorily negligent.

Judgment reversed.

1. Trial ⇐252(8)

In action for injuries to pedestrian who, after having assisted in pushing stalled automobile onto southerly lane of three-lane highway, and after he had flagged automobile which was partially in center lane preparatory to pushing stalled automobile, found himself under truck which came from the rear, instruction giving statute prohibiting parking of automobile on highway should not have been given since such instruction could not apply to pedestrian who was not person who left stalled automobile on highway. West's Ann.Vehicle Code, § 582.

2. Automobiles ⇐246(22)

In action for injuries to pedestrian who, after having assisted in pushing stalled automobile onto southern lane of three-lane highway, and after having flagged automobile which stopped partially in center lane preparatory to pushing stalled automobile, found himself under truck which came from the rear, instruction that violation of statute prohibiting parking of automobiles on highway, "may be the proximate cause" of accident was erroneous since it placed blame for accident on pedestrian as matter of law if jury were to find that stopping was a proximate cause of all that followed. West's Ann.Vehicle Code, § 582.

3. Automobiles ⇐242(2)

Evidence that a moving vehicle has collided with another vehicle ahead of it is at least some proof of negligence on part of driver of colliding vehicle.

4. Negligence ⇐61(1), 62(1)

If accident was produced by concurrent effect of two or more separate wrongful acts, each would be a proximate cause of injury, and neither would operate as an efficient intervening cause.

5. Automobiles ⇐245(55)

Where plaintiff who had assisted in pushing stalled automobile onto southerly lane of three-lane highway flagged automobile which stopped partially in center lane preparatory to pushing stalled automobile, and flagged automobile was struck by third automobile and plaintiff thereafter found himself under truck which came from rear, whether accident was produced by concurrent effect of two or more separate wrongful acts was for jury. West's Ann. Vehicle Code, § 582.

6. Appeal and Error ⇐1064(2)
Trial ⇐194(16)

In action for injuries to pedestrian who, after having assisted in pushing stalled automobile onto southerly lane of three-lane highway, and after he had flagged automobile which stopped partially in center lane preparatory to pushing stalled automobile, found himself under truck which came from the rear after third automobile struck the flagged automobile, giving instruction that because of position of stalled automobile pedestrian was guilty of negligence as matter of law was prejudicial error even though jury, had it been left to determine question as one of fact, might have found pedestrian to be contributorily negligent. West's Ann.Vehicle Code, § 582.

7. Negligence ⇐65, 105

The defense of assumption of risk and contributory negligence are based on different theories, contributory negligence arising from lack of due care, while defense of assumption of risk, will negative liability regardless of fact that plaintiff may have acted with due care.

8. Negligence ⇐105

Defense of assumption of risk is available when there has been a voluntary acceptance of risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk.

9. Negligence ⇐67, 105

Where facts are such that plaintiff must have had knowledge of hazard, situation is equivalent to actual knowledge, and there may be an assumption of risk, but where it merely appears that he should or could have discovered the danger by exercise of ordinary care, defense is contributory negligence and not assumption of risk.

10. Trial ⇐252(8)

In action for injuries to pedestrian who after having assisted in pushing stalled automobile onto highway was struck either by another automobile or a truck, instruction on assumption of risk allegedly based on testimony of pedestrian to effect that when he was pushing automobile or standing on pavement he then knew that an automobile might hit him was improperly given where instruction was not prefaced by requirement that jury first find that pedestrian was on the pavement when hit, where there was no evidence that pedestrian knew that in standing on shoulder he likely would be hit.

11. Negligence ⇐59

In determining proximate cause, question to be decided is not whether actor foresaw, or by exercise of ordinary care would have foreseen, the identical consequence that happened, but whether it was reasonably foreseeable that injury was likely to occur.

12. Trial ⇐234(4)

Although the giving of formula instructions is not necessarily prejudicial error, they should not be given.

13. Negligence ⇐138(2, 4)

Where party to action, by reason of loss of memory, is unable to testify respecting his conduct at and immediately before accident and produces no witness who testifies to such facts, he is entitled to an instruction of due care, but instruction should not be given where plaintiff's evidence discloses acts and conduct immediately prior to time in question.

14. Automobiles ⇐242(8)

Where pedestrian, who was struck either by automobile or truck, and his witness testified to pedestrian's movements placing him in position where he was hit, and whether he was contributorily negligent depended upon his actions up to that point, brief space of time, not as much as two seconds, which then elapsed before he was hit had no bearing on question, and hence plaintiff was not entitled to presumption of due care.

Malcolm K. Campbell, Boccardo, Blum, Lull & Niland, San Jose, Edward J. Niland, San Jose, of counsel, for appellant.

Hoge, Fenton & Jones, Monterey, for respondent Robert Alameda.

Low & Duryea, San Francisco, for respondents Rutkowski & Gilboy Transportation Co.

Campbell, Custer, Warburton & Britton, San Jose, W. R. Dunn, Burlingame, of counsel, for respondent Greenley.

BRAY, Justice.

After denial of a motion for new trial, plaintiff appealed from a judgment after jury verdict in favor of all defendants in a personal injury action, raising the sole question of the correctness of the instructions.

Facts.

Plaintiff was struck while standing on El Camino Real near Mariani's Restaurant outside Santa Clara, at about 1 a. m. on March 16, 1954. There were four vehicles involved directly or indirectly in the accident. Plaintiff worked as a dishwasher in the restaurant and went into the parking lot at the rear thereof, to be taken home by his brother-in-law, Vargas, in the latter's car, a Plymouth. It was raining. Vargas

could not start the car, so the both of them pushed it out of the lot and onto the driveway leading to the highway. The night janitor then helped plaintiff push the car (Vargas in it, steering) onto the southerly lane of the highway. (It is a three-lane highway. The southerly lane is nearest the restaurant and used for eastbound traffic. Adjoining this lane on the south is a hard shoulder about 6 feet in width and south of that a flat area of dirt or gravel.) They pushed the car down the highway about 200 feet, stopping it in the southerly lane. Plaintiff went back two or three car lengths and stood 5 to 6 feet off the paved portion of the highway. He flagged down a Studebaker car driven by defendant Greenley, who stopped in the center lane opposite the Plymouth. Plaintiff then went to a position on the shoulder 4 to 6 feet from the southerly lane and opposite the Plymouth. Greenley then backed the Studebaker into a position about 2 feet behind the Plymouth on an angle, about half of the car in the center lane and about half of it in the southerly lane. (Apparently he intended to turn his wheels to the right and then push the Vargas car.) Looking towards Greenley's car (both cars were lighted) plaintiff saw the lights of another vehicle approaching from the west. He could not tell whether it was a truck or a car. The lights were in the southerly lane 15 to 20 feet from him. They appeared to be going straight down that lane. They were not on the shoulder. The next thing plaintiff knew he was coming to his senses under a truck, that of defendant Gilboy Company operated by defendant Rutkowski. He was then on the dirt on the left side of the truck. He testified that at no time had he been standing on the pavement. Vargas testified that when plaintiff was flagging the Greenley car he saw plaintiff standing 1 or 2 yards behind the right rear of the Plymouth. He did not see him again until after the accident. Vargas, who was sitting in his car, saw in his rear view mirror the lights of the approaching truck. It came at some speed and pulled to the right onto the shoulder. When the vehicles came to rest, the back end of the truck was on the shoulder about opposite Vargas' car and about a car's width away. The front of the Greenley car was then about 1½ yards behind Vargas' car.

Greenley testified that as he approached he saw plaintiff, whom he had no difficulty in seeing, in the southerly lane flagging frantically. Greenley stopped in the center lane to the left of the Plymouth. Vargas asked him to give a push so after looking back and finding the traffic to be well up the highway (there were headlights about half a mile away) he backed his car. When he had backed about three lengths, he saw a truck coming down the outside. It was then about three lengths behind him, in the process of leaving the southerly lane, and was at least partly on the shoulder. Realizing that trucks have wide beds, Greenley was afraid to back further and stopped his car at approximately a 45 degree angle, most of the car in the southerly lane, and a part projecting into the center lane. As he was about to turn his wheels to get in behind the Plymouth, his car was struck from behind by an Oldsmobile driven by defendant Alameda (owned by defendant Martin Produce Company). The truck was then just opposite him between his car and the Plymouth. The truck was going 5 to 10 miles per hour but coming to a stop. Greenley never saw the lights of the Alameda car. As Greenley was backing up he saw plaintiff standing towards the outer edge of the pavement about a car's length behind the Plymouth. At that time the truck had not yet reached the Greenley car. He did not see plaintiff again and does not know what hit plaintiff nor where he was when hit. The Alameda car struck with terrific impact, the left side of Greenley's car by the driver's seat, driving the car into the Plymouth. Greenley's car was shoved ahead at least three car lengths and the Plymouth at least one. The truck stopped on the shoulder opposite the Plymouth. There was room in the center lane for the Alameda car to have passed. Greenley judged from Alameda's actions that he had been drinking. Alameda accused Greenley

of pulling out of Mariani's driveway in front of him. Greenley admitted that in talking to the investigating officers he discussed how plaintiff could have been knocked over into the truck by Greenley's car when it was struck by Alameda's car. An officer testified that Greenley told him that as he was backing he was hit by Alameda and knocked into the Vargas car and against plaintiff who was standing there. Vargas told the officer that the Greenley car hit plaintiff.

Rutkowski testified that he had been following the Greenley car in the southerly lane and 450 to 500 feet from it. He saw Greenley's brake light go on when he was 350 to 400 feet from him. Rutkowski reduced the truck's speed from 40 to 45 miles per hour to 38 to 40 miles. He saw Greenley turn into the center lane about 250 to 300 feet ahead of him. He did not recall seeing plaintiff at this time, although in his deposition he said he saw a man standing in the road at this time. When Greenley stopped in the center lane Rutkowski was about 60 to 65 feet behind him. He then saw Greenley start to back. Figuring he might run into Greenley Rutkowski turned off onto the shoulder at his right. He was then going 25 to 30 miles an hour. He drove partly on the shoulder and partly on the dirt. As he was passing Vargas' car at 5 to 10 miles per hour he saw plaintiff for the first time. Plaintiff was then behind the Plymouth in the southerly lane of the highway. About half the Greenley car was in the center lane. Rutkowski never saw the lights of the Alameda car, saw its motion or knew that it was on the road. The rear of his truck had passed about 5 feet beyond the Plymouth when he heard a loud crash. He did not see plaintiff under his truck and did not know whether or not he had been lying there. Rutkowski smelled liquor on Alameda's breath. The latter accused Rutkowski of driving the Greenley car. He saw plaintiff after he was carried into the restaurant. Plaintiff said he had been hit by either a "truck" or a "trunk." Rutkowski and an officer examined the truck but could find no marks on it. Shortly after the accident there was a hard rain.

Alameda testified that about 125 or 150 yards from Mariani's he saw red tail lights ahead of him. He was then going 30 to 35 miles an hour. About 90 to 110 yards away from them he moved into the middle lane to pass. There were no lights in that lane. He saw no one standing in the highway and never saw plaintiff. He saw two red lights in the southerly lane and some to the right thereof. He did not again look at the lights in the southerly lane. He could not say whether he reduced his speed. About 20, 30 or 40 yards or 30 to 40 feet away he saw a car diagonally in front of him, as if it had dropped from the sky. It seemed to take up the whole lane. He went for his brakes and a second later the collision occurred. He could not say how fast he was going but it must have been less than 35 miles an hour. He accused someone of driving out of Mariani's in front of him because he could not figure how otherwise the car could get in the position of the Greenley car. He had two glasses of wine with his dinner about 11 p. m. An officer testified Alameda told him he was right on the Greenley car before he saw anything. The officer did not consider that Alameda was under the influence of intoxicating liquor. The point of impact between the Alameda car and the Greenley car was located as being right on the line between the southerly and the center lanes. All the damage to Alameda's car was confined to his right front fender and grille. After the collision Alameda's car was 15 feet ahead of the point of impact.

Instructions.

[1] 1. The most serious question arises concerning the instruction giving section 582, Vehicle Code.[1] This instruction should

1. "Upon any highway in unincorporated areas no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the main travelled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway but in every event an unob-

not have been given. It could not apply to plaintiff who was not the person who left the Plymouth on the highway, even though he was assisting Vargas in pushing it there. It was not his car nor did he direct it, nor have the right to direct it. Vargas sitting at the wheel was the person who determined that it should be stopped on the highway rather than on the shoulder.

The situation was similar to that in Moore v. Franchetti, 22 Cal.App.2d 75, 70 P.2d 492. There the plaintiff was riding as a guest in an automobile that was struck from the rear by another automobile. The car in which the plaintiff was riding continued down the highway 30 or 40 feet and stopped on the highway. The plaintiff and the driver got out, examined the car. Then to determine the extent of the damage to it, the driver entered the car and attempted to start the motor. The plaintiff stood beside the car, half on and half off the highway. A third car came along, collided with the last mentioned car and struck the plaintiff. It was contended that the plaintiff was negligent in not removing the automobile in which she had been riding from the highway. The court held that as the car was under the management and control of the driver, "there was no reasonable ground to charge her with the duty of its removal * * *." 22 Cal.App.2d at page 78, 70 P.2d at page 494.

[2] The jury could have understood only that the above instruction applied to plaintiff. Vargas was not a party to the action. It told the jury in effect that plaintiff was guilty of negligence as a matter of law and that it was incumbent upon him to prove by a preponderance of the evidence that it was not practicable to drive off the main travelled portion of the highway. There was no reason why the car could not have been kept off the highway, but plaintiff could not be charged with failure to do so as he had no control of the car. Thus the instruction required an impossibility of him. Further, the instruction said that a violation of the section, (that is, this negligence of plaintiff as a matter of law) "may be the proximate cause" of the accident which followed. This would place the blame for the accident on plaintiff as a matter of law if the jury were to find that the stopping of the car was a proximate cause of all that followed including plaintiff's injury. Whether plaintiff's participation in moving the car onto the highway and leaving it

structed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway. This section shall not apply upon a highway where the roadway is bounded by adjacent curbs.

"This section shall not apply to the driver of any vehicle which is disabled in such a manner and to such an extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle on the main travelled portion of a highway. (Given at request of defendant)

"A violation of this section may be the proximate cause of an accident where the unlawfully parked vehicle is struck by another vehicle. (Given at request of defendant)

"Conduct which is in violation of any section of the California Vehicle Code just read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise. (Given at request of defendant)

"One who parks his automobile upon the travelled portion of a highway is prima facie a violator of the law, and a prima facie case of negligence is thereby established, whereby it becomes encumbent upon such person to prove by preponderance of evidence that it was not practicable to drive off the main travelled portion of the highway. (Given at request of defendant)"

there was negligence which proximately contributed to his injury was a question of fact for the jury and not one of law.

[3–6] This is a peculiar case. Undoubtedly plaintiff was injured by being struck by one of the vehicles involved in the accident. The jury could have found as a matter of fact that the truck driver under the circumstances here was negligent in driving his truck to the right of the paved portion of the highway, and that he should have seen plaintiff if plaintiff were standing where he claimed to have been when hit. Also, it could have found to the contrary. It could have found that Greenley was negligent under the circumstances in backing up his car and leaving it standing (or even moving forward) partially in the middle lane and that such negligence was a proximate cause of plaintiff's injury whether he was hit by the truck or by the Greenley car being pushed into him by the Alameda car. Here, too, the jury could have found to the contrary. It could have found that Alameda under the circumstances was negligent in hitting the Greenley car and that was either the sole cause or a cause of plaintiff's injury.[2] If the accident was produced by the concurrent effect of two or more separate wrongful acts, each would be a proximate cause of the injury, and neither would operate as an efficient intervening cause. Whether such was the situation here was a question of fact for the jury. Deshotel v. Atchison, T. & S. F. Ry. Co., 144 Cal. App.2d 224, 300 P.2d 910. Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 602, 110 P.2d 1044. It could have found that plaintiff was or was not contributorily negligent. Under the circumstances, giving the instruction seemingly telling the jury that because of the position of Vargas' car plaintiff was guilty of negligence as a matter of law was prejudicial error, even though the jury, had it been left to determine the question as one of fact, might have found plaintiff to be contributorily negligent.

[7–9] 2. Assumption of risk. This instruction should not have been given. "The defenses of assumption of risk and contributory negligence are based on different theories. Contributory negligence arises from a lack of due care. The defense of assumption of risk, on the other hand, will negative liability regardless of the fact that plaintiff may have acted with due care. (See Prosser on Torts [1941], p. 377.) It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk. (See Rest., Torts, § 893.) Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk, but where it merely appears that he should or could have discovered the danger by the exercise of ordinary care, the defense is contributory negligence and not assumption of risk. Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 385, 240 P.2d 580; see Prosser on Torts [1941], p. 386." Prescott v. Ralph's Grocery Co., 42 Cal.2d 158, 161–162, 265 P.2d 904.

[10] Defendants base their claim that the instruction was properly given upon the testimony of plaintiff to the effect that when he was pushing the car or standing on the pavement he then knew that a car might hit him. Had the instruction been prefaced by a requirement that the jury first find that plaintiff was on the pavement when hit the instruction would have been proper. But without that limitation it was improper because there was no evidence that plaintiff knew that in standing on the shoulder he likely would be hit. The jury could have found that by exercise of ordinary care he could have discovered the danger and that having failed to do so he was guilty of con-

2. Evidence that a moving vehicle has collided with another vehicle ahead of it is "at least some proof of negligence on the part of the driver of the colliding vehicle." Cartmill v. Arden Farms Co., 83 Cal.App.2d 787, 789, 189 P.2d 739, 740; Linde v. Emmick, 16 Cal.App.2d 676, 682, 61 P.2d 338. It is doubtful if Alameda's testimony cleared him of that negligence.

tributory negligence, but there is no evidence from which the jury could have found the necessary element of assumption of risk, namely, that he *must have known* of the hazard.

[11] 3. The instruction on concurrent causation (BAJI 4th ed. #104–C.2) has been criticized in Werkman v. Howard Zink Corp., 97 Cal.App.2d 418, 218 P.2d 43, on the ground that it states that the negligence of one person is not a proximate cause of an accident in which the negligence of another is involved unless the first person foresaw or by exercising ordinary care would have foreseen that the other person would conduct himself as he actually did. The true rule is: "The question to be decided by the jury was not whether she did foresee, or by the exercise of ordinary care would have foreseen, the identical consequence that happened, in order that her negligence be a proximate cause of the injury. The question was whether it was reasonably foreseeable that injury was likely to occur." Werkman case, supra, 97 Cal. App.2d at page 425, 218 P.2d at page 48. It woud be well not to give it again.

[12] 4. Favoring defendants. Whether plaintiff's burden was overemphasized in the instructions as was done in Taha v. Finegold, 81 Cal.App.2d 536, 184 P.2d 533, is a very close question in this case. Many instructions on defendants' theory of the case were given which were repetitive and recited the same rule in differing ways. While, as there were three defendants, each of whom was entitled to have its theory instructed upon, and hence of necessity more instructions were required than ordinarily, nevertheless many of the instructions could have been combined. There were many formula instructions given which could have been avoided. Some of these were favorable to plaintiff although most of them favored defendants. As we pointed out in Taha v. Finegold, supra, 81 Cal.App.2d at page 543, 184 P.2d at page 536, although the giving of formula instructions is not necessarily prejudicial error, they "should not be given." As this case will have to be retried we deem it unnecessary to determine whether there was prejudicial overemphasis in the instructions. Such a question may easily be avoided on the retrial.

5. The court instructed that contributory negligence has to appear by a preponderance of the evidence. If on the retrial plaintiff desires specific instructions on the subject he can offer them.

6. Unavoidable accident. This type of instruction has been held proper in Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823, as saying in effect that a jury might find the accident to be an unavoidable one, where a plaintiff has failed to prove that a defendant was negligent or that his negligence, if any, did not proximately cause the accident. Hyman v. Market Street Ry. Co., 41 Cal. App.2d 647, 107 P.2d 485, relied upon by plaintiff, has been overruled, or at least modified, by the Parker case. See Shiya v. Reviea, 122 Cal.App.2d 155, 264 P.2d 190.

[13, 14] 7. Plaintiff offered and the court refused an instruction on the presumption of due care. Plaintiff testified that from the time he saw the truck's headlights 15 to 20 feet away until he regained consciousness under the truck, he was unable to remember anything. Where a party to an action, by reason of loss of memory, is unable to testify respecting his conduct at and immediately before the accident and produces no witness who testifies to such facts, he is entitled to an instruction of due care. Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313; Simon v. City and County of San Francisco, 79 Cal.App.2d 590, 180 P.2d 393. The instruction should not be given where the plaintiff's evidence discloses acts and conduct immediately prior to the time in question. Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16. Here plaintiff and his witness Vargas testified to plaintiff's movements placing him in the position where he was hit. Whether he was contributorily negligent depends upon his actions up to that point. The brief space of time (not as much as two seconds) which then elapsed before he was hit had no bearing on the question,

and therefore plaintiff was not entitled to the presumption. The situation is similar to that in Mundy v. Marshall, 1937, 8 Cal. 2d 294, 65 P.2d 65, where the testimony placed the deceased crossing the street diagonally outside a crosswalk. He was last seen in the center of the street a brief moment before he was hit. It was held: "The manner in which the decedent was crossing the street having been covered by the plaintiff's own evidence, there is no room for the operation of the presumption that he was exercising due care * * *." 8 Cal.2d at page 296, 65 P.2d at page 66.

We find no error in the other instructions criticized by plaintiff nor in the refusal to give the instructions offered by plaintiff and not given.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



149 Cal.App.2d 714

John C. HILL, d/b/a Pacific Bronze Company, Plaintiff and Appellant,

v.

MATTHEWS PAINT COMPANY, a corporation, Defendant and Respondent.

Civ. 21810.

District Court of Appeal, Second District, Division 2, California.

April 3, 1957.

Action for damages for losses sustained as result of fire allegedly caused by the spontaneous combustion of spray material purchased from the defendant. Judgment for defendant in the Superior Court of Los Angeles County, Burnett Wolfson, J., and the plaintiff appealed. The District Court of Appeal, Fox, J., held that the evidence justified a denial of recovery either under the theory of breach of warranty or negligence, and that admission of certain evidence was not prejudicial.

Judgment affirmed.

1. Appeal and Error ⇐930(1)

Where jury found for defendant, on appellate review, the evidence must be stated in the aspect most favorable to the defendant.

2. Appeal and Error ⇐1012(1)

Arguments upon the weight of evidence are irrelevant before a reviewing court, once it is established that the judgment of the lower court rests upon substantial evidence.

3. Sales ⇐441(3)

In buyer's action for breach of warranty in sale of spray material which allegedly ignited and damaged plaintiff's property by fire, burden was on plaintiff to show by preponderance of evidence that defendant breached the warranties under which its spray material was sold and plaintiff failed to sustain such burden.

4. Appeal and Error ⇐1011(1)

An appellate court will not interfere with a judgment based on conflicting evidence.

5. Negligence ⇐121(5)

To be entitled to a judgment based on negligence, plaintiff must prove that defendant's act of wrongful omission is the proximate cause of the plaintiff's injury.

6. Negligence ⇐56(1.1)

Where negligence proved is not fastened to the particular injury for which recovery is sought, the case stands exactly as if no negligence had been proven.

7. Negligence ⇐136(25)

Question of whether plaintiff has sustained burden of establishing that defendant's negligence was the cause in fact from which his injury resulted is ordinarily for the trier of facts.

8. Negligence ⇐134(11)

When there is evidence that injury may reasonably be attributed to a cause for which no liability attaches to defendant, it

is proper to find against plaintiff on the issue of negligence.

9. Negligence ⇐134(11)

In action for damages based on negligence as result of fire allegedly caused by spontaneous combustion of spray material purchased from the defendant, evidence that the fire was caused by sparks and not by any defect in the defendant's product and other evidence sustained judgment for defendant for failure to show that any negligence of defendant was proximate cause of injury.

10. Negligence ⇐134(11)

That defendant's negligence could possibly have been cause of plaintiff's injury is not sufficient to support recovery but proof must be sufficient to raise a reasonable inference that negligence complained of was a proximate cause of the injury.

11. Appeal and Error ⇐1071(5)

Where views expressed by Appellate Court on issues of breach of warranty and negligence manifested that findings in favor of defendent were supported, the finding that plaintiff was contributorily negligent could be treated as mere surplusage.

12. Appeal and Error ⇐843(2)

If a judgment is amply supported by findings which are sustained by sufficient evidence, questions relative to other findings are immaterial and may be disregarded.

13. Appeal and Error ⇐1052(7)

In action for damages from fire, admission in evidence of regulations of National Board of Fire Underwriters and Safety orders which would be germane to the question of plaintiff's contributory negligence were not prejudicial, where in view of other findings, finding that plaintiff was contributorily negligent could be treated as mere surplusage.

Mitchell & Hibbert, Los Angeles, for appellant.

Moss, Lyon & Dunn, Sidney A. Moss, and Henry F. Walker, Los Angeles, for respondent.

FOX, Justice.

By the instant action, plaintiff sought damages for losses sustained as the result of a fire allegedly caused by the spontaneous combustion of a spray material purchased from defendant. Trial was to the court without a jury. The court found for defendant and entered judgment accordingly. Plaintiff appeals.

Plaintiff's complaint comprises three causes of action. Count I alleges, in substance, that defendant breached an express oral representation, promise and warranty to manufacture a spray finish material "which would be safe and in all respects fit and proper for plaintiff's use and capable of drying within twelve hours." Count II is predicated on defendant's breach of an implied warranty to furnish a spray material fit and proper for plaintiff's use. The third count charges defendant with negligence in manufacturing, selling and delivering to plaintiff a spray finish material that was both inherently dangerous and unfit for plaintiff's use. The answer, after admitting the sale of the spray, denied the above allegations and interposed the affirmative defense of plaintiff's negligence in application of the spray as proximately contributing to the injury.

[1] The underlying issue presented is whether the evidence sustains the findings on which the judgment rests. In examining this question we are required, under conventional rules of appellate review, to state the evidence in the aspect most favorable to the prevailing party.

Since 1948 plaintiff had been engaged in the business of large-scale manufacture of novelty items of an ornamental nature.[1] His operations in 1950 were conducted in a plant in the city of Gardena. The items manufactured by plaintiff were subjected to a finishing process in which they were spray-painted. This was accomplished in four sheet-metal spray booths located in plaintiff's plant. Each spray booth contained a rotating wheel or turntable with 20 pedestals, on which the raw castings were

1. He has pursued this occupation, either as a hobby or as a small business, since 1937.

placed for successive spraying with three different coating materials.

The spraying cycle in plaintiff's operations followed a set pattern. First, as the wheel or table rotated, each casting was sprayed with a coating of burnt umber lacquer, which was a "nitrate cellulose dope" used primarily as a sealer. Second, a coating of non-jell lacquer, with finely-ground copper powder added to give a bronze color, was applied on top of the base coat. Third, a final coating was applied to produce a glossy finish. Each coating was applied with the use of a spray gun fed by a hose connected to a gallon container attached to the wall outside the spray booth. Each coat was applied alternately, but in the same order, as the castings were rotated on the turntable. One entire spraying cycle took about 25 minutes.

The spraying booths were constructed and installed for plaintiff by a company specializing in such equipment. Each booth was equipped with an exhaust vent or duct used to draw fumes or overspray into the air outside the building. This apparatus consisted of a stack (duct) and fan placed in the top center part of the spray booth enclosure. The stack extended upwards running through and above the roof of the plant, thus enabling the overspray to be expelled outdoors. The fan was situated inside the stack, approximately three or four inches above the point where the stack joined the top of the booth. The fan was operated by a motor attached to the outside of the blower section of the stack. The fan was mounted in a housing, and a belt running through the side of the housing in an enclosed casing connected the fan to the motor.

Plaintiff testified that in 1948, he purchased all the spraying materials he used from the Andrew Brown Company. In 1950 or 1951, he began purchasing the first or base coating from the India Paint Company. Later, the India Paint Company also supplied him with the non-jell lacquer used for the second coating. The glossy finish material used in the third coat continued to be furnished by the Andrew Brown Company. Plaintiff testified he had never experienced any difficulty in the use of these products.

In August, 1953, one Chester Pollet was in the employ of defendant as a salesman whose duties were to visit prospective customers to solicit orders for defendant's finishing materials. Pollet was a layman not versed in the chemistry of paints and varnishes. He called on plaintiff for the first time on August 25, 1953, in the hope of obtaining business. Plaintiff informed Pollet that he was interested in obtaining a third coating material that would dry faster and harder than the substance he obtained from Andrew Brown, something that would "dry overnight so it could be wrapped with paper, not stick." Pollet informed plaintiff that "we would see if we could do that for him." Pollet testified he spent twenty minutes at plaintiff's place of business and was shown the spray booths and how the material was applied. He recollected only that plaintiff gave him a sample of the burnt umber material he was using and that he informed him that the materials he was using were lacquers and synthetics.

On August 28, 1953, Pollet delivered to plaintiff a one-gallon sample of defendant's finishing material known as QD Synthetic No. 53–821. Pollet had previously sold this same compound to other customers. He told plaintiff he thought it would dry fast enough and hard enough to satisfy his requirements. When Pollet called on plaintiff three days later, he was told that the gallon sample had proved satisfactory. Plaintiff next ordered a five-gallon sample "to test the material further." On September 9, 1953, Pollet spoke to plaintiff again at the latter's place of business. Plaintiff expressed satisfaction with the five-gallon sample and gave Pollet an order for a 55 gallon drum of defendant's QD spraying compound.

On September 19, 1953, a fire broke out in plaintiff's place of business which caused the loss for which recovery is sought. The fire originated in the southwest spray booth then being manned by an employee of plain-

tiff known as Lito Ruiz Mendez (herein called Ruiz). While engaged in applying the first coating of spray (the burnt umber —not defendant's product) to the castings Ruiz observed a flame drop down from the fan onto the pedestal table. The table started to burn and the fire spread rapidly. Ruiz dashed from the booth to report the incident to Joe Guzman, who was at work in another booth. Ten seconds later, the fire had become very intense and smoke and flame enveloped the booth. The fire department was notified and fire-fighting equipment was dispatched to the scene.

Captain Craycroft, of the fire department, arrived with the fire engines and launched an investigation when the fire was extinguished. The southwest spray (Ruiz) booth had collapsed in ruins. In the debris Captain Craycroft found an electric fan and motor and identified it as being the same one introduced as Exhibit "G." He testified it was not an explosion-proof type of motor. After examining it, he dropped it a few feet from where he found it. Det. Lt. Morrison, assigned to the Arson Detail of the sheriff's office, picked up this motor from the ashes. He also testified that the motor was not of an explosion-proof type. Such a motor, he stated, may create either static electricity or give off a spark which could produce an ignition. All other motors observed by Lt. Morrison in the ruins were not of an explosion-proof type. Lt. Morrison testified he talked to one of plaintiff's employees (obviously Guzman) who stated he "saw fire and sparks coming out of the (southwest) spray booth from the stack or duct at the top of the spray booth." Based on his investigation, Lt. Morrison concluded there were two possible causes of the fire: (1) an accumulation of overspray in the duct system spontaneously igniting; or (2) a mechanical failure in the fan system in the duct.

Captain Craycroft testified that Guzman, when questioned about the origin of the fire, "told me that sparks from an electric motor ignited fumes from the lacquer." Captain Craycroft stated he made an investigation to determine the cause of the fire and concluded it was caused by sparks from an electric motor. He testified the motor found in the debris of the southwest booth had no spark shield.

Plaintiff testified that Exhibit "G" was not, nor could it be, the type of motor or fan which was in operation in the spray booth. He estimated the inside diameter of the stack did not exceed 16 inches, whereas the outer diameter of the fan in Exhibit "G" is 17.7 inches. He stated Exhibit "G" was one of 13 fans and motors installed in the walls of the building to act as a hot-air exhaust. He testified that the motor operating the fan in the stack was explosion proof. Plaintiff's son gave testimony to the same effect.

Plaintiff testified he recommenced business operations at a new location on October 8, 1953, and continued to use defendant's QD product. About a week later, two fires, on successive days, occurred in a trash pile where overspray dust from defendant's product and other cleanouts from the spray booths had been thrown. On October 17, 1953, the overspray dust in one of the spray booths started to smoke. Plaintiff testified he discontinued operations for two days in an effort to learn the cause of these fires. On October 19 he resumed operations, this time reverting to the Andrew Brown product in place of defendant's QD material. He testified that no fires occurred after he ceased using defendant's QD spray.

Thereafter, using the expert services of chemists, engineers and technicians conversant with the properties of paint and sprays, plaintiff conducted a series of tests under conditions which assertedly reproduced the operation in which he was engaged at the time of the fire on September 19, 1953. The overspray dust and residuals emanating from defendant's QD materials were studied. The effect of the testimony, oral and documentary, adduced by these experts, who were witnesses for plaintiff, was to indicate that defendant's product had a dangerous tendency toward spontaneous ignition and would be hazardous to use in the spray cycle process employed by plaintiff. As epitomized by Ralph Huff, one of

plaintiff's experts, the use of defendant's spray engendered a quantity of spray dust which oxidized rapidly, heated up, and burst into flame when accumulated "to any degree," whereas such a reaction did not occur with the use of the Andrew Brown material.

Defendant's expert, Dr. Jeffreys, testified that after conducting various tests during the course of a month, he found that defendant's QD material was not a hazardous spraying material when properly used. He attacked the validity of the tests performed by plaintiff's expert witnesses and ascribed the results obtained by them to the fact that they were made under conditions which did not parallel the situation during plaintiff's actual operations in the spray booth. He stated that he had conducted experiments under conditions simulating plaintiff's spraying cycle and found that there was no overheating produced by the use of defendant's product. He found no significant difference with respect to the effect of defendant's material on the overspray as compared to the Andrew Brown product. Dr. Jeffreys pointed out that all the materials used in the three coatings of plaintiff's spraying cycle were inflammable, that there is an ever present danger that the fan belt or motor might produce static electricity or friction heat that, in turn, could cause a spark that might ignite dust or overspray. The fan itself, he suggested, could strike a portion of the housing while momentarily unbalanced during its rotation and set off a spark that could ignite. In response to a hypothetical question postulating the employment of defendant's material in plaintiff's spraying cycle in conjunction with an explosion-proof motor, Dr. Jeffreys gave his opinion there would be no spontaneous ignition caused by the accumulation of overspray.

Plaintiff testified he knew that all the materials he used in his spray cycle were inflammable and that precautions were required when spraying at the time any of these coatings were used in the spraying process. Defendant's employees testified that the product here involved had been sold before and after plaintiff's fire to other customers without adverse results.

The court found against plaintiff on the issues of breach of express and implied warranties and negligence. It also found in defendant's favor on the question of contributory negligence.

Plaintiff's fundamental contention is that the fire was caused by a latent defect in defendant's spray material because it was negligently manufactured, and such defect consisted of its tendency to spontaneously ignite when used in plaintiff's spray cycle. As a result, plaintiff asserts defendant breached its duty of care as a supplier of a dangerous product and also breached the express and implied warranties that the product was reasonably fit for plaintiff's purposes.

[2] Turning first to the question of breach of warranty, both express and implied, plaintiff's brief contains a compendium of particulars, fortified by profuse citation to oral evidence and documentary proofs, which support his position with respect to these issues. Such labor is patently a duplication of the unsuccessful effort he made to persuade the trial court, and is conspicuous by its complete omission of rebuttal evidence of probative value adduced in defendant's behalf which was adopted by the trial court. Arguments upon the weight of the evidence are irrelevant before a reviewing court once it is established that the judgment of the lower court rests upon substantial evidence. This is the situation which confronts us here.

[3, 4] The entire question here involved —whether defendant breached an express or an implied warranty—depends primarily on the facts. According to the findings of the trial court, those facts are all against plaintiff's contentions. These findings are supported by the evidence. If in fact there were any warranties, the burden was on the plaintiff to show by a preponderance of the evidence that defendant had breached the warranties under which its spray material was sold. Dougherty v. Lee, 74 Cal.App. 2d 132, 135, 168 P.2d 54. However, de-

fendant established by the testimony of its witnesses that its product was not hazardous when properly handled and was reasonably safe and fit for use as contemplated by plaintiff. There was evidence that plaintiff had used the spray material successfully for several weeks and that the product was one which defendant sold to other customers, both before and after the sales to plaintiff, without adverse incident. While plaintiff produced contrary evidence that could have supported a verdict in his favor, the point urged is controlled entirely by the conflict of evidence rule, in the face of which an appellate court will not interfere with the judgment. Baker v. Smith-Booth-Usher Co., 180 Cal. 309, 181 P. 56; National Elec. Welding Machines Co. v. Glick, 83 Cal.App.2d 32, 187 P.2d 465.

[5–8] Passing now to the cause of action based on negligence, it is plaintiff's contention that defendant was negligent in failing to subject the spray material to proper and customary tests before delivering it to him. In this connection, plaintiff asserts that defendant made no tests to determine the spontaneous ignition qualities of its spraying compound and the result of this omission was the sale to him of a product containing a latent defect which was hazardous when used in his spraying cycle. Conceding, *arguendo,* that defendant was negligent in not testing its product, nevertheless, in considering plaintiff's argument, we must be mindful of the following controlling rules of law: (1) To be entitled to a judgment based on negligence, plaintiff must prove that defendant's act of wrongful omission is the proximate cause of plaintiff's injury. Valdez v. Taylor Automobile Co., 129 Cal.App.2d 810, 821, 278 P.2d 91; Holmes v. Moesser, 120 Cal.App.2d 612, 614, 262 P.2d 27. (2) The burden of proof devolves on plaintiff to show the causal connection between the alleged negligence and the resulting injury. Petersen v. Lewis, 2 Cal.2d 569, 572, 42 P.2d 311; McKellar v. Pendergast, 68 Cal. App.2d 485, 489, 156 P.2d 950. (3) Where the negligence proved is not fastened to the particular injury for which recovery is sought, "the case stands exactly as if no negligence had been proven." Puckhaber v. Southern Pacific Co., 132 Cal. 363, 364, 164 P. 480; Spencer v. Beatty Safway Scaffold Co., 141 Cal.App.2d 875, 880, 297 P.2d 746; Davis v. Lane, 24 Cal.App.2d 400, 405, 75 P.2d 565. (4) The question of whether plaintiff has sustained the burden of establishing that defendant's negligence was the cause in fact from which his injury resulted is ordinarily for the trier of the facts. Basin Oil Co. of California v. Baash-Ross Tool Co., 125 Cal.App.2d 578, 603, 271 P.2d 122; Been v. Lummus Co., 76 Cal.App.2d 288, 294, 173 P.2d 34. (5) When there is evidence that the injury may be reasonably attributed to a cause for which no liability attaches to defendant, it is proper to find against plaintiff on the issue of negligence. Holmes v. Moesser, supra.

[9, 10] Applying the foregoing rules to the present case, the testimony of Dr. Jeffreys, who made extensive tests of defendant's spray material, rebuts the contention that an accumulation of overspray from defendant's product under the conditions prevailing in plaintiff's spraying cycle would cause a spontaneous ignition and affirmatively establishes that it was non-hazardous and safe to use as a spray. Furthermore, from a consideration of the testimony of Fire Captain Craycroft and Detective Lt. Morrison, from the statements made by plaintiff's employees, from the fact that the accident occurred early in the morning at a time when the first coating rather than defendant's product was being applied, and from the fact that a non-explosion proof motor and fan apparatus was found in the debris of Ruiz's spray booth, the trial court could reasonably infer that the fire was caused by sparks and not by any defect in defendant's product. Since the evidence indicated that all the materials used in plaintiff's spraying process were highly inflammable and it was sufficiently shown that sparks from the fan-motor assembly could have ignited the vapors, fumes or overspray produced in the course of spraying, the finding that there was no ac-

tionable negligence on defendant's part is in accordance with the reasonable probabilities established by the evidence. "Before respondent could be held to answer in damages for the injuries suffered by appellant, it was incumbent upon the latter to assume the burden of proof and show by a preponderance of the evidence that the negligence of respondents was the proximate cause of the fire." Bartholomai v. Owl Drug Co., 42 Cal.App.2d 38, 42, 108 P.2d 36, 39. It is clear that, in the mind of the court, plaintiff failed to sustain the burden of proof incumbent upon him to show that any negligence of defendant was the proximate cause of the injury. As has recently been stated by this court in Spencer v. Beatty Safway Scaffold Co., supra, 141 Cal.App.2d at page 882, 297 P. 2d at page 751: "That defendant's negligence could *possibly* have been the cause, is not sufficient. The proof must be sufficient to raise a reasonable inference that the negligence complained of was the proximate cause of the injury. If that is not the result of the evidence, if the fact finder is left in doubt and uncertainty, he cannot base a verdict or finding on guess or conjecture [citations]."

Plaintiff relies heavily upon India Paint & Lacquer Co. v. United Steel Products Corp., 123 Cal.App.2d 597, 267 P.2d 408, a decision of this court affirming a judgment based upon the trial court's findings of breach of warranties. Such reliance is misconceived. Our function, in that case, as it is in the matter *sub judice,* was to determine whether there was substantial evidence to support the findings of the lower court. Our scrutiny of the record developed a solid evidentiary basis for the judgment. The underlying fallacy of plaintiff's reliance on an authority such as the India case, where a judgment for plaintiff was affirmed on conflicting evidence, is his failure to recognize that a reviewing court cannot usurp the fact-finding function of the lower court and that the scope of our review extends only to a determination whether, in the case presented, the judgment rendered is supported by sufficient evidence. Thus, in the India case, we view the evidence from a perspective most strongly in favor of plaintiff, who there prevailed. Similarly, since defendant was successful below in the instant action, our orientation towards the evidence has proceeded upon the postulate that questions of credibility of witnesses and conflicts in the testimony were weighed by the trial court and resolved in defendant's favor. We are not at liberty to reevaluate the evidence. When seen in this aspect, there is complete harmony between the India case and the instant matter, and what is equally important, adherence to the fundamental principles of appellate review.

[11–13] Plaintiff's final contention relates to the admission in evidence of certain standards and regulations of the National Board of Fire Underwriters and General Safety orders of the Department of Industrial Relations of the State of California, which were received as Exhibits "K", "L", "M" and "N". If otherwise admissible, this evidence would be germane to the question of plaintiff's contributory negligence. However, since the views we have expressed on the issues of breach of warranty and negligence manifest that the findings thereon in defendant's favor find abundant support in the evidence and fully sustain the judgment rendered, the further finding that plaintiff was contributively negligent may be treated as mere surplusage. Thus, evidence erroneously received, assuming such was the case, directed to that issue becomes immaterial in terms of its effect upon the outcome of the case. "It is elementary law that if a judgment is amply supported by findings which are sustained by sufficient evidence, questions relative to other findings become immaterial upon appeal and may be disregarded. [Citations.]" Bohn v. Watson, 130 Cal.App.2d 24, 41, 278 P.2d 454, 465.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

149 Cal.App.2d 768

H. S. WATSON, Plaintiff and Appellant,

v.

LOS ALTOS SCHOOL DISTRICT, SANTA CLARA COUNTY, State of California, a political subdivision of the State of California, et al., Defendants and Respondents.

Civ. 17156.

District Court of Appeal, First District, Division 1, California.

April 4, 1957.

Action by plaintiff and other taxpayers against a school district to enjoin it from acquiring the plaintiff's property which had already been condemned and from disbursing any school district funds for that purpose. Demurrer of the school district was sustained without leave to amend in the Superior Court, County of Santa Clara, Leonard R. Avilla, J., and the plaintiff appeals. The District Court of Appeal, Peters, P. J., held that the petition was demurrable, where both trial and appellate courts knew as a fact that the records of the prior appeal were unchallenged documents conclusively demonstrating that the allegations of the petition were untrue.

Judgment affirmed.

1. Judgment ⇐670

In taxpayer's action to enjoin school district from acquiring property already condemned and from disbursing school district funds for that purpose, judgment in prior condemnation proceedings was not res judicata where parties were not same, in that plaintiff appeared in different capacities in the two actions, and issues involved were not identical. West's Ann. Education Code, §§ 18403, 18404.

2. Pleading ⇐214(1)

Generally, allegations of complaint as against demurrer must be taken at face value and assumed to be true.

3. Pleading ⇐216(1)

A complaint otherwise good on its face is nevertheless subject to demurrer when facts judicially noticed render it defective.

4. Pleading ⇐216(1)

In taxpayer's action to enjoin school district from acquiring his property already condemned, complaint based on theory of noncompliance with Education Code sections by the district in condemning the property was demurrable where both trial and appellate courts knew as a fact, that in the records of the prior appeal were unchallenged documents conclusively demonstrating that the allegations were untrue. West's Ann.Education Code, §§ 18403, 18404; West's Ann.Code Civ.Proc., § 1241, subd. 2.

5. Evidence ⇐43(2)

The rule that courts may not take judicial notice of related prior proceedings in the same case has exceptions.

6. Evidence ⇐48, 49

Under the statute, the courts may take judicial notice of who fills the various county offices within the court's jurisdiction and the genuineness of their signatures. West's Ann.Code Civ.Proc., § 1875, subd. 3.

7. Evidence ⇐43(2)

Trial and appellate courts could take judicial notice of records in a prior appeal conclusively establishing that the school district obtained within time specified, required reports from both the County Planning Commission and the State Department of Education as basis of condemnation proceeding. West's Ann.Code Civ.Proc., § 1875, subd. 3.

Atkinson, Farasyn & London, Mountain View, for appellant.

Spencer M. Williams, County Counsel, Joan A. Symon, Deputy County Counsel, County of Santa Clara, San Jose, for respondents.

PETERS, Presiding Justice.

Watson, on behalf of himself and the other taxpayers in the school district, brought this action against the district to enjoin it from acquiring his property, which had already been condemned, and from disbursing any school district funds for that

purpose. If the funds have already been disbursed and the property already acquired he seeks a rescission of the transaction. The school district's demurrer was sustained without leave to amend, and judgment was entered accordingly. Watson appeals.

Watson individually, the school district and the general subject matter of the litigation have previously been before this court. In Los Altos School Dist. of Santa Clara County v. Watson, 133 Cal.App.2d 447, 284 P.2d 513, it was held that Watson had no legal grounds to complain of a judgment determining that the school district had the right to condemn his property, and this court affirmed the final order of condemnation entered pursuant to that judgment. Watson then brought the present action.

The complaint in the present action alleges that the governing board of the district adopted a resolution on March 23, 1953, finding that the public interest and necessity required the acquisition of the property involved, and directing the County Counsel to prosecute an action in eminent domain to acquire it; that pursuant thereto the condemnation action was commenced, a verdict rendered, and a final judgment entered in favor of the school district providing that Watson be paid $36,226 for his property; that in acquiring the property the school district did not comply with sections 18403 and 18404 of the Education Code; that this failure makes the acquisition unlawful and contrary to public policy; that unless the district is enjoined the taxpayers "will suffer public embarrassment in that the disbursement of said funds by said defendants is unlawful and unauthorized"; that the intended expenditure will cause funds to be lost to the district and not recoverable; that because of the unlawful award the taxpayers of the district will be subjected to a greater burden of taxation; and that Watson has no plain, speedy and adequate remedy at law.

On the previous appeal Watson, individually, attacked the judgment upon which the final order of condemnation was predicated as being unsupported by some claimed essential findings of fact. Specifically, he complained of the same alleged defect in the condemnation procedure here alleged, namely, the claimed failure of the school district to comply with the provisions of sections 18403 and 18404 of the Education Code.[1] It was his claim on the previous appeal that the failure of the trial court to find expressly on this issue was reversible error. This court gave several alternative grounds for holding that the omission was not fatal. One such ground was that the recital in the final order of condemnation that "all acts required of plaintiff have been duly done and performed" satisfied the requirement, if one existed, of a finding on this issue. In addition, as an independent alternative ground of its opinion, the court pointed out that the record as augmented demonstrated that the reports in question were sought and secured by the board within the time limits specified in the sections, and that both reports were favorable. In this connection this court stated on the prior appeal, 133 Cal.App.2d 447, at page 450,

1. Section 18403, at the time here involved, provided: "To promote safety to pupils and comprehensive community planning the governing board of each school district before acquiring title to property for a new school site shall advise in writing the planning commission * * * [which] shall investigate the proposed site and within 30 days shall submit to the governing board a written report of the investigation together with recommendations concerning the site.

"The governing board shall not acquire title to the property until the report of the planning commission has been received. If the report does not favor the acquisition of the property for a school site, the governing board of the school district shall not acquire title to the property until 30 days after the commission's report is received."

Section 18404, in substantially similar language, requires the governing board to secure a similar report from the State Board of Education. (The sections were both amended, in particulars not here relevant, in 1955.) Stats. of 1955, p. 1500, Chap. 877, § 26; p. 1501, Chap. 877, § 27; p. 2638, Chap. 1451, § 1.

284 P.2d 513, at page 516: "Also, it happens that the record before us has been augmented (upon the motion of the respondent) to include certain evidence introduced at the trial which demonstrates that the state department of education reported on June 9, 1953, and the county planning commission on June 19, 1953, each favorably to the acquisition. The trial started June 15th; verdict was rendered June 26th; findings were filed July 17th; judgment was entered July 20th; and the final order of condemnation was filed August 13, 1953."

[1] On the present appeal the parties argue several issues. They first argue over whether the prior determination is *res judicata* in the present proceeding. We may assume that it is not, either because such defense in this case cannot be raised by demurrer, or that the parties are not the same, that is, because Watson appears in different capacities in the two actions, or for other reasons. The parties also argue over whether sections 18403 and 18404 of the Education Code are mandatory or merely directory.[2] These are both interesting questions, but they need not be discussed on the present appeal. This is so because we are of the opinion that the trial court was entitled to take judicial notice of certain facts that demonstrate that the complaint on file is a sham and contains false allegations.

The situation presented is simply this: The complaint is based on the theory of non-compliance with the Education Code sections. It alleges such non-compliance as follows:

[2-4] "That plaintiff is informed and believes and upon such information and belief alleges that at no time did defendants or each of them adhere to or abide by the provisions of Sections 18403 and 18404 of the Education Code of the State of California." Of course, normally the allegations of the complaint must be taken at face value and must be assumed to be true. Tyree v. Epstein, 99 Cal.App.2d 361, 221 P.2d 1002. But here the trial court knew and this court knows as a fact that in the records of the prior appeal are unchallenged documents which conclusively demonstrate that the allegation above quoted is untrue. These documents conclusively establish that the school district did obtain within the times specified the required reports from both the county planning commission and the state department of education. It would be a travesty on justice were we required in this proceeding to ignore these exhibits, and were we required to send the case back for a trial that we know would end in but one way—a holding that such compliance had been had. No such ridiculous result is necessary. The rule is well settled that a complaint otherwise good on its face is nevertheless subject to demurrer when facts judicially noticed render it defective. As pointed out in 2 Witkin, California Procedure, page 1185: "The theory is that the pleader should not be allowed to by-pass a demurrer by suppressing facts which the court will judicially notice. The principle is that of *truthful pleading*, and is applied for the same reason as in the similar situation of pleaded exhibits which contradict allegations." There are many examples where facts judicially noticed have been used to support a demurrer. Chavez v. Times-Mirror Co., 185 Cal. 20, 195 P. 666; People v. Oakland Water Front Co., 118 Cal. 234, 50 P. 305; Wilson v. Loew's, Inc., 142 Cal.App.2d 183, 298 P.2d 152; Pike v. Archibald, 118 Cal.App.2d 114, 257 P.2d 480;

2. The school district argues that the sections are not mandatory because section 1241(2) of the Code of Civil Procedure makes the resolution of the governing board of a school district that recites that public interest and necessity require the acquisition of the property "conclusive evidence" that the proposed improvement "is planned or located in the manner which will be most compatible with the greatest public good." This section was made applicable to school districts in 1949, Stats. of 1949, p. 1539, Chap. 802, and is later in time to the two Education Code sections which were first adopted in 1939. Stats. of 1939, p. 1825, Chap. 476.

Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987; see also 40 Cal.L.Rev. 192; 10 So.Cal.L.Rev. 513.

[5] Although it has been held that the courts may not take judicial notice of related prior proceedings in the same case, that rule is not without exceptions. As was said in City of Los Angeles v. Abbott, 217 Cal. 184, 192, 17 P.2d 993, 995, to refuse to take judicial notice of prior related proceedings when justice requires it "would be to blink the perceptive sense of courts to a degree not consistent with the increasing need for a more practical and efficient method in the administration of the law. * * * The rule precluding the court from taking judicial notice of its judgment in another case is not an inflexible one, and has several exceptions. * * * the rule is not based on lack of power but is a rule of expediency, to be applied or refused application as the equities and justice of the cases require." (See generally Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333; Muller v. Reagh, 148 Cal.App.2d 157, 306 P.2d 593.

[6, 7] It should also be noted that the state board of education is, of course, a state agency. The planning commission is a county agency, and the county, of course, is a legal department of the state. (See generally, 13 Cal.Jur.2d 347, § 2.) Section 1875(3) of the Code of Civil Procedure provides that courts may take judicial notice of "Public and private official acts of the legislative, executive and judicial departments of this state and of the United States." Under this section, or prior to it, it has been held that the courts may notice who fills the various county offices within the court's jurisdiction and the genuineness of their signatures, Wetherbee v. Dunn, 32 Cal. 106; of the reports of the Debris Commission and of state engineers, Gray v. Reclamation District, No. 1500, 174 Cal. 622, 163 P. 1024; letters from the U. S. Secretary of State to the U. S. Attorney General, Brownell v. City & County of S. F., 126 Cal.2d 102, 271 P.2d 974; records of the State Department of Social Welfare, Adoption of McDonnell, 77 Cal.App.2d 805, 176 P.2d 778; records of the State Medical Examiners, McPheeters v. Board of Medical Examiners, 74 Cal.App.2d 46, 168 P.2d 65; and the public records of a municipality relating to the election of a municipal judge. Chambers v. Ashley, 33 Cal.App.2d 390, 91 P.2d 932. These cases are authority, if such were needed, that the trial court and this court have the power to take judicial notice of the records in question.

Exercising the power thus involved, it is apparent that the complaint does not state a cause of action. The records alleged, on information and belief, not to have been filed have in fact been filed. This is the sole basis of the complaint. Without the allegation of non-compliance the complaint would be obviously vulnerable. The trial court was entitled to judicially notice that compliance in fact had been had. The complaint was therefore demurrable.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



149 Cal.App.2d 530

Henry C. NORMAN, Plaintiff and Respondent,

v.

Don E. TULLY and Fredrick T. Clawson et al., Defendants and Appellants.

Civ. 5367.

District Court of Appeal, Fourth District, California.

March 28, 1957.

Hearing Denied May 22, 1957.

Trucker's action for personal injuries in accident which occurred when truck he was driving downgrade was struck from rear by defendant's that was out of control. The Superior Court of Fresno County, Arthur C. Shepard, J., entered judgment for trucker and defendant truck owner and

driver appealed. The District Court of Appeal, Mussell, J., held that evidence presented jury question as to negligence of defendant truck driver in failing to use a proper gear in descending grade and in failing to keep truck under control and there was no error in instructing jury as to doctrine of res ipsa loquitur.

Affirmed.

See also, Bogert v. Clawson, 308 P.2d 880.

1. Appeal and Error ⇐1050(1)

In action by trucker for personal injuries received in accident which occurred when truck he was driving downgrade was struck from rear by defendant's truck which was out of control, there was no prejudicial error arising from admission of testimony of highway officer who had been familiar for over three years with grade, as to what was the safe maximum speed to be used in descending grade.

2. Automobiles ⇐245(15, 43)

In trucker's action for personal injuries in accident which occurred when truck he was driving downgrade was struck from rear by defendant's truck which was out of control, evidence presented jury issues as to negligence of defendant truck driver in failing to use a proper gear in descending grade involved and in failing to keep truck under control. West's Ann. Vehicle Code, § 670.

3. Appeal and Error ⇐216(1)

Where refusal to give instruction is urged for a ground of reversal, it is incumbent upon party urging such ground to request and offer a proper instruction.

4. Automobiles ⇐246(60)

In trucker's action for personal injuries in accident which occurred when truck he was driving downgrade was struck from rear by truck that was out of control, where jury impliedly found that trucker's conduct was not a contributing cause of accident, under circumstances, giving instructions on doctrine of res ipsa loquitur as to issue of cause of defendant's truck going out of control was not error. West's Ann.Vehicle Code, § 670.

5. Appeal and Error ⇐1052(1)

In trucker's action for personal injuries received in truck collision where it was not claimed that damages awarded were excessive, there was no reversible error in admission of testimony by doctor for plaintiff who stated that testimony he gave as to plaintiff's present condition was based on his lawyer's advice as to such condition.

Baker, Palmer, Wall & Raymond, Robert L. Raymond, Bakersfield, for appellants.

Lerrigo, Thuesen, Thompson & Thompson, Eckhart A. Thompson, Fresno, for respondent.

MUSSELL, Justice.

This is an action for damages for personal injuries sustained by plaintiff in an accident which occurred on June 11, 1954, at about 10:30 p. m., at a point approximately one-half mile north of Grapevine Station on United States Highway 99, and involved three northbound truck and trailer combinations. United States Highway 99, at the point of collision, is a four lane asphaltic concrete highway and is divided by a concrete and steel barrier. This part of the highway is known as the "Grapevine Grade", which is six miles long and has a six per cent downgrade for northbound traffic.

Plaintiff Henry C. Norman was driving a truck and trailer north, towards Bakersfield. He was traveling approximately 18 miles per hour and overtook a truck and trailer which was being driven northward at a speed of about 12 miles per hour. Norman decided to turn into the inner traffic lane to pass this truck and trailer. He looked in his mirror to see if anything was behind him and to see if it was clear. There were no vehicles visible to his rear and he then put out his arm signal and pulled out to pass the other truck. When he was pulling around it, and the two cabs were about even, his equipment was struck

from the rear by a tractor truck and trailer owned by defendant Tully, then being driven by defendant Clawson. The Tully tractor and trailer, at the time of the accident, was traveling between 50 and 60 miles per hour. It was loaded with canteloupes and oranges and the equipment, in all, weighed about 72,000 pounds.

Clawson told an investigating highway patrol officer that he was driving north at about 30 miles per hour on the Grapevine when his brakes became hot and "faded out on him" and he told plaintiff at the scene of the accident he "didn't know the hill or guessed he came off too fast." Both defendants testified that the brakes on their equipment had faded out and would no longer stop the truck and trailer some time before they passed the Grapevine Station, and that they traveled from three and one-half to four miles after the brakes failed, before the accident.

Officer Donald Barr, of the California Highway Patrol, testified that he had been stationed at Lebec on the Grapevine grade for three years and patroled the grade daily; that he had observed many trucks going down the grade and had investigated numerous accidents where trucks went out of control; that from time to time he had followed trucks going down the grade and out of control; that the grade is one of the most dangerous in California; that there are two signs posted along the highway where the Grapevine starts that state "that it is a six per cent downgrade and trucks use low gears"; that these signs are approximately 4 feet high and 8 feet wide and the lettering thereon is reflectorized so they will be picked up very clearly by lights at night; that the barrier dividing the north and southbound traffic lanes is constructed of steel and concrete; that it is rounded so that a truck or car can rub the barrier without going over it into the other lane and it is engineered so that it will throw them back into the traffic lane; that it will stop a truck or car at certain speeds and that he had seen trucks stop by deliberately using this barrier, and in one instance had observed a truck, traveling 30 miles per hour, which stopped by using the barrier; that the barrier has many black marks caused by trucks using it to stop; that he had discussed with truckers, and had made a study, as to what speeds were safe on that particular grade; that he had investigated many accidents on it and stated that in his opinion "20 miles per hour, on a loaded truck, is as fast as the hill should be negotiated."

The jury returned a verdict in favor of plaintiff in the sum of $8,000 and defendants appeal from the judgment. The first contention of appellants is that the only evidence upon which the jury could predicate its implied finding of negligence was the improperly admitted opinion evidence of the witness Barr. He testified in this connection that in his opinion "20 miles per hour on a loaded truck is as fast as the hill should be negotiated", and it is argued that it was prejudicial error to admit this evidence for the reason that the witness was not qualified as an expert. We are not in accord with these contentions.

[1, 2] There is substantial evidence in the record, in addition to the testimony of officer Barr, from which the jury could reasonably infer that defendants were negligent in failing to keep their truck and trailer under control, in failing to maintain adequate brakes, in failing to keep the truck in a low gear so that its operation could be controlled, and in failing to use the barrier as a means of stopping or reducing the speed of their equipment. " 'It is the duty of the driver of a motor vehicle operating the same on a public street to be vigilant at all times keeping a reasonable lookout to possible danger to himself and others and to keep the vehicle under such control that to avoid a collision, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent person in like position.' " Reich v. Long, 97 Cal.App.2d 657, 660, 218 P.2d 589, 591. In the instant case the highway was posted with signs warning truck drivers to use low gears and defendants were required to have adequate braking

equipment. Veh.Code, Sec. 670. It was within the province of the jury to determine whether defendants were negligent in failing to use a proper gear in descending the grade involved and in failing to keep their equipment under proper control. No prejudicial error appears in the admission of the testimony of officer Barr relative to the safe maximum speed. He had investigated many accidents on the grade in which trucks were out of control. He had followed trucks down the hill and had patroled the area daily. In Lynch v. Birdwell, 44 Cal.2d 839, 849, 285 P.2d 919, 924, it is said: "'It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence (citation), and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown.' (Huffman v. Lindquist, (1951), 37 Cal.2d 465, 476, 234 P.2d 34, 29 A.L.R.2d 485.)" No such abuse appears in the instant case.

In Zelayeta v. Pacific Greyhound Lines, 104 Cal.App.2d 716, 726, 727, 232 P.2d 572, 579, it is said:

"Thus, expert testimony is admissible or not dependent upon whether the subject matter is within common experience or whether it is a special field where the opinion of one of skill and experience will be of greater validity than that of the ordinary juryman. * * * It is equally clear that cases may occur where the opinions of trained experts in the field on this subject will be of great assistance to the members of the jury in arriving at their conclusions. In such cases a traffic officer who has spent years investigating accidents in which he has been required to render official reports not only as to the facts of the accidents but also as to his opinion as to their causes, including his opinion, where necessary, as to the point of impact, is an expert. Necessarily, in this field, much must be left to the common sense and discretion of the trial court. Nolan v. Nolan, 155 Cal. 476, 101 P. 520 [132 Am.St. Rep. 99, 17 Ann.Cas. 1056]; Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App.2d 568, 126 P.2d 644."

[3] The second argument presented by appellants is that the court erred in instructing the jury on the doctrine of res ipsa loquitur, in that it failed to instruct that the doctrine does not apply if the accident was due to any voluntary action or contribution on the part of the plaintiff. However, it does not appear from the record before us that the defendants offered an instruction on the subject, and where, as here, the refusal to instruct is urged for a ground of reversal, it was incumbent upon the defendants to request and offer a proper instruction. In re Estate of Dopkins, 34 Cal.2d 568, 575, 212 P.2d 886. In Fedler v. Hygelund, 106 Cal.App.2d 480, 485–486, 235 P.2d 247, 250, a truck was being driven by appellant down a grade at a speed between 30 and 35 miles per hour. Appellant applied his brakes and discovered they would not hold and the truck proceeded downgrade out of control, until it turned over, injuring the respondent. The court said:

"We think from the facts related that the question of Rippin's negligence was for the jury to determine and that their determination is supported by substantial evidence and by the reasonable inferences which they could have drawn therefrom. Indeed, the jury could have considered that because the truck had been for some time and was at the time the accident happened under the exclusive control of Rippin and because ordinarily trucks do not run away downgrade unless the one having the control of the truck has been negligent, Rippin had in some way failed to exercise due care. Such facts constitute circumstantial evidence from which an inference of want of care may be drawn. In short, the doctrine of res ipsa loquitur was applicable to the situation portrayed by pleadings and the evidence here."

The court further stated, 106 Cal.App. at page 487, 235 P.2d at page 251:

> "It is true that respondent did not ask the trial court to instruct the jury upon the doctrine of res ipsa loquitur, but that does not mean that when we search the record to determine whether or not it supports the verdict we can ignore the presence of the inference simply because the jury were not instructed upon the matter. The doctrine is grounded upon common observation and common sense, and, whether instructed or not upon the matter, the jury is competent to draw the inference if it desires to do so."

In Seneris v. Haas, 45 Cal.2d 811, 823, 291 P.2d 915, 924, it is said that the conditions to be met before the doctrine may be applied are that the accident or injury must be of a kind which ordinarily does not occur in the absence of someone's negligence; that it must be caused by an agency or instrumentality in the control of the defendant; and that it must not have been due to any voluntary action or contribution on the part of plaintiff. It was also there held: "In order that a plaintiff be entitled to the benefit of the doctrine of res ipsa loquitur, he need not exclude every other possibility that the injury was caused other than by defendant's negligence" and that the court was of the opinion in that case that the jury, under appropriate instructions, should have been permitted to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur were present.

[4] In Simmons v. Rhodes & Jamieson, Ltd., 46 Cal.2d 190, 195, 293 P.2d 26, it is held that plaintiff may properly rely upon the doctrine of res ipsa loquitur even though he has participated in the events leading to the accident if the evidence excludes his conduct as the reasonable cause. Here, the jury was instructed that before plaintiff could avail himself of the doctrine, he must prove by a preponderance of the evidence that no intervening injury to his truck occurred and that the instructions on the doctrine of res ipsa loquitur were directed to the issue of the cause of defendants' truck going out of control. The jury's implied finding that plaintiff's conduct was not a contributing cause of the accident is supported by his testimony that he changed lanes when he was approximately 300 feet from the point of collision; that he looked in his rear view mirror and noticed no unusual conditions to the rear of his truck; that he could see approximately 200 yards to the rear, and gave a signal before turning. Under these circumstances the trial court's instructions on the doctrine of res ipsa loquitur were properly given to the jury on the issue of the cause of the defendants' truck going out of control.

[5] The third and final contention of appellants is that the court erred in permitting hearsay testimony in the examining of Dr. Doyle. The doctor testified on cross-examination that the testimony he gave as to the plaintiff's present condition was based on his lawyer's advice as to such condition. Thereafter, the doctor was permitted, on redirect examination to testify as to the information received by him and stated that he had received a copy of another doctor's consultation. It is not claimed that the damages awarded plaintiff for his injuries were excessive and we find no reversible error in the admission of the doctor's testimony.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

149 Cal.App.2d 536

Leonard BOGERT, Plaintiff and Respondent,

v.

Frederick J. CLAWSON and Don E. Tully, Defendants and Appellants.

Henry C. Norman and Kings County Truck Lines, a corporation, et al., Defendants.

Civ. 5371.

District Court of Appeal, Fourth District, California.

March 28, 1957.

Hearing Denied May 22, 1957.

Action by truck driver for personal injuries received when truck attempting to pass on the downgrade was struck from the rear by following truck that was out of control. The Superior Court of Kern County, Gordon L. Howden, J., after jury returned a verdict against owner and operators of both passing truck and following truck, granted new trial to owner and operator of passing truck and other defendants appealed. The District Court of Appeal, Mussell, J., held that there was no error in failing to give requested instructions as to unavoidable accident caused by latent mechanical failure, where there was no evidence of any mechanical failure which caused following truck to go out of control.

Affirmed.

See also, Norman v. Tully, 308 P.2d 875.

Trial ⇐252(8)

In truck driver's action for personal injuries received in collision that occurred when truck attempting to pass on downgrade was struck from rear by following truck that was out of control, there was no error in refusing to give requested instructions by owner and operator of following truck as to unavoidable accident due to latent mechanical defects, where there was no evidence of a mechanical defect which caused following truck to go out of control.

Baker, Palmer, Wall & Raymond, Bakersfield, for appellants.

Leon Boro and LeRoy Snyder, Jr., Fresno, for respondent.

MUSSELL, Justice.

This is an action for damages for personal injuries sustained by plaintiff in an accident which occurred on June 11, 1954, at about 10:30 p. m. on United States Highway 99, approximately one-half mile north of Grapevine Station on what is known as the Grapevine grade, in Kern county. This grade is approximately six miles long and has a six per cent downgrade for northbound traffic. In the area where the accident occurred the highway is divided into four lanes, separated by a concrete and steel barrier, approximately thirty inches high. Three northbound tractor-trailer truck combinations were involved. At the time of the accident, plaintiff was driving his tractor-trailer, partially loaded, in the outer or east northbound traffic lane, when a tractor-trailer driven by one Henry Norman in the inner lane, and owned by Kings County Truck Lines, was in the process of passing plaintiff's equipment. The third truck and trailer, owned by defendant Don E. Tully and being driven by defendant Frederick J. Clawson, collided first with the rear of the Norman truck and trailer and then with plaintiff's truck and trailer, causing injuries to plaintiff. The Clawson truck and trailer was traveling down the grade, out of control. Clawson was unable to stop it and collided with plaintiff's truck and trailer at a speed of between 50 to 60 miles per hour.

A jury returned a verdict against appellants Tully and Clawson and against Henry C. Norman and Kings County Truck Lines, a corporation, owners of the truck and trailer operated by Norman. A motion for a new trial was granted as to defendants Norman and Kings County Truck Lines, and defendants Clawson and Tully appeal from the judgment. The sole ground relied upon by appellants for reversal of the judgment is that there was

prejudicial error in the trial court's refusal to instruct the jury on the doctrines of mechanical failure and unavoidable accident.

At the outset, it may properly be observed that appellants' answer to the first amended complaint contains no allegation that the collision was due to an unavoidable accident or was the result of a mechanical failure of appellants' equipment. In this connection, appellants offered instructions which the trial court refused to give. They are as follows:

"You are instructed that if the defendants Tully and Clawson cared for and maintained the mechanical system of the truck in the same manner and as frequently as a reasonably prudent person would deem the same necessary, and used the same precautions in said maintenance as a reasonably prudent person would do, and if you further find that their part in the accident here in question resulted solely and proximately from a latent failure in the equipment on said truck, which could not be known or remedied by such measures, then, as to the defendants Tully and Clawson, this accident was an unavoidable accident, in which case there is no legal responsibility on those defendants to respond in damages to the plaintiff.

"If you find that the sole cause of this accident, insofar as the defendants Frederick Clawson and Don E. Tully are concerned, was the failure of a mechanical function on the truck in which they were riding, and if you further find that the defendants Tully and Clawson could not have anticipated the mechanical failure in the exercise of ordinary care, then as to those defendants this accident is what is known as an unavoidable accident, and there is no legal responsibility of the defendants Tully and Clawson to respond in damages to the plaintiff."

These instructions were only proper and required to be given if there was evidence that the accident resulted solely and proximately from a latent failure in the equipment which could not be known or remedied, or a failure of a mechanical function of the truck and trailer which could not have been anticipated by appellants by the exercise of ordinary care.

In 24 California Jurisprudence, Trial, Section 78, it is stated that a request for an instruction may properly be refused if it is inapplicable to the issues raised by the pleadings, or if it is not pertinent to some issue or theory developed by the evidence; that even though a request is pertinent to an issue presented by the pleadings, refusal of it is proper if such issue is wholly unsupported by the evidence; and that in fact, the refusal of requests in such cases is not only proper, but their allowance constitutes error which, if prejudicial, warrants a reversal.

In Ackerman v. Griggs, 109 Cal.App. 365, 367, 293 P. 115, it was held that there was no error in refusing an instruction where such proposed instruction was one on facts which were not supported by any evidence. In Risdon v. Yates, 145 Cal. 210, 217, 78 P. 641, it was held that instructions, though abstractly correct, should not be given if they are inapplicable to the evidence and may mislead the jury. In Buttrick v. Pacific Elec. Ry. Co., 86 Cal. App. 136, 139–140, 260 P. 588, 590, it is said: "The giving of an instruction which finds no support in the evidence is improper, and, if prejudicial, is ground for a reversal." (Citing cases.)

In the instant case defendants Tully and Clawson introduced no evidence showing that there was a failure of the mechanical system of their truck and trailer. Tully had his truck under control after the accident and drove it to Bakersfield. He produced no evidence that the brakes were not functioning immediately after the accident and produced no mechanics or experts to show that any air lines or any part of his braking system had either partially or completely failed. Clawson's statement to the highway patrol officer immediately

after the accident was that he "was driving north at a speed of about 30 miles per hour on the Grapevine when the brakes became hot and faded out on him about a half mile south of Grapevine." No claim was made by him of any latent defect in his equipment or that any part of the braking system was broken or that there was any other mechanical defect in the truck or trailer. Clawson testified that it was his first trip over the Grapevine; that Tully was asleep in the sleeper when they started down the grade; that as soon as he had difficulty with his brakes, he called Tully and that at the time he (Clawson) was "banking the cement wall"; that when Tully got down to the cab they were traveling about 30 miles per hour; that he started down the hill in second-direct gear; that he had traveled down the grade about two miles when his brakes "commenced not to hold it any more and just kind of faded out" when he was traveling at about 15 miles per hour; that he tried to stop his equipment by turning it into the guardrail or barrier and it kept bouncing out; that Tully told him to get away from it and "stay away from it because I think he was scared we would go over the top"; that when they went by the Grapevine they thought they were holding their speed; that when he called to Tully he was shifting into a higher gear to "keep the motor in the truck"; that he also did some shifting into higher gear after Tully climbed into the cab; that the shifting into higher gear would increase the speed of the truck slightly and would decrease the tendency of the motor to hold the truck; that in shifting he took his foot off the brakes and used the brakes intermittently; that he supposed the reason he did not have his brakes all the way down was that he was afraid he would burn them clear out; that by applying varying pressures to the brakes "it seemed like the brakes held a bit and that they held better the harder he put them on."

Henry Norman testified that when he talked to Clawson after the accident he asked him "what the hell he came off so fast for, he said, 'Well, maybe I came off too fast. I don't know the hill', or similar to that."

Highway patrol officer Bard testified that there is a sign posted at the top of the grade on the right-hand side of the northbound traffic lane reading "5 miles at 6% downgrade, trucks use slow gear"; that in his opinion, in most instances, vehicles go out of control because they come down the hill too rapidly to begin with and, in most instances, their brakes fade; that during his investigation neither Clawson nor Tully complained to him of a mechanical failure of their equipment.

The trial court gave the following instructions on unavoidable accident:

> "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been *proximately* caused by *negligence*. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.
>
> "The proximate cause of an injury is that cause which, in natural and continuance sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. (It may operate directly or through intermediate agencies or through conditions created by such agencies.)"

Appellants, in support of their contention, cite Howard v. Triangle Freight Lines, 109 Cal.App.2d 620, 241 P.2d 35. In that case plaintiffs were injured in a collision between an automobile and truck. A copper air line on the truck, which ran to the trailer, suddenly broke and the

loss of air locked the brakes. Walker, the driver, turned the equipment to the right-hand shoulder of the road and while it was partly on the shoulder and partly on the highway, plaintiffs' car crashed into the left rear corner of the trailer. It was there held that there was no negligence on the part of the driver but that it did not follow that the owners could not be liable since they were also charged with negligence in knowingly permitting this equipment to be operated with such defective brakes that a sudden stop would probably result. This case differs from the case at bar in that here we have no broken fittings, no broken air line and no evidence that there was anything mechanically wrong with the Tully truck and trailer.

In Phillips v. Pickwick Stages, 85 Cal. App. 571, 259 P. 968, also cited by appellants, the driver of the stage put it in low gear and rolled down a hill. He tried to stop the stage by means of the use of the foot brake and in so doing, the foot pedal which operated that set of brakes suddenly broke, rendering it useless. The driver was unable to stop the equipment and it ran into plaintiffs, who were watching a parade. The court held that if the sole proximate cause of the accident was due to the breaking of the foot pedal due to a latent defect which could not have been discovered upon a careful examination and inspection, appellant would not be liable, and further stated, 85 Cal.App. at page 574, 259 P. at page 969:

> "While instructions in a particular case are to be determined, not alone by the pleadings therein, but also by the evidence in support of the issues between the parties, and even though an issue is raised by the pleadings, it is not proper to give an instruction thereon, although it may be abstractly correct, where there is no basis for it in the evidence (14 R.C.L. 786), still it must appear that injury resulted therefrom in order to warrant a reversal."

Barber v. Gordon, 111 Cal.App. 279, 295 P. 377, is also cited by appellants. In that case the appellants were driving northerly on a public highway in the county of Ventura. At the same time, respondent was driving southerly. As the respective parties approached a turn in the road, the automobiles collided. The jury found in favor of the defendant in both actions. The defense of inevitable accident was based upon the alleged locking of the steering mechanism of the car driven by the respondent. According to the testimony of the respondent, at the time of the collision the steering mechanism became locked so that it was impossible to turn the automobile to the right in rounding a curve, in order to avoid the collision. It was there held that the evidence was sufficient to sustain the finding of unavoidable accident based upon the alleged locking of the steering mechanism of the car driven by respondent.

In Alward v. Paola, 79 Cal.App.2d 1, 179 P.2d 5, 9, cited by appellants, defendant testified that she was driving a 1940 Buick car and following her husband en route to Los Angeles; that after going up a hill and starting down the "Five Mile Grade" at a speed of about 40 miles per hour, her Buick appeared to be gaining on her husband's car; that she attempted to apply her brakes to retard the speed but that the foot brakes failed to function and the Buick continued to gain speed; that she became excited and tried to prevent a collision by driving in the center lane; that she proceeded down the grade, passing and overtaking cars in this manner, with the car out of control, for about two miles; that she gained speed up to 60 miles per hour and finally struck the rear left fender of a light-colored car proceeding in the same direction when endeavoring to turn out and pass it; that soon thereafter she struck plaintiffs' car, a Dodge sedan, approaching her from the south. Expert mechanics testified that in the 1940 model Buick there was a "bug" in the construction by the manufacturer in that the master cylinder of the brake system was placed within

three inches of the exhaust pipe; that as a result thereof, occasionally, on climbing a hill, when the exhaust became hot from the combustion of gas in the motor, the brake fluid would boil so that vapor or gases would be present in the brake lines; that such condition rendered the braking system inoperative until such time as the vapors or gases in them cooled (a matter of a few minutes), permitting condensation to a liquid, and then there would be brakes present again. In response to the hypothetical question, as submitted, they gave the opinion that this is what occurred in the Buick automobile on the day in question; and that there was no way to anticipate or foretell that it would occur. It was there held that the general instructions on the doctrine of unavoidable accident and sudden peril were proper and that "As to instruction No. 33, there is evidence that some 1940 Buicks came from the manufacturer with a defect in construction in reference to the braking system and that this 'bug' was not such as to be discoverable by an ordinary lay person or by any ordinary, reasonable inspection; that such defect came about through original design and construction by the manufacturer and was not due to any wear or tear, age or use while in the hands of the ultimate user. There is no evidence anywhere in the record, nor has it ever been contended that any reasonable inspection of any kind by the owner or operator of the vehicle would have led to the discovery of the defect of the original manufacturer. There was sufficient evidence justifying the trial court in giving that instruction."

In the instant case there was no testimony, expert or otherwise, of a mechanical defect or "bug" in the Tully truck and trailer and we find no prejudicial error in the refusal of appellants' proposed instructions.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

149 Cal.App.2d 737

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank J. PIGG, Defendant and Appellant.

Cr. 5812.

District Court of Appeal, Second District, Division 2, California.

April 3, 1957.

Defendant was convicted of burglary in the second degree. From judgment rendered by the Superior Court, Los Angeles County, Richard B. Eaton, J., defendant appealed. The District Court of Appeal, Moore, P. J., held that one who was present when plan to commit burglary was suggested but who did not himself suggest it and who, because he desired to see defendant convicted since his stepdaughter was living with defendant, drove defendant and other participants to and from scene of burglary and, within 24 hours thereafter, reported it to police was merely a "feigned accomplice" and his testimony did not require corroboration.

Judgment affirmed.

1. Criminal Law ⇐1159(4)

A witness' credibility was matter for trial court's determination, and where it accepted testimony as true, such testimony would be taken as true on appeal unless its falsity was apparent without resorting to inferences.

2. Criminal Law ⇐507(4)

One who was present when plan to commit burglary was suggested but who did not himself suggest it and who, because he desired to see defendant convicted since his stepdaughter was living with defendant, drove defendant and other participants to and from scene of burglary and, within 24 hours thereafter, reported it to police was merely a "feigned accomplice" and his testimony did not require corroboration in burglary prosecution of defendant. West's Ann.Pen.Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Feigned Accomplice".

3. Criminal Law ⇐507(4)

Where one feigned participation in a burglary because he desired one of the participants to be convicted, it was not requisite to his status as a mere feigned accomplice whose testimony did not require corroboration that he should have consulted officers before joining burglars. West's Ann.Pen.Code, § 1111.

Angelo L. Baldwin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Henry K. Workman, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was accused under two counts of having committed burglary and of a prior conviction of robbery. He was convicted of burglary in the second degree. He appeals from the judgment.

While Chester Blevins was present at the apartment of Dale Evan Thomas, the latter telephoned to Patrick Rush concerning the stealing of some property. Immediately Rush and the appellant Pigg visited Thomas and engaged him in conversation with respect to a plan stealthily to enter the offices of the Jenmac Corporation in Gardena in order to obtain its check protector and typewriter. Blevins offered to convey them in his automobile. He entertained a secret purpose; he had a stepdaughter, age sixteen and married, but who had for some time occupied an apartment with Dale Thomas. He planned that if Thomas were arrested, the stepdaughter would return to her mother's care or go back to her husband's home.

After appellant and Rush had procured a paper automobile license and Blevins had pasted it on his car, they drove to Gardena and to the plant of the Jenmac Corporation. Appellant, Rush and Thomas left the automobile and Blevins drove up and down the avenue. The three men broke into the back door, took the typewriter and check protector and returned with them to Mr. Blevins' automobile. Thereupon, the four men proceeded to the Weibel Auto Works on Paramount Boulevard in Long Beach. Having worked there, Thomas knew he could find blank checks to suit their purpose. After Blevins parked in the rear lot, the other men went to the front where Rush and appellant walked up and down while Thomas broke the window, entered, took the checks and made his exit.

On the following evening, April 21, 1956, Blevins observed a radio car on Valley Boulevard and told its operator, Deputy Sheriff Sergeant LeBerthon that he feared the outcome of certain unlawful acts in which he had participated and he "was anxious over his involvement." After describing the burglaries and his associates and the houses burglarized, he stated that his motive was to protect his stepdaughter; that he considered Thomas a menace to her welfare, and that he feared him for the remainder of his family at home. The officer accompanied Blevins and his wife to the investigators at the sheriff's Temple City station. He had not heard of either of the burglaries and Mrs. Blevins had, to this point, prevailed upon her husband not to report the crimes.

We are thus faced with the duty of determining whether the trial court was correct in holding that Blevins was a feigned, and not an actual accomplice, and whether his testimony was a sufficient corroboration of defendant Rush. The latter had been accused; the accusation had been dismissed and he testified to the facts on behalf of the People. The problem arises out of Section 1111 of the Penal Code which provides that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the crime charged. He is an accomplice who it liable to prosecution for the identical offense charged against the person on trial. Now, Blevins did not

suggest a burglary. It was a scheme of Thomas who telephoned Rush of the plan to steal the property. Blevins was merely present when Thomas used the telephone. Immediately Rush and Pigg entered and the four men conversed concerning the proposed burglary. They discussed whether it would be wise for Blevins to accompany them. He drove them to the Gardena plant of the Jenmac Corporation and back to the Weibel Auto Works. At the trial, he testified that his purpose in accompanying the men was to protect his stepdaughter against Thomas and that he reported the events to the deputy sheriff on the following day.

[1–3] Inasmuch as Blevins' testimony was adopted and his credibility was a matter for the trial court's determination, his avowed intent in accompanying the burglars is true on this appeal unless its falsity is apparent without resorting to inferences. People v. Garcia, 129 Cal.App.2d 251, 253, 276 P.2d 668; People v. Dragoo, 121 Cal. App.2d 322, 324, 263 P.2d 90. The testimony is undisputed that Thomas had lived with the stepdaughter; that Blevins desired to get him convicted of a crime; that he had not originated the idea of a burglary. He was a feigned accomplice and his testimony did not require corroboration. People v. Finkelstin, 98 Cal.App.2d 545, 559, 220 P.2d 934; People v. Griffin, 98 Cal.App.2d 1, 22, 219 P.2d 519. It was not necessary for Blevins to consult an officer before joining the burglars. That might have insured his freedom from prosecution, but also where a citizen feigns participation in a burglary and the trial court accepts his explanation of his conduct, he has done nothing contrary to law and his act was not opposed to sound public policy. People v. Emmons, 7 Cal.App. 685, 692, 95 P. 1032. He had not suggested either burglary. He had reported his act to the sheriff within 24 hours after the burglary, before any officer had learned the identity of any participant in the crimes. The sheriff had heard nothing of them and had no suspicion of the actors prior to Blevins' report. Had he failed to acquaint the sheriff's office with the commission of the offenses, they might have remained unsolved. Although the police had made every reasonable effort to ascertain the evil-doers, no one had a suspicion of their identity prior to Blevins' report to Sergeant LeBerthon. The solution of the crimes was due to his feigned complicity.

Appellant contends that where a person becomes an active participant in a crime, he cannot escape the status of being an accomplice by claiming that his co-actors were criminals and that he merely induced them to break the law that he might effect their convictions, citing People v. Scott, 1 Cal.Unrep. 68. But Mr. Scott had actually planned the robbery and had held the victim while another beat his head. The court wisely rejected that claim of feigned participation for the reason that it was a case "where personal violence is committed in pursuance of a plan set on foot and accomplished by the immediate agency of the witness."

People v. Wilson, 76 Cal.App. 688, 245 P. 781, is not pertinent. The facts in their entirety were placed before the jury. It was held that the jury was not obliged to accept as true the defendant's claim that he was a feigned accomplice. While Blevins may not have acted with patriotic or ethical motives, the implied finding is that his purpose was to insure the detection and punishment of two cat-like burglaries in a metropolitan area. His position is not unlike that of an officer who has feigned complicity in a crime without having been abased by his efforts. His testimony required no corroboration.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles H. OTTERMAN, Defendant and Appellant.

Cr. 5746.

District Court of Appeal, Second District, Division 2, California.

April 8, 1957.

PER CURIAM.

Appellant's appeal having been dismissed on motion, and it appearing that the ends of justice would be better served by a consideration of the record and of the authorities pertinent to appellant's contention, now therefore

It is ordered that the dismissal of the appeal entered herein on the 19th day of March 1957 be and it is hereby vacated and that appellant is granted 30 days from this date to file his opening brief.



149 Cal.App.2d 586

E. J. NORTON and Ruby Norton, Plaintiffs and Appellants,

v.

Marvin Braxton FUTRELL and James B. Futrell, Defendants and Respondents.

Civ. 8986.

District Court of Appeal, Third District, California.

March 29, 1957.

Action for death of plaintiffs' son who died as a result of injuries sustained by him when a bicycle he was riding was struck from the rear by an automobile driven by defendant with permission of codefendant. The Superior Court, Merced County, Gregory P. Maushart, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that in view of fact that there was ample evidence to support findings that decedent's death was proximately caused by negligence of defendant, and that decedent was not guilty of contributory negligence, trial court's refusal to give an instruction on presumption of due care in favor of decedent was prejudicial error.

Judgment reversed.

1. Death ⇐104(2)

In order to determine whether a party is entitled to an instruction as to the presumption that a decedent was in the exercise of due care for his own safety, court must look only to evidence produced by party seeking to invoke the presumption.

2. Death ⇐104(2)

In action for death of plaintiff's son who was killed when while riding a bicycle it was struck in the rear by an automobile driven by defendant, trial court erred in refusing an instruction requested by plaintiff as to presumption that deceased was in the exercise of due care, and applying such presumption to the evidence of the case, in view of fact that testimony of plaintiffs' witness was not contrary to the presumption of due care by deceased.

3. Appeal and Error ⇐1064(1)
Trial ⇐235(1)

In automobile-bicycle collision case, instruction on weight of evidence, that if weight was equally balanced, and left issue in doubt and uncertainty, such issue must be decided against party that had burden of proof, was improper as providing a test of weight of evidence opposed to accepted test of preponderance of probability, but was not prejudicial.

4. Evidence ⇐597

In a civil case it is not necessary that the jury be absolutely certain or doubtless, but it is sufficient if the choice selected is more probable than the choice rejected.

5. Appeal and Error ⇐1067
Death ⇐104(2)

In action for death of plaintiff's son who died as a result of injuries sustained by him when a bicycle he was riding was struck from the rear by an automobile driven by defendant with permission of codefendant, in view of fact there was ample evidence to support findings that decedent's death was proximately caused by negligence of defendant, and that decedent was not guilty of contributory negligence, trial court's refusal to give an instruction on presumption of due care in favor of decedent was prejudicial error.

C. Ray Robinson, Merced, for appellants.

Hansen, McCormick, Barstow & Sheppard and Manfredo, Best & Forbes, Fresno, for respondents.

SCHOTTKY, Justice.

Plaintiffs, E. J. Norton and Ruby Norton, sought damages from the defendants for the death of their son, William Donald Norton. The death was alleged to have been the proximate result of the negligence of the defendants. The defendants denied that they were negligent and alleged that the deceased was contributorily negligent. Judgment was entered upon a jury verdict in favor of the defendants. Plaintiffs' motion for a new trial was denied and plaintiffs have appealed from the judgment.

The plaintiffs and appellants are the surviving parents of William Donald Norton, who died as a result of injuries received in an accident At the time of the accident the decedent was riding a bicycle in a westerly direction on State Highway 140 approximately three-quarters of a mile east of the city of Planada in the county of Merced, California. The accident occurred some time between 8:15 p.m. and 8:30 p.m. on May 8, 1955, when the bicycle being ridden by the deceased was struck from the rear by an automobile driven by the defendant Marvin Braxton Futrell with the permission of the defendant James B. Futrell. At the time of the accident the evidence disclosed that the bicycle being ridden by the decedent was not equipped with headlights, taillights or reflectors. The decedent was accompanied by another boy, Donald A. Curtis, who was also riding a bicycle in a position to the rear of the decedent, but who was not hit. Donald A. Curtis' bicycle was equipped with a generator type light which was on at the time of the accident. The automobile's lights were on dim.

Appellants raise no issue as to the sufficiency of the evidence to support the judgment, but contend most earnestly that the court committed prejudicial error in refusing appellants' requested instruction that decedent was entitled to the benefit of the presumption of due care. In support of this contention appellants cite the recent case of Gigliotti v. Nunes, 45 Cal.2d 85, at page 92, 286 P.2d 809, at page 813, in which, in reversing a judgment for defendant, the Supreme Court declared:

> "As ground for reversal, it is first contended that the court erred in refusing to give plaintiffs' requested instruction on the presumption of due care (Code Civ.Proc., § 1963 subd. 4) on the part of Walters, the deceased driver of the Dodge. As expressed in Scott v. Burke (1952), 39 Cal.2d 388, 394, 247 P.2d 313, it is settled law that where alleged negligent acts and conduct of a decedent are at issue before the court and the 'testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, * * * an instruction that the deceased is presumed to have exercised ordinary care for his own concerns is * * * proper' except that if the fact proved by uncontradicted testimony produced by the party seeking to invoke the presumption, 'under circumstances which afford no indication that the testimony is the product of mistake or inadvertence * * * is wholly irreconcilable with the presumption * * * the

latter is dispelled and disappears from the case.'

"Although there is no room for the presumption where the driver or other person whose claimed negligence is at issue himself testifies to his actions at the time involved [citation], the rule is established that if such person be deceased or unable to testify by reason of loss of memory, the fact that other witnesses for the parties testify fully as to the acts and conduct of the allegedly negligent person does not deprive the party relying on the presumption of the benefit thereof unless the testimony which he himself produces 'under circumstances which afford no indication that the testimony is the product of mistake or inadvertence * * * is wholly irreconcilable with the presumption sought to be invoked.' [Citations.] Plaintiffs' evidence in the present case is not irreconcilable with the presumption.

"The benefit of the presumption has frequently been held available to plaintiffs in wrongful death actions [citing cases], as well as to one who by reason of loss of memory is unable to testify concerning his conduct at and immediately before the time of the accident. [Citation.]"

Donald Curtis, the principal witness called by appellants, testified that prior to the accident the decedent was riding a bicycle on a public highway at a time when the lighting conditions were "dusky dark," but stated that he could see the outline of the houses in Planada, three-quarters of a mile away, at the time of the accident. He testified that the bicycle being ridden by the decedent had no taillights, no reflectors and no headlights, but that the witness' bicycle was equipped with a headlight which was shining upon the aluminum rear fender of the bicycle ridden by the decedent. He testified that shortly before the accident the decedent had crossed from the right-hand traffic lane to the opposite lane and had returned to the right-hand lane at the witness' suggestion. He testified further that when the decedent came back to the right-hand lane the decedent was "way up ahead of me" and that immediately prior to the accident he, the witness, was just catching up to the decedent.

Donald A. Curtis also testified that he and the decedent had departed from a dump at approximately 8:00 or 8:05 p. m. and that the accident occurred ten or fifteen minutes later, which at the latest would have been 8:20 p. m. It was stipulated that the time of sunset on the day in question was 7:55 p. m.

Respondents argue that since there is no indication that the testimony of Donald A. Curtis was the product of mistake or inadvertence, under the authority of the Gigliotti case, supra, such testimony as to the acts and conduct of the decedent immediately preceding and at the time of the accident is wholly irreconcilable with the exercise of due care by the decedent, and establishes that the decedent was contributorily negligent as a matter of law.

[1] We are unable to agree with respondent. Section 618 of the Vehicle Code does not require lamps until a half hour after sunset, and since the testimony of Donald A. Curtis tends to show that the accident occurred less than a half hour after sunset, the testimony that no headlights, taillights and reflectors were on the bicycle ridden by the decedent is not "wholly irreconcilable" with the presumption that the decedent exercised due care for his own safety since the inference is clearly warranted that such equipment was not necessary at the time of the accident. The only witness who testified that the accident occurred after the half-hour period subsequent to sunset was the defendant Marvin Futrell, but under the authority of the Gigliotti case, supra, and Hooper v. Bronson, 123 Cal.App.2d 243, 266 P.2d 590, we must only look to the "evidence which is produced by the party seeking to invoke the

presumption" to determine whether such party is entitled to the presumption.

Furthermore, we believe that the jury could have found from the evidence that the decedent and his companion cyclist were traveling lawfully down the extreme right-hand side of the roadway in the exercise of due care when the defendant approached from the rear without exercising that vigilance and lookout required by the standard of due care for the safety of others, that the collision was the proximate result of such negligence by the defendant without any negligence of the decedent proximately contributing to the accident, that the accident occurred at a time when lights were not required, and that even if lights were required, the jury could conclude that the defendant was guilty of negligence by driving with dimmed lights and by looking down the left lane of the highway as he testified.

We are convinced that in view of the authorities hereinbefore cited it must be held upon the record in the instant case that appellants were entitled to an instruction upon the presumption of due care.

[2] Respondents contend that even if appellants were entitled to such an instruction appellants cannot complain because the two instructions on the presumption of due care offered by appellant were improper in form and content.

One of these offered instructions appears in the record as follows:

"If a person dies as the result of an automobile accident and is, therefore, unable to testify concerning the circumstances surrounding the accident, then the law provides that the deceased person is entitled to the benefit of the presumption that he was using due care for his on protection and safety and that he was obeying the law at the time of the accident. The presumption in this case is that at the time of this accident the deceased, William Donald Norton, was not on the road without lights or reflectors at a time when lights or reflectors were required, and that he was obeying the law in every respect. These presumptions are a form of evidence and they will, in and of themselves, justify a finding that the deceased, William Donald Norton, was not guilty of contributory negligence, unless the presumptions have been overcome by satisfactory evidence to the contrary. You should consider these presumptions together with any other evidence bearing upon whether or not the deceased, William Donald Norton, was guilty of contributory negligence.

"Requested by plainciffs and refused: Testimony of Pltfs own witness refutes the above statement. Gregory P. Maushart, Judge."

We believe that the court erred in refusing to give the foregoing instruction. It is apparent that the court refused to give the instruction upon the ground that appellants' own witness refuted the statement, and respondents make the same contention here. However, as we have hereinbefore pointed out, the testimony of Donald A. Curtis was not to the contrary and it was correct for the jury to presume "that at the time of this accident the deceased, William Donald Norton, was not on the road without lights or reflectors at a time when lights or reflectors were required, and that he was obeying the law in every respect." The instruction correctly stated further that: "These presumptions are a form of evidence and they will, in and of themselves, justify a finding that the deceased, William Donald Norton, was not guilty of contributory negligence, unless the presumptions have been overcome by satisfactory evidence to the contrary." We are satisfied that this instruction was a correct statement of the law and that it was error for the court to refuse to give it. Our conclusion as to this instruction makes it unnecessary to discuss the other instruction offered by appellants as to the presumption of due care.

[3] Appellants also complain of the following instruction given by the court at the request of respondent:

> "I instruct you that it is the law of this state that if the evidence should be conflicting and the weight of the evidence is equally balanced, and leaves the issue in your mind in doubt and uncertainty, it is your duty in such case to decide that issue against the party that has the burden of proof as to that issue."

[4] The instruction should not have been given. The phrase "and leaves the issue in your mind in doubt and uncertainty" is opposed to the accepted test of preponderance of probability. The term "probability" denotes an element of doubt or uncertainty and recognizes that where there are two choices, it is not necessary that the jury be absolutely certain or doubtless, but that it is sufficient if the choice selected is more probable than the choice rejected. In Murphy v. Waterhouse, 113 Cal. 467, 45 P. 866, 867, the court states:

> "In a civil case it is error to tell the jury that there must be evidence sufficient to convince their minds of any fact necessary to be shown by either party. The weight of evidence, or preponderance of probability, is sufficent to establish a fact in a civil case."

However, while we believe that it was error to give this instruction, we do not believe that it was reversible error.

Appellants complain of certain other instructions given by the court. We have examined them and do not believe that the court erred in giving them.

[5] Having concluded that the court erred in refusing to give an instruction on the presumption of due care, we must decide whether such error was sufficiently prejudicial to require a reversal of the judgment. A careful study of the entire record convinces us that there was ample evidence to support a finding that decedent's death was proximately caused by the negligence of appellant Marvin Futrell and that decedent was not guilty of contributory negligence. These were issues of fact upon which the evidence was sharply conflicting, and as stated in Gigliotti v. Nunes, supra, 45 Cal.2d at page 94, 286 P.2d at page 815:

> "Because the evidence, as already shown, was in such sharp conflict as to some of the circumstances of the accident, and would have amply supported a different verdict, the error in refusing to give the due care presumption instruction is prejudicial."

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

149 Cal.App.2d 368

Horace GARDNER and Ethel Gardner, Plaintiffs and Respondents,

v.

Charles Dell RUBIN et al., Defendants, Charles Dell Rubin, Appellant.

Civ. 22153.

District Court of Appeal, Second District, Division 2, California.

March 22, 1957.

Makers of note brought action against holder in due course and others to cancel note and trust deed, on ground that there was fraud inducing execution of note and trust deed. One of the makers died before trial. The Superior Court of Los Angeles County, Maurice C. Sparling, J., entered judgment adverse to the holder in due course, and he appealed. The District Court of Appeal, Fox, J., held that evidence sustained findings that deceased maker was semi-illiterate, that he was not aware of the fact that he signed note and trust deed, that his signature was fraudulently secured, that he relied on false representations, and that makers were not negligent in executing note and trust deed.

Judgment affirmed.

1. Appeal and Error ⇐989

When a finding of fact is attacked on ground that there is no substantial evidence to sustain it, power of reviewing court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support finding.

2. Appeal and Error ⇐996

When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.

3. Appeal and Error ⇐931(1), 994(3), 1012(1)

District Court of Appeal on appeal must view evidence in light most favorable to respondent and bear in mind that it is trial court's function to pass on credibility of witnesses and determine weight to which their testimony is entitled.

4. Mortgages ⇐86(3)

In action by makers of note against holder in due course and others to cancel note and trust deed, on ground that there was fraud in inducing execution of note and trust deed, evidence sustained trial court's findings that deceased maker was semi-illiterate, that he was not aware of fact that he signed note and trust deed, and that his signature was fraudulently secured, and that he relied on false representations.

5. Cancellation of Instruments ⇐53

In action by makers of note against holder in due course and others to cancel note and trust deed, on ground that there was fraud in inducing execution of note and trust deed, implicit in trial court's finding that holder in due course was not entitled to any relief was the further finding that makers were not negligent in executing the note and trust deed.

6. Mortgages ⇐86(3)

In action by makers of note against holder in due course and others to cancel note and trust deed, on ground that there was fraud in inducing execution of note and trust deed, evidence sustained trial court's implied finding that makers were not negligent in executing the note and trust deed.

7. Cancellation of Instruments ⇐50

Question whether or not failure to read a document, which is sought to be cancelled, is such negligence as to preclude relief, is ordinarily a question of fact, particularly where failure to read is induced by reliance on misrepresentation of the other party or his agent.

8. Cancellation of Instruments ⇐4

In passing on question whether or not failure to read a document, which is sought to be cancelled, is such negligence as to preclude relief, trier of fact may consider the age and mental and physical condition of the person signing.

Arnerich, Del Valle & Sinatra, Los Angeles, for appellant.

Levy, Bernard & Jaffee and Samuel R. Tannenbaum, Los Angeles, for respondents.

FOX, Justice.

Plaintiff brought this action to cancel a note and trust deed on the ground that there was fraud in the execution of these instruments. Judgment was rendered in favor of plaintiffs. Defendant Rubin, to whom these instruments had been transferred, appeals.

In seeking a reversal, appellant contends: (1) "The findings of the trial court that the plaintiff, Horace Gardner, was semi-illiterate; that he was not aware of the fact that he had signed a note and deed of trust; that his signature to said instrument was fraudulently secured and that he relied on the false representations made by defendants, are unsupported by the evidence and contrary to law;" and (2) "Plaintiffs were negligent in executing the note and deed of trust and the trial court erred in failing to so find."

This transaction contemplated the repair and improvement of plaintiffs' home which was owned by them as joint tenants. On May 5, 1954, defendant Richard Kritzer, who was secretary of the defendant U. S. Wrecking Corporation (herein referred to as the Corporation), and Garvin Foss, a sales representative of the Corporation, called on plaintiffs in their home for the purpose of working out such a transaction. As a result, a one-page contract was entered into which called for furnishing all labor and materials in making certain repairs to plaintiffs' home and further provided that plaintiffs were to be furnished $345 in cash to finish decorating their home.[1] The total amount of plaintiffs' obligation under the contract was $2,000. Monthly payments, without specifying the amount thereof in the contract, were to be made "on or before the 5th day of every month." It was orally understood, however, that these payments would be $20 per month. Although work was to begin "within a week or so" none of it has even been started and plaintiffs did not receive any funds with which to decorate their house.

Plaintiffs also signed on this occasion a promissory note in favor of the Corporation for $2,000 payable in monthly installments of $20 per month beginning on June 5, 1954, and continuing until December 5, 1954, at which time the entire balance became due and payable. This note was secured by a trust deed on plaintiffs' property. The acknowledgment of plaintiffs' signatures on the trust deed was purportedly taken by Frances Davis, a notary public, who was an escrow officer for a mortgage company located at the same address as the Corporation and which shared offices with the Corporation. Plaintiffs, however, did not appear before the notary and the latter had no contact with them.

On May 21, 1954, the Corporation transferred the note and trust deed to appellant Rubin. Plaintiffs received notice on or about June 4, 1954, that their "trust deed and note for $2,000 in favor of" the Corporation had been sold to Mr. Rubin and advising where to make the payments. Not being aware that they had signed any such documents, plaintiffs became alarmed and Mrs. Gardner immediately consulted a lawyer. This action was filed on the 20th day of the following month.

Mr. and Mrs. Gardner are Negroes with little or no business experience beyond the acquisition of this property and the occasional purchase of furniture on the installment plan. At the time of this transaction, Mr. Gardner was 64 or 65 years of age and a sick man. Mrs. Gardner described his condition by saying, "My husband was not reliable, because he was suffering then with spinal meningitis;" that he "hadn't been out of the hospital two weeks;" and that "he almost lost his mind." She also

1. The contract also provided that the Corporation would pay taxes on the property, "not to exceed $75.00." According to the President of the Corporation, this was done.

stated, "My husband was feeling bad, and he went to sleep * * *." She referred to the time while she was discussing the deal with Kritzer and Foss. Mr. Gardner passed away on January 1, 1956, which was prior to the trial. His education was limited to "about the second grade," while Mrs. Gardner progressed to "around the seventh grade." She was not familiar with the nature of a promissory note or trust deed.

Reverend Aaron Watkins was at the Gardner home at the time this transaction was taking form. While he was not present during the preliminary discussions between the parties, Mr. Gardner called him into the room and asked him to read the one-page contract (Exhibit 1) and tell him what he thought about it. Mrs. Gardner was called in too at this time. Reverend Watkins read the contract aloud to the Gardners. It had not been signed. The parties went over the improvements that were to be made and discussed certain of them, e.g., whether the interior was to be plastered or papered. Reverend Watkins thought that the deal was fine except that the contract did not state when the payments were to be made. Mrs. Gardner indicated she wanted to make the payments on the fifth of the month. This was agreeable to Kritzer. So, he interlined in handwriting the following: "Payments to be made on or before the 5th of every month." Reverend Watkins left "at that moment"; Kritzer "was still writing when" he left. The interlineation was initialed by the parties by reason of the fact that the contract was a printed form with the spaces filled in by typing. Reverend Watkins was not called upon to read any promissory note or deed of trust to the Gardners. He did not see any such documents there. In fact, there was no mention of a note or promissory note or deed of trust during the discussion of the transaction by the parties. Nothing was said to Mrs. Gardner about signing a note or trust deed. She signed some papers—the promissory note and deed of trust—without reading them. Kritzer told her these papers were "credit references" and Mrs. Gardner thought that was what they were. No one read either note or deed of trust to her. Had she known the character of these papers she would not have signed them. In explanation of her failure to read these documents Mrs. Gardner testified: "I just signed my name, because I was taking their word for it. * * * they pretended that they were honest, and I thought they were honest." She added that she was nervous; that she was cooking and her food was burning; that there was a Bible class she wanted to go to; and that "I thought it was an honest concern."

Kritzer testified he explained to the Gardners what a deed of trust was, the due date of the note, the amount of payments and the date payable. He further testified that Reverend Watkins read the contract, note and trust deed, and that in response to the Gardners' inquiry whether everything was all right, he replied, "Certainly." He also stated that neither the Gardners nor Reverend Watkins asked him any questions about the instruments.

Appellant gave testimony indicating he was a holder in due course, and the court so found; but the court also found that he was not entitled to any relief "due to the fact that there was fraud in the execution of said note and deed of trust." This is based on the principle that where one is fraudulently induced to sign a negotiable instrument believing it to be a different type of document such instrument is not enforceable even by a holder in due course in the absence of negligence on the part of the maker. C. I. T. Corp. v. Panac, 25 Cal.2d 547, 550, 154 P.2d 710, 160 A.L.R. 1285.

The pertinent findings with respect to fraud in the execution of the note and trust deed are quoted below.[2]

2. "VIII: The court further finds that it is true that the plaintiffs, considering their mentality and lack of education, were not aware of the fact that they had signed a note and deed of trust, and the court further finds that their signature to said documents was secured by fraud in the execution thereof exercised by the

[1–3] In passing on appellant's contention that the findings are lacking in evidentiary support, the following principles must be observed: "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. [Citations.] When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. [Citations.]" Primm v. Primm, 46 Cal.2d 690, 693–694, 299 P.2d 231, 233. Thus we must "view the evidence in the light most favorable to the respondent". In re Estate of Isenberg, 63 Cal.App. 2d 214, 216, 146 P.2d 424, 425, and bear in mind that it is the function of the trial court to pass on the credibility of the witnesses and determine the weight to which their testimony is entitled.

[4] Applying these principles, it is clear there is ample evidence to support the challenged findings. It should be noted at this point that appellant does not question the sufficiency of the evidence to support the findings that fraud in the execution of the note and trust deed was practiced on Mrs. Gardner. He does contend, however, that the evidence does not establish that Mr. Gardner was so imposed upon. Unfortunately, Mr. Gardner was not available to tell his side of the story since he had passed on before the trial. It is obvious that his second-grade education and lack of business experience ill equipped him to determine whether the contract Kritzer and Foss had prepared correctly reflected the deal they had made for the repair of the Gardner home. Gardner recognized his limitations so he asked Reverend Watkins to join the group, read the contract and tell him what he thought about it. After discussing the transaction, Reverend Watkins advised Gardner it was fine provided the contract stated when the payments were to be made. Kritzer immediately made an appropriate interlineation to cover this matter. Kritzer knew Gardner was relying on Reverend Watkins to advise him whether the contract accurately and completely covered their agreement. Yet, according to Watkins' testimony, which the court accepted as true, he was not called upon to read to the Gardners any promissory note or trust deed; neither did he see any such documents there. Nor was any mention made of either a note or trust deed during the discussion of the transaction. The inference is therefore unmistakable that Kritzer was fraudulently attempting to conceal the fact that a promissory note secured by a trust deed on the Gardner home was a part of the deal. In pursuance of this scheme, Kritzer requested Mrs. Gardner to sign some papers for credit reference purposes. Believing he and his concern were honest she signed these documents without reading them.[3] Mrs. Gardner was thus fraudulently induced to sign the promissory note and trust deed here in controversy. This lends support to the inference that Kritzer was attempting to conceal the character of these documents. This being so, it is a reasonable inference that he pursued the same policy with respect to Mr. Gardner, else his scheme undoubtedly would have failed. As the parties were together when the final form of contract was being considered, and since Kritzer could reasonably anticipate that Mr. and Mrs. Gardner would recount and discuss what had been said by him, and since any conflicts in his statements to them would create undesirable suspicion that might tend to frustrate the deal, it is

defendants U. S. Wrecking Corporation and Richard Kritzer."

"XI: The court further finds as true that the plaintiffs at the time they executed the said deed of trust and note were not aware they were signing a deed of trust and note, but were under the impression that they were signing an application for credit, and their signatures to said document were secured fraudulently by the defendants."

3. Reverend Watkins apparently had left the Gardner home before this.

a reasonable inference that Kritzer made the same misrepresentation to Mr. Gardner that he made to Mrs. Gardner, viz., that the papers he was requested to and did sign were credit references rather than a promissory note and trust deed on their property. In view of Reverend Watkins' examination of the contract (Exhibit 1), which presumably was the only document involved in the transaction, and his report that the deal was "fine" with the addition of the time when the payments were to be made, and Kritzer's immediate acceptance of this suggestion, it is a reasonable inference that Mr. Gardner relied on the latter's representation that the papers were credit references.

In the evaluation of this transaction the fact that Mr. and Mrs. Gardner admittedly did not appear before a notary public to acknowledge their signatures to the trust deed is not without significance. Such illegal acknowledgment was undoubtedly arranged by Kritzer since the notary was employed by a mortgage company that shared offices with the defendant corporation, of which Kritzer was secretary.

While the court did not expressly find, as appellant intimates, that Mr. Gardner "was semi-illiterate," perhaps such finding may be implied in the findings the court did make. See footnote 2. If so, an inference in support of such a finding may readily be drawn from the fact that he had about a second-grade education, practically no business experience, and called Reverend Watkins in to read and explain the written contract Kritzer had prepared. While it appears that Mr. Gardner could sign his name, it does not appear that he could read.

From the foregoing it is clear that the challenged findings are amply supported by the evidence and the inferences reasonably deducible therefrom.

[5, 6] Implicit in the court's finding that appellant was not entitled to any relief although he was a holder in due course of the note, is the further finding that plaintiffs were not negligent in executing the note and trust deed. C. I. T. Corp. v. Panac, 25 Cal.2d 547, 548–552, 154 P.2d 710, 160 A.L.R. 1285. Appellant contends plaintiffs were negligent as a matter of law. We cannot agree.

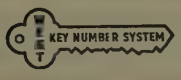
[7, 8] "Whether or not failure to read a document is such negligence as to preclude relief is ordinarily a question of fact, and this is particularly true where the failure to read is induced by reliance on the misrepresentation of the other party or of his agent [citations]." Wright v. Lowe, 140 Cal.App.2d 891, 897, 296 P.2d 34, 38. And in passing on that question the trier of fact may take into consideration "the age and mental and physical condition of the person signing". C. I. T. Corp. v. Panac, supra, 25 Cal.2d at page 559, 154 P.2d at page 718.

Plaintiffs had taken reasonable precautions to see that the contract truly reflected their agreement by asking Reverend Watkins to read and explain it. This he had done indicating it was satisfactory with the addition of a provision as to when the payments were to be made, to which Kritzer readily agreed and proceeded to add in handwriting, at which time Reverend Watkins left the Gardner home. He had not been told that a note and trust deed were involved. He was not present when these papers were presented to the Gardners for their signature. So the plaintiffs did not have anyone to consult as to the character of these documents. It is a reasonable inference that Mr. Gardner could neither read nor understand these papers in view of his limited education, business experience and physical condition. While Mrs. Gardner could read, she was wholly unfamiliar with the nature of a promissory note or trust deed. Kritzer pretended to be honest and she thought he was, so she took his word for it and signed the papers as requested. True, her food was burning, and she was anxious to attend her Bible class, but she nevertheless signed because she thought she could safely rely on Kritzer's representations. And this was not without reason. Reverend Watkins had

looked over the contract and had said the deal was fine with one addition, which Kritzer promptly proceeded to insert. Also, Kritzer had been most accommodating in agreeing to use paper rather than plaster in certain portions of the interior, and in agreeing to the amount, and time for making the monthly payments, to meet plaintiffs' convenience. This all naturally served to establish confidence. Nothing had been said about a note and trust deed. Reverend Watkins was no longer present. Under these circumstances it cannot be said, as a matter of law, that plaintiffs were negligent in signing the note and trust deed.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



149 Cal.App.2d 509

Merlin FREEMAN and Lillian Freeman, his wife, Plaintiffs, Appellants and Respondents,

v.

Theresa ARNKE and Robert Trost, as Executors of the Last Will and Testament of Theresia Trost, Deceased, Defendants, Respondents and Appellants.

Civ. 17397.

District Court of Appeal, First District, Division 2, California.

March 28, 1957.

Rehearing Denied April 26, 1957.

Action for a declaratory judgment construing a lease by which plaintiffs leased the upper floors of an apartment building and agreed to pay a minimum monthly amount of rental and additional rental of 40 per cent of the amount by which the gross monthly rentals exceeded a certain amount. From a judgment in the Superior Court, City and County of San Francisco, Theresa Meikle, J., both parties appealed. The District Court of Appeal, Brazil, J. pro tem., held that the lessees in computing the gross rental were not entitled to deduct charges for utilities and use of furniture furnished by the lessees; that lessees were not required to furnish specified monthly information requested by the lessor; that the lessees were entitled to have their assistant manager occupy an apartment rent free; and were not bound to fix an arbitrary rent therefor or to pay any percentage thereon to the lessor.

Affirmed, modified and reversed in accordance with the opinion. Attempted appeal from order made on defendants' motion for new trial amending the judgment dismissed.

1. Contracts ⇐170(1)

If a contract is definite, it is neither necessary nor proper to rely upon conduct of the parties for its construction.

2. Contracts ⇐169

In determining the intent of parties to the contract, the court may look to the circumstances surrounding the making of the agreement, including the object, nature, and subject matter of the writing.

3. Landlord and Tenant ⇐200.2

Where lessees leased an apartment building and agreed to pay as additional rent, an amount equal to 40 per cent of the amount by which the "gross monthly rentals" received by the lessee were in excess of a certain amount, lessees in computation of such amount were not entitled to exclude therefrom charges for any utilities paid or incurred by the lessees.

See publication Words and Phrases, for other judicial constructions and definitions of "Gross Monthly Rentals".

4. Landlord and Tenant ⇐200.2

Where plaintiffs leased an apartment building and were required to pay minimum monthly rental and additional rent of 40 per cent of the amount by which the gross monthly rentals received by lessee for the demised premises were in excess of a certain amount, in computing such amount,

lessees were not entitled to deduct from the gross rental a fair rental value for lessees' own furniture furnished for use of sub-lessees.

5. Landlord and Tenant ⇐200.2

Where plaintiffs leased an apartment building and were required to pay a minimum monthly rental and additional rental equal to 40 per cent of the amount by which gross monthly rentals received by lessees for demised premises were in excess of a certain amount, lessees were not required to furnish lessor monthly statements showing lessees' gross monthly rentals received by lessees or other information regarding tenants, where agreement required only a statement showing lessees' gross monthly rentals received by lessees during preceding month for demised premises.

6. Landlord and Tenant ⇐200.2

Where plaintiffs leased an apartment building under agreement requiring payment of a minimum monthly rental and additional rental equal to 40 per cent of the gross monthly rentals received in excess of a certain amount, lessees under agreement were entitled to have their manager occupy an apartment in premises rent free and were not bound to fix an arbitrary rent for apartment or to pay any percentage thereon to the lessor.

Joseph A. Garry, Chas. A. Sweigert, San Francisco, for defendants-appellants.

Hilary H. Crawford, Hilary H. Crawford, Jr., San Francisco, for plaintiffs-respondents.

BRAZIL, Justice pro tem.

In order that the situation may be more readily understandable, we begin with a statement of the facts of the case rather than referring first to what is being appealed.

By a written lease, dated August 18, 1954, plaintiffs leased the three upper floors of the Trost Apartments from defendant for eleven years and two months. By its terms, plaintiffs were required to pay a minimum monthly rental of $750; and agreed to pay additional rent in an amount equal to 40% "of the amount by which the gross monthly rentals received by the lessee for the herein demised premises are in excess of Fifteen Hundred ($1500.00) Dollars during each monthly period during the term." The lessees were also required to "deliver to the lessor on or before the 10th day of each succeeding month during the term of this lease, a statement showing the lessee's gross monthly rentals received by the lessee during the preceding month, for the demised premises."

The demised premises contain 42 apartments and a penthouse. Except for stoves, built-in refrigerators, linoleum, wall beds and stairs and hall carpets, the plaintiffs (lessees) are the owners of all household furniture, furniture and equipment in the leased premises, which as found by the trial court is worth in excess of $16,500. The plaintiffs had occupied the premises, as assignees under a similar previous lease, for about four years before the lease was signed on August 18, 1954. Very soon after this last date, the lessees started making separate charges to the tenants for rent and for utilities, and then reporting as gross rental only the rent, leaving out the amount collected for utilities. By April 1, 1955, the amount collected for utilities was omitted from statement of gross rent as to all of the apartments. The amount collected from the tenants for utilities was the exact amount charged to the lessees, so that plaintiffs made no profit by this arrangement. These charges amounted to $4 per apartment for electricity and water, and $2.43 per apartment for gas boiler, hot water and heat.

The lessees have the absolute right, as admitted by the lessor, to charge whatever rent they pleased as long as the minimum rent of $750 is paid. The lessor believed that rents in the apartment house had been reduced when the monthly statements showed a smaller return. When the lessor found out what was going on, she called the matter to lessees' attention, and thereafter, pursuant to demand, they paid under protest

40% of the amount they received as reimbursement from tenants for utility expenses. About the same time lessor demanded in writing that the lessees supply her with a monthly statement in much greater detail than had previously been given. Mrs. Theresia Trost, the original lessor died April 11, 1955; the named defendants taking over thereafter in their capacity as executors of her will. There were other disputes of a minor nature, which need not be related here at length, for the parties to this action have agreed on their complete settlement.

On or about November 1, 1950, Mrs. Trost leased the same apartment building to another, which lease was assigned to Mr. and Mrs. Freeman very soon thereafter, and they then took over possession and operation of the place. They have been there ever since. The furniture, which belongs to the Freemans, was acquired, along with the lease, from the original lessee. From time to time since then, the present lessees have replaced and added to the furniture. All of it, with additions and replacements, remains in the apartment house under chattel mortgage to the lessor as security for payment of the rent reserved. Apparently, there were no disagreements between the parties for the remaining four years of the lease and up until the time lessor found out in January 1955 that lessees were first reimbursing themselves for utility expense, claiming the same to be no part of gross rental.

The record discloses no difference in the terms of the two leases except in matters that can have no bearing in determining a correct result here. For example, the minimum rent was $700 per month, instead of $750; and the additional rent began when gross rentals reached a figure of $1,500 instead of $1,400 per month. The second lease refers to "demised" premises in the place of a simple reference to premises.

It is admitted by all parties that at least until the second lease was put into effect, for a period of about four years, the lessees paid to the lessors as gross rental an amount based on receipts by lessees from individual tenants without deduction for public utilities, or rent for their furniture. The lessees do not admit that this testimony is relevant. At all these times the lessees deducted, with lessor's understanding, whatever was paid the utility company for cooking gas. Originally, the latter amount was paid directly by each tenant through individual meters. This deduction continued, and was allowed when the meters were replaced by one central meter; which cooking gas theretofore had been charged to the lessees. In their monthly settlements, no distinction was made between utility bills for electricity and water, and "gas for boilers for hot water and heat"; neither being deducted. In so far as use of an apartment by an assistant manager without rent is concerned, the parties never agreed either expressly or impliedly on their respective rights and obligations under the lease.

The first time any deduction was made by the lessee was in October 1955 (not accounted for in statement given lessor November 8, 1954) for a few apartments. By April 1, 1955 they made deductions for all of the apartments, following the practice begun after the new lease was signed, of giving each tenant two receipts, one for rent and the other for expense of utilities. Prior to this time lessees gave their tenants but one receipt and made no reference to them of a separation of rent from utility expense.

As Mr. Freeman explains it in the transcript of testimony:

> "Q. I say, you considered for four years under the old lease and for several months under the new lease, until you started—A. I paid percentage on everything I collected.
>
> "Q. Yes. And you considered that they were the gross rentals? A. I never gave much thought until I found out I was losing several thousands a year and I couldn't figure out what was happening to me."

The seventh paragraph of the lease provides, "That the lessee will pay for all

water, heat, light and power supplied to said premises."

The lessees filed an action for declaratory relief to resolve their differences, interpret some provisions of the lease and to recover judgment for claimed overpayment.

The judgment, as modified on defendants' motion for new trial, and only in so far as either party is dissatisfied with its terms, provides (1) that lessees have a right to make an arrangement with each of their tenants to pay the rent for each apartment and the utility charge incurred for the apartment separately, not including however gas for boilers for hot water and heating; (2) the plaintiffs are entitled to have their assistant manager occupy an apartment in said premises rent free and are not thereby required to fix a rental therefor or to pay any percentage thereon to defendants; (3) plaintiffs are bound to furnish defendants monthly a statement of gross rentals which statement shall show numbers of the respective apartments, name of tenant, amount of rent received (excluding utilities as defined), date rent is paid, and date to which rent of apartment is paid; (4) plaintiffs are not entitled to deduct any amount from the gross rental of each apartment as rent for plaintiffs' furniture and (5) plaintiffs to recover $500 plus interest. Other than the provision allowing plaintiffs their costs, the judgment contains nine separately numbered orders. The foregoing numbers do not correspond with the numbers given in the judgment.

Although appellant lessor formally appealed from the entire judgment, the appeal, as indicated by the opening brief, is only

1. From "that portion of the judgment which permits lessees, in the computation of 40% of the gross rental received in excess of $1,500.00, to exclude therefrom charges for any utilities paid or incurred by lessees".

2. From "the conclusion of the Court in Par. 5 of the judgment to the effect that the Assistant Manager may occupy an apartment rent free."

3. From the judgment against them for $500 and in any event from the amount thereof; claiming that the order changing findings determines the amount to be only $320.

The appellant lessees, by their cross-appeal, have appealed from two of the provisions of the judgment, i. e.,

1. That which requires them to furnish lessor with a detailed monthly statement, and

2. That which determines they are not entitled to deduct $5 or any sum per month or at all from gross rentals for use of their furniture. They also attempt to appeal from all of the order which the trial court made modifying the judgment upon hearing of motion for new trial, except that they do not appeal from that part of the order which denied defendant's motion for new trial.

The lessees maintain that the parties agreed to pay according to a simple, unambiguous formula—"gross rental of the demised premises," that the lessor is entitled to what was bargained for and no more. The amount collected from each tenant for utilities, being the exact amount the utility company charges each apartment for use of its products, is not rent at all; and is not being paid for anything which lessor has provided. Likewise, a furnished apartment rents for more than an unfurnished one; lessor does not own the furniture—therefore, lessees should be able to deduct from rent collected that portion thereof which is actually being paid for the use of the lessees' property.

[1] "* * * If the contract is definite and certain it is neither necessary nor proper to rely upon the conduct of the parties for its construction. Rules of construction are resorted to for the purpose of ascertaining what the contract really was, and, if that matter is not in doubt, it is unnecessary to rely upon those considerations which obtain where the construction of the contract is in doubt." Hughes v. Pacific Wharf & Storage Co., 188 Cal. 210, 217, 205 P. 105, 108.

[2] "As an aid in discovering the all-important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement * * * including the object, nature and subject matter of the writing * * *. Also applicable here is the familiar rule that when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court * * *". Universal Sales v. California Press Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665, 671.

The judgment of a trial court refusing to enter judgment in an action for declaratory relief between lessor and lessee of a parking lot, evidently on the ground that the provision for payment of rental did not allow for controversy, was reversed. Lawrence Barker, Inc., v. Briggs, 39 Cal.2d 654, 248 P.2d 897. In that case the lease provides that the lessor was to receive over and above the minimum rental an amount by which 60% of the gross receipts exceeded the sum of $15,000 and was to be based on gross income "derived in any manner, directly or indirectly, from the use or occupancy of said demised premises." The case was sent back to the trial court to enter a judgment interpreting the rental provisions.

"The term 'gross income' does not carry definite and inflexible meaning under all circumstances. It should be defined in such a way as to ascertain the sense in which it was used by the parties when they drew the leases here involved, * * *." Payments from hotel guests for telephone services were not to be included in determining hotel rental under leases in which part of the rental was based on "gross income * * * from the operation of said premises" in view of prior course of conduct of the parties. Marlton Operating Corp. v. Local Textile Mills, Sup.1950, 137 N.Y.S.2d 438, 440.

[3] Whatever doubts courts or lawyers may have in the term "gross rental from the demised premises," it is safe to say, knowing the parties' conduct, that they never had any doubt of its meaning; and that they conducted their mutual affairs with that common knowledge. Incidentally, neither the parties' conduct nor the wording of the lease justifies any differentiation between "utility expenses", and "gas for boilers for hot water and heat". The presence or absence of the right to deduct these expense items is the same in both instances.

[4] What has been said about deducting expenses for gas and light applies with equal force to the right of lessee to deduct from gross rental a fair rental value for his own furniture. What at first may appear illogical, i. e., an owner cannot in this situation charge rent for his own property, assumes reason in light of the parties' conduct and the surrounding circumstances. The owner wants a percentage of the gross rentals for apartments which he places under the absolute control of the lessee under the lease. As the parties to this action agree, the lessee could leave every apartment vacant as long as he paid the minimum rent. By the same token he could improve each apartment by painting, putting in new carpets, giving better and more expensive service or by putting in as much of his own furniture as he wanted to. By so doing he could charge more rent, thus benefiting himself and the lessor. The lessor still is entitled to a percentage of everything received as rent even if a portion of that is attributable to the lessee's property or business ability. With full knowledge of the exact terms of the lease, the parties thereto construed the lease, on the first of each month for at least four years, when statements of gross rentals were given and received, to mean that if the lessee kept his own furniture in or put new furniture in the place, the lessor was still going to get a percentage of gross rental of the apartment as it was rented—a furnished apartment. Apparently, neither party believed any right existed in the lessee to make such a deduction, for it wasn't

mentioned until February 1955 at the earliest, when Mr. Freeman said he talked to lessor's agent Mr. Recht about it. The whole idea of charging for the furniture, probably arose from a facetious remark of Mr. Recht. Mr. Freeman testified that: "Along about the latter part of January or the first part of February, I was talking to Mr. Recht about separating the utilities and he said then that I might as well separate the furniture and deduct the cost of the janitor too. Now that would be the first time, to my recollection of discussing the separation of the furniture."

[5] There is nothing in the written lease, nor in the parties' conduct interpreting that lease, which justifies the portion of the judgment (Item 7 thereof) requiring the lessees to "furnish to the defendants monthly, on or before the 10th day of each month, a statement showing the plaintiffs' gross monthly rentals received by plaintiffs * * * that said statement shall show the numbers of the respective apartments, the name of the tenant thereof, amount of rent received * * * date that apartment rent is paid, date to which rent of apartment is paid". In this regard, all lessees are required to do is to "deliver to the lessor on or before the 10th day of October, 1954, and on or before the 10th day of each succeeding month during the term of this lease, a statement showing the lessee's gross monthly rentals received by the lessee during the preceding month for the demised premises.", as is clearly set forth in the lease.

[6] The trial court's determination in Item 5 of the judgment that "lessees are entitled to have their assistant manager occupy an apartment in said premises rent free and that the plaintiffs are not bound to fix an arbitrary rent, or rental value, on said apartment or to pay any percentage thereon to the defendants", appears reasonable. The evidence shows that the assistant manager receives less wages in money because he occupies an apartment rent free, but it also shows that the assistant manager is of greater value by reason of his living in the building rather than off the premises. Actually, no rent is received for that apartment as such, so there is nothing received for which the lessee can be charged. The lessor, as well as the lessees, benefit from this arrangement, for gross income of the place would undoubtedly be greater than if he lived off the premises and rented that same apartment to another.

Of the $500 judgment awarded to plaintiffs, $320 represented payment under protest on utilities and $180 was for rent paid under protest by plaintiffs for their own apartment, which, all agree, they need not have accounted for.

The judgment is affirmed except as portions thereof are modified or reversed: Those portions which give plaintiffs (lessees) the right to deduct from gross rental, and to issue separate receipts therefor, for actual utility bills for water, gas and electricity, and those portions which require plaintiffs (lessees) to deliver to defendants (lessors) a monthly statement on or before the 10th day of each month containing anything more than "gross monthly rentals received by the lessees during the preceding month for the demised premises" are hereby reversed. That part of the judgment awarding plaintiffs $500 from defendant is modified to provide for an award of $180.

The attempted appeal from the order made on defendants' motion for new trial amending the judgment is dismissed. The entire matter has been considered by the court on the appeal from final judgment.

The trial court is ordered to enter judgment in accordance with indications therefor, set out in this opinion.

Affirmed, modified and reversed in the particulars hereinabove mentioned.

Each party to this action shall pay his own costs on appeal.

KAUFMAN, P. J., and DOOLING, J., concur.

149 Cal.App.2d 520

Alice HALL, formerly known as Alice Mashburn and Alice White, Plaintiff and Respondent,

v.

NAPA COUNTY TITLE COMPANY, a corporation, Defendant and Appellant.

Civ. 8929.

District Court of Appeal, Third District, California.

March 28, 1957.

Hearing Denied May 22, 1957.

Action by ex-wife for moneys allegedly due from title company instituted after ex-wife had obtained judgment against ex-husband in the amount of $10,712.76 as her share of proceeds of sale of property which proceeds had been deposited with title company. The Superior Court, Napa County, Mervin C. Lernhart, J., entered judgment for ex-wife and title company appealed. The District Court of Appeal, Schottky, J., held where ex-wife and title company, which held proceeds of property of ex-husband and ex-wife, had defaulted, the title company had right to pay out the proceeds in accordance with default judgment decreeing ex-husband to be owner of major portion of proceeds, and title company was not liable to ex-wife who, without notice to title company, had obtained order vacating default judgment and had then recovered judgment awarding major portion of proceeds to her.

Judgment reversed with directions to enter judgment in favor of title company.

1. Judgment ⇐878(1)

Where ex-wife and title company, which held proceeds of property of ex-husband and ex-wife, had defaulted, the title company had right to pay out the proceeds in accordance with default judgment decreeing ex-husband to be owner of major portion of proceeds, and title company was not liable to ex-wife who, without notice to title company, had obtained order vacating default judgment and had then recovered judgment awarding major portion of proceeds to her.

2. Judgment ⇐538

As soon as a final judgment, in the sense that it is the court's disposition of the cause, is entered, judgment is operative at once unless a stay is obtained, and prevailing party may execute the judgment in any way open to him.

Royal E. Handlos, San Francisco, for appellant.

Francis H. Frisch, Napa, for respondent.

SCHOTTKY, Justice.

Defendant above named has appealed from the judgment in the instant action which action is the aftermath of an unusual sequence of events.

On October 15, 1948, Edward L. Mashburn and plaintiff above-named, who were formerly husband and wife, entered into an agreement in writing providing for the sale of their property. After the sale of said property Mr. York, who was then the attorney for both husband and wife, deposited the proceeds of the sale with the Napa County Title Company on April 27, 1950, with instructions which contained the following: "Pay on order of Alice N. Mashburn and Edward L. Mashburn." The parties were unable to agree on a division of the proceeds and Edward commenced an action against Alice and the title company for a partition and accounting.

Service was made upon Alice by publication. The order for publication of summons found that respondent herein was concealing herself to avoid service of summons. She was never personally served in that action. Her default and the default of the title company were entered, and a judgment was entered on June 22, 1951, decreeing Edward to be the owner of $7,548.38 out of the sum of $12,654.15 in possession of the title company. The balance was made payable to Alice subject to assignments previously made by her; and the Napa County Title Company was ordered by said judgment to pay over to said plaintiff and defendant the sums awarded to them by said judgment.

On June 26, 1951, the title company paid out all moneys remaining in its possession with the exception of $2,387.87 retained for payment to plaintiff above named, and on June 27, 1951, mailed a letter to her notifying her of the entry and terms of the judgment. Said letter was sent by her to Mr. York who thereupon contacted the title company and instructed them not to disburse any of the money deposited with the title company on the account of the Mashburns. However, the title company, in reliance upon the judgment entered by default, had already disbursed practically all of the funds with the exception of $2,387.87.

On August 20, 1951, defendant, Alice Mashburn, filed her motion to open her default and vacate the judgment and for an order permitting her to file her answer. The grounds of her motion were that said default judgment was entered on service of process by publication within one year, and that said judgment was taken against her through her mistake, inadvertence, surprise and excusable neglect. Notice of motion was served on Edward L. Mashburn, plaintiff in said action, but no notice was given to the title company which was also a defendant in said action.

An answer and cross-complaint was filed by plaintiff with said motion but said answer and cross-complaint was not served on the title company nor was the title company joined as a defendant in the cross-complaint.

On September 24, 1951, the court made and entered its order vacating and setting aside the default and the judgment in its entirety.

A new trial was had between Edward and Alice upon plaintiff's complaint, defendant Alice's answer and cross-complaint, and plaintiff's answer to the cross-complaint. Napa County Title Company did not appear in the action.

On June 26, 1953, judgment was entered and Alice was awarded judgment in the amount of $10,712.76 and Edward was awarded $1,941.38, being the total of the amount which the parties originally deposited with the Napa County Title Company.

Thereafter, on March 8, 1954, the instant action was filed by plaintiff against defendant Napa Title Company, and following a trial judgment was entered in favor of plaintiff and against defendant in the sum of $6,587.99. A motion for a new trial was denied and defendant has appealed from the judgment.

Appellant Napa Title Company contends most earnestly that the motion of respondent Alice Hall to set aside the first judgment on the former action did not affect that judgment so far as appellant was concerned. Appellant argues that in view of the fact that it was a party defendant to said action and was ordered by said judgment to make certain payments, the court had no power or jurisdiction to vacate said judgment as to appellant without notice of said motion having been given to appellant. We deem it unnecessary to discuss this contention as we believe the judgment must be reversed upon other grounds.

[1, 2] We believe that in the original action appellant title company had the right to pay out the money in accordance with the judgment, without waiting beyond the time that the judgment was entered. As soon as a final judgment, in the sense that it is the court's disposition of the cause, is entered, the judgment is operative at once unless a stay is obtained. The prevailing party may execute the judgment in any way open to him. In this case, the title company was a party to the action. True, it defaulted after service of process upon it, but permitting the case to go against it by default simply meant that it had considered the relief asked in the complaint and was satisfied that it had nothing to combat and could accept the judgment of the court and abide by it so long as it was within the embrace of the relief asked against it. As soon as the judgment had been entered, Edward L. Mashburn was entitled to have a writ of execution issued upon it, and had that been done, the title company would have had no reason to refuse to deliver to the officer the amount in its hands which the judgment de-

clared belonged to Edward. Such being the case, there was no reason to require of Edward that he issue execution, or that appellant in anywise resist honoring the judgment in order to give to Alice Hall opportunity to attack it. These considerations are not altered by the fact that Alice, having, as the court found, wilfully concealed herself to avoid issuance of summons in this very case, had elected to stay out of the court until after the judgment had been rendered. She later came in and succeeded in setting the judgment aside, but that gave her no right to claim that the title company was not justified in obeying the judgment which had not been stayed. Appellant was a party to the suit; the judgment ran directly against it, ordering it to turn over to Edward that portion of the funds in its hands which the court had determined to belong to him.

In Brown v. Howard, 86 Cal.App. 532, 261 P. 732, 733, the following occurred. A judgment was rendered against several defendants, and plaintiff caused levy to be made on the property of one. Thereafter, the judgment was stipulated to be vacated with the result that the defendant whose property was seized was entitled to be reimbursed for all sums levied and taken from him. Before the judgment was vacated, however, an attorney at law, who sued out the execution and for his client received the proceeds, had delivered the proceeds to his client save $100, which he retained with consent of his client as payment for his services. The defendant entitled to restitution, however, sought to compel the attorney to pay the entire amount he had received. The court said:

"Presumptively that judgment was regular and valid on its face, and the execution was likewise valid. Consequently the money collected under the said execution came into the hands of defendant Harry Lyons [attorney] lawfully. It was not until the judgment in said action had been set aside that plaintiff became entitled to the return of said money and that defendants could be said to hold said money for the use and benefit of plaintiff. [Citation.] Consequently the liability of defendant Lyons cannot exceed the sum of $100 which was remaining in his hands at the time said judgment was set aside. [Citation.]"

In Wilson v. Coffey, 116 Cal.App. 635, 3 P.2d 62, the following situation obtained. Money had been escrowed and then deposited in court by the escrowee who was discharged from liability. A judgment was rendered, and the attorney of the successful litigant withdrew the money and passed it to his client before any stay of the judgment was ordered. The court said, 116 Cal. App. at page 639, 3 P.2d at page 64:

"The third point made by the plaintiff is that the attorneys for the defendant should have been ordered by the lower court to see that the deposit was returned. In support of that point he contends that the deposit having been made in court upon the stipulation and notice to both parties, the deposit should have been withdrawn only in the same manner. That contention is not sound. It was deposited subject to the order of the court. The judgment in the pending action was the 'order' of the court. It was not irregular in form. * * * The first judgment was entered April 8, 1925. No stay of execution was entered. It took effect as of that date. * * * The plaintiff's trouble arose by reason of his omission to have a stay of execution ordered by the trial judge. * * * The record discloses no irregularity regarding the payment of the fund.

"* * * As early as September 28, 1925, the trial court had given the plaintiff a judgment for those moneys. No stay was asked or granted. At any time after that date the plaintiff could have caused a writ of execution to issue. He did not do so apparently, but alleged in his affidavit that the defendant is insolvent. Under these circumstances we cannot say that the trial court committed an error in refusing to order a writ of restitution to issue. We find no error in the record."

In view of the authorities hereinbefore set forth, and upon the record in the instant case, we believe that the judgment against appellant title company cannot be sustained and that the court should have rendered judgment in favor of appellant. Our conclusion in this regard makes it unnecessary to discuss the remaining contentions urged in the brief.

The judgment is reversed, with directions to enter judgment in favor of appellant.

VAN DYKE, P. J., and PEEK, J., concur.



149 Cal.App.2d 773

Joan BOWMAN, Plaintiff and Respondent,

v.

Dale BOWMAN, Defendant and Appellant.

Civ. 17243.

District Court of Appeal, First District, Division 1, California.

April 4, 1957.

Hearing Denied May 29, 1957.

Divorce proceeding by wife on ground of extreme cruelty. The Superior Court, Alameda County, S. Victor Wagler, J., entered interlocutory divorce decree after denying motion for new trial, and husband appealed. The District Court of Appeal, Bray, J., held, inter alia, that trial court's allowance of $75 per month for support of parties' two twelve year old boys did not constitute an abuse of trial court's discretion, in view of defendant's take-home pay of approximately $7,378 per year.

Judgment affirmed.

1. Husband and Wife ⇐14(3)

Where deed to residence of husband and wife had been taken by them in joint tenancy, rebuttable presumption was that the property was in fact held in joint tenancy, and spouse claiming it to be community property had burden of overcoming such rebuttable presumption.

2. Husband and Wife ⇐14(3)

Fact that residence of husband and wife had been purchased with community funds was not, standing alone, sufficient to rebut presumption that the property was held in joint tenancy in accordance with joint tenancy deed under which husband and wife received title.

3. Evidence ⇐426, 461(4)

In divorce action, parol evidence of oral agreement by or of intention of husband and wife to hold as community property their residence which they purchased under joint tenancy deed was admissible.

4. Husband and Wife ⇐14(3)

In divorce action, understanding, which exists on part of one spouse, but which is uncommunicated to other, to hold as community property dwelling purchased by them under joint tenancy deed cannot rebut presumption that the property was in fact held in joint tenancy by them.

5. Evidence ⇐461(4)

In divorce proceeding, understanding, if any, between parties to hold as community property, in spite of form of deed, dwelling acquired by parties under joint tenancy deed could be shown by parties' conduct and declarations.

6. Husband and Wife ⇐14(3), 264

In divorce proceeding, evidence was sufficient to overcome presumption that dwelling purchased by parties under joint tenancy deed was in fact held in joint tenancy and was sufficient to establish that both parties considered the property as community property without intending it to have any attributes of joint tenancy except for purpose of avoiding probate upon death of one spouse.

7. Divorce ⇐296, 312.6(4)

In divorce proceeding, allowance for maintenance of parties' minor children rests in trial judge's sound discretion, and his award will not be set aside on appeal in absence of abuse of such discretion.

8. Divorce ⇐296

In divorce action, trial court's allowance of $75 per month for support of parties' two twelve year old boys did not constitute an abuse of trial court's discretion, in view of defendant's take-home pay of approximately $7,378 per year.

Cornish & Cornish, Berkeley, for appellant.

Harris, Darter & Older, Oakland, Cyril Viadro, San Francisco, for respondent.

BRAY, Justice.

This appeal by defendant from portions of an interlocutory decree of divorce, after denial of a motion for new trial, raises two questions: (1) Is the property of the parties community or joint tenancy? (2) The propriety of the order of $75 per month support for each of two of the three children.

Record.

After 13 years of marriage plaintiff sued defendant for divorce on the grounds of extreme cruelty, asking for custody of the three children of the parties and a division of the community property, which allegedly included the family home. Defendant cross-complained on similar grounds asking for the custody of the children and alleged the home to be in joint tenancy. The court granted plaintiff the divorce, found the home to be community property, awarded it and the household furnishings to plaintiff, granted her custody of the children, subject to defendant's right of visitation, ordered defendant to pay plaintiff for the support of two of the children, $75 each per month, $60 per month for the support of the third child, and granted plaintiff $1 per month as alimony. Defendant was awarded a 1951 Plymouth, a life insurance policy, a trailer and money in a credit union. Defendant appeals from the portion of the decree finding the home to be community property and awarding it to plaintiff, and from the $75 allowance to the two children.

1. Joint Tenancy or Community Property.

[1–5] The deed to the property was taken in joint tenancy. This fact raises a rebuttable presumption that the property was in fact held in joint tenancy, and places on the party claiming it to be community property the burden of overcoming the presumption. Schindler v. Schindler, 1954, 126 Cal.App.2d 597, 272 P.2d 566; Jones v. Jones, 1955, 135 Cal.App.2d 52, 286 P.2d 908. The fact that the property was purchased with community funds, standing alone, is insufficient to rebut the presumption created by the form of the deed. Gudelj v. Gudelj, 1953, 41 Cal.2d 202, 259 P.2d 656. Parol evidence of an oral agreement by, or intention of, the parties to hold it as community property is admissible. Tomaier v. Tomaier, 1944, 23 Cal.2d 754, 146 P.2d 905. While the presumption cannot be rebutted by an understanding of one party uncommunicated to the other, Gudelj v. Gudelj, supra, an understanding to hold it as community property, in spite of the form of the deed, may be shown by the conduct and declarations of the parties. Thomasset v. Thomasset, 1953, 122 Cal.App.2d 116, 264 P.2d 626; Socol v. King, 1950, 36 Cal.2d 342, 223 P.2d 627. Here there was admittedly no express agreement that the property was to be held other than as shown by the deed. Defendant claims there was no evidence of any mutual understanding or intention of the parties to hold the property as community property and that, therefore, the presumption was not overcome.

Our task, then, is to determine whether there is substantial evidence of such understanding or intention. The home was purchased shortly after marriage, with moneys loaned by plaintiff's parents to make the down payment. This was repaid and the other payments on the property, from defendant's salary. Plaintiff did not remember discussing the purchase with her husband and the realtor. She did not know how the deed was made out, although she signed some papers at the

realtor's office at the time of purchase. She and defendant never discussed the deed nor how it was to be made out. She thought it was community property as she thought that when persons were married, everything was community property. Defendant testified that at the time of the purchase he, plaintiff and a realtor had a conversation as to how the property was to be deeded. Plaintiff's parents advised that it be deeded in joint tenancy. The realtor agreed on the theory that should anything happen to one spouse, the other spouse would automatically get the home without probate. It was always defendant's understanding that it was held in joint tenancy and not as community property. In explaining his idea of the difference between the two, he stated that there would be no difference except that if one should die, the other would automatically obtain the property without probate, but in "ordinary everyday living there would be no difference * * *" The property was bought with the intent that it should be a home for him, his wife and children. He was asked, "And that was your intention, it was to be community property and the home for them all, didn't you?" He answered "It was to be ours." Again he stated: "It is joint tenancy. It belongs to us." The fact that the original down payment came from the wife's parents and that community funds paid for the property, although by no means conclusive on the question, is of some significance. In his questionnaire defendant listed the home under "community property" although he added "joint tenancy."

[6] While the court could have found to the contrary, there is substantial evidence to overcome the presumption and to show that both parties considered the property as community property and never intended it to have any of the attributes of joint tenancy except to avoid probate. Defendant considered the property "ours," belonging "to us," not separate. The only reason given for taking the deed in joint tenancy form was to dispense with probate. Defendant never mentioned the right of survivorship. Even today, he appears not to know the characteristics of a joint tenancy. The intent to avoid probate is not inconsistent with the intent to have the property as community property. As said in Jenkins v. Jenkins, 147 Cal.App.2d 527, 305 P.2d 289, where the circumstances were almost identical with those here, the evidence was clearly sufficient to justify a finding that the sole purpose the parties had in following the realtor's advice that the property should be put in joint tenancy was as a matter of convenience to avoid probate. A somewhat similar situation occurred in Mademann v. Sexauer, 117 Cal. App.2d 400, 256 P.2d 34, where the property was purchased with the husband's money and the deed was taken in joint tenancy primarily because the parties believed thereby they would avoid probate and where it was contended that the presumption was not overcome, was held to be community property. Applicable here is the following, 117 Cal.App.2d at page 403, 256 P.2d at page 36:

> "In this connection it may be observed that the intricacies of the law and the subtle distinctions in respect to real estate titles, community property in particular, are not generally understood by the Layman. Certainly the real nature of a particular transaction rather than the verbal form in which it is cast, must always be the decisive factor in cases of this nature.
>
> "The record herein discloses substantial evidence that Mr. and Mrs. Mademann intended the real estate, whatever its source, to be community property, and that the joint tenancy deed was executed because of certain advice given by a person not a lawyer, and under the belief that this procedure would simplify the steps necessary to be taken upon the death of one spouse."

Our case is distinguishable from Schindler v. Schindler, supra, 126 Cal.App.2d 597, 272 P.2d 566, in that there while the wife

thought the property deeded in joint tenancy was community property, there was no evidence that the husband ever considered it anything but joint tenancy. The wife was relying solely on her own intention. In our case the evidence supports the conclusion that the husband, as well as the wife, considered it, in effect, community property.

2. Support.

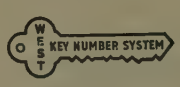
A temporary order of support (apparently on stipulation) was issued requiring defendant to pay $60 per month for each child. He contends that the court abused its discretion in awarding in the interlocutory decree any sums in excess of that amount. The situation at the trial on this question was unusual. Neither side went into the question of the needs of the children. Defendant conceded that $60 per month is a reasonable sum for the support of each. Plaintiff was merely asked how much she was asking for the support of the children. She replied "$75.00 each." Plaintiff offered an exhibit showing that defendant's earnings for the year were $8,817.28, take-home pay approximately $7,378. She also offered the questionnaire previously filed by defendant in which he stated that the necessary monthly expenses of the three children were $180, and that $60 per month would be a fair and reasonable sum for him to pay for each child. Defendant testified when asked what he thought would be adequate for the support of the children: "Taking into consideration the fact that there is no rent to pay or taxes on the home, in other words, the home was provided, I feel $60.00 a month, I believe, is very adequate." He further testified that he would be willing to take care of the taxes and insurance on the home. (Under the interlocutory decree he is not required to do so.)

[7,8] It hardly needs the citation of authority that the amount of the allowance for the maintenance of the minor children of a divorced couple rests in the sound discretion of the trial judge and in the absence of an abuse thereof such an award will not be set aside on appeal. Karlslyst v. Frazier, 213 Cal. 377, 381, 2 P.2d 362; Espinoza v. Espinoza, 85 Cal.App.2d 155, 192 P.2d 33. We cannot say that the trial court abused its discretion here in requiring defendant to pay $75 per month each for the support of 12-year old boys in view of defendant's income.

Judgment affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.



149 Cal.App.2d 788

Regina DIAMOND, Plaintiff and Respondent,

v.

Jack H. DIAMOND, Defendant and Appellant.

Civ. 21979, 22015.

District Court of Appeal, Second District, Division 3, California.

April 4, 1957.

Suit by wife for divorce on ground of cruelty, wherein husband cross-complained for divorce on same ground. The Superior Court, Los Angeles County, Clarence M. Hanson, J., granted each party a divorce, and from portion of judgment dividing the community property and from order making allowance for wife's counsel fees and court costs on appeal by husband from judgment. husband appealed. The District Court of Appeal, Shinn, P. J., held that since both parties were found guilty of cruelty and each was granted a divorce, equal division of the community property was mandatory.

Judgment insofar as it divided community property reversed for retrial of such issue and matter of support for either party, and order awarding counsel fees and costs on appeal affirmed.

1. Divorce ⇐231, 252

Where both husband and wife were found guilty of cruelty and each was granted a divorce, equal division of community property was mandatory, but alimony also could be awarded to either party.

2. Divorce ⇐287

Where judgment granting both husband and wife a divorce made no allowance for support of wife but awarded more than 80 per cent of community property to her and judgment in so far as it divided community property was reversed for retrial of such issue, trial court should also reconsider question of allowance for support of either party.

3. Divorce ⇐188, 222, 315

During period in which appeal could be taken from interlocutory decree dissolving marriage, relation of husband and wife still existed and trial court had discretion under statute to make an allowance for wife's counsel fees and costs on appeal by husband from portion of judgment dividing community property, though judgment made no allowance for support of wife and directed that neither party should recover costs of suit from the other. West's Ann.Civ.Code, § 137.3.

4. Divorce ⇐226, 286

On motion by wife for an allowance for attorney's fees and costs on appeal by husband from portion of divorce judgment dividing the community property, evidence supported findings as to wife's need for and husband's ability to pay such allowance, and reviewing court would not reweigh the evidence. West's Ann.Civ.Code, § 137.3.

5. Divorce ⇐227(1), 288

Allowances of $200 and $250 to wife for attorney's fees and court costs, respectively, on appeal by husband from portion of divorce judgment dividing community property were not unreasonable in amount. West's Ann.Civ.Code, § 137.3.

Alexander H. Schullman and Jack R. Berger, Los Angeles, for appellant.

Ralph Rosenstock, Los Angeles, for respondent.

SHINN, Presiding Justice.

Defendant Jack H. Diamond prosecutes two appeals, one from that part of a judgment in an action for divorce which divides the community property of the parties and the other from an order in the same action awarding plaintiff $200 on account of attorney's fees and $250 on account of court costs on the appeal first mentioned. Plaintiff sued for divorce on the ground of cruelty. Defendant cross-complained for divorce on the same ground. The court found each of the parties to have been guilty of cruelty and awarded each of them a divorce. The judgment also awarded plaintiff a share of the community property of a value largely in excess of one-half thereof. The point on the appeal from parts of the judgment is that since each of the parties was awarded a divorce the court was required to make an equal division of the community property.

The pleadings admitted and the court found that at the time of trial the parties owned community property consisting of real property, money in escrow, the proceeds of sale of real property, a second trust deed, two automobiles, household furniture and Israeli bonds in the sum of $300, although it was found that of the household furniture some of it was the separate property of the plaintiff.

The court found there was a balance of $2,700 unpaid on the trust deed and $2,990.19 held in an escrow as proceeds of the sale of real property. The court made no findings as to the value of the other community property. By its decree the court divided the community property. Appellant in his brief does not state the total value of the property awarded to respondent except to say that the court awarded her "virtually all of the community property." Respondent in her brief says she received in value $8,365 and that appellant received $2,006.77. In his reply brief appellant does not question these figures. The decree awarded the wife something more

than 80% of the community property. She was not awarded any support or costs of trial.

[1] In De Burgh v. De Burgh, 39 Cal. 2d 858, 874, 250 P.2d 598, the Supreme Court held that when a divorce is granted to both parties the community property must be equally divided. In view of this decision we must hold that the trial court was required to make an equal division of the community property.

[2] The court also declared in De Burgh that in the same situation alimony may be awarded to either party. We think the matter of the division of community property and the matter of support were probably considered by the court as an entire problem and that the award of an excessive amount of the community property may have influenced the court to deny any allowance for the support of plaintiff. It would seem to us that since an equal division of the community property is mandatory the court should reconsider the matter of support. To be sure, plaintiff has not appealed from the denial of support, but she was not displeased with the judgment and had no reason to be. We do not suggest that support money should be awarded. That is not our problem. We merely hold that it is one for which the trial court must find a solution in the light of recent innovations in the law.

[3] After defendant gave notice of appeal from parts of the judgment, plaintiff made a motion for an order awarding her attorney's fees and costs on appeal. Upon the hearing of the motion at which the parties introduced evidence, it was found that plaintiff had no savings with which to pay counsel fees or costs on appeal and the defendant had ability to pay a reasonable amount for the same. The court ordered defendant to pay $200 attorney's fees and $250 as costs of plaintiff on defendant's appeal from parts of the judgment. Defendant attacks this order upon the ground that the interlocutory decree finally relieved him from any obligation of support and that the court was thereafter without authority to order him to pay costs and attorney's fees on the appeal. There would be merit in this contention if the interlocutory decree had been final with respect to the dissolution of the marriage. McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257. But the time had not expired within which an appeal could be taken from the part of the decree that dissolved the marriage and the action was still pending. The relation of husband and wife still existed and it was within the discretion of the court to make an allowance for counsel fees and costs under section 137.3 of the Civil Code. The fact that the judgment directed that neither party should recover costs of suit from the other was no barrier to the making of the order in question. By a preliminary order defendant had been required to pay $175 as plaintiff's attorney's fees prior to trial, the court reserving the question of further fees to the time of trial. No further allowance was made for past services, but the order for the payment of fees and costs on appeal was a different matter as to which the court's power to make an allowance was not affected in any way by the earlier proceedings.

[4, 5] The further argument is advanced that the evidence was insufficient to show plaintiff's need for an allowance for attorney's fees and costs or defendant's ability to pay the same. There was evidence to support the court's findings and it is not our function to reweigh the evidence. The amounts allowed were not unreasonable and the order was well within the discretion of the court.

The judgment is reversed insofar as it makes a division of the community property for a retrial of that issue and the matter of support for either party. The order awarding plaintiff counsel fees and costs on appeal is affirmed. Costs of appeal to respondent; none to appellant.

We concur.

PARKER WOOD and VALLÉE, JJ., concur.

149 Cal.App.2d 655

Lee R. SMITH, Plaintiff and Appellant,

v.

William MAKAROFF, Defendant and Respondent.

Civ. 9030.

District Court of Appeal, Third District, California.

April 1, 1957.

Hearing Denied May 29, 1957.

Action against physician for alleged malpractice in failing to diagnose plaintiff's tuberculosis, wherein plaintiff did not contend that physician's negligence had caused the disease. The Superior Court, Sonoma County, Donald Geary, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Warne, J. pro tem., held that instruction that jury was to find for defendant, unless it found that tuberculosis was proximately caused by his negligence was prejudicially erroneous in that it had no support either in pleadings or evidence, and its error was not cured by fact that jury was elsewhere fully and correctly instructed that plaintiff could recover if defendant's negligence had been the proximate cause of aggravating previously existing disability.

Judgment reversed.

1. Appeal and Error ⇐1066
Trial ⇐251(8), 252(8), 296(3)

In action against physician for alleged malpractice in failing to diagnose plaintiff's tuberculosis, wherein plaintiff did not contend that physician's negligence had caused the disease, instruction that jury was to find for physician unless it found that tuberculosis was proximately caused by physician's negligence was prejudicially erroneous in that it had no support either in pleadings or evidence, and its error was not cured by fact that jury was elsewhere correctly instructed that plaintiff could recover if physician's negligence had been the proximate cause of aggravating previously existing disability.

2. Trial ⇐243

Giving of conflicting instructions on material point is error.

Dreyfus & McTernan, San Francisco, for appellant.

Lamb & Hoge, San Francisco, for respondent.

WARNE, Justice pro tem.

Plaintiff brought this action against the defendant, Dr. William Makaroff, to recover damages for alleged malpractice. Plaintiff alleges in his complaint that by reason of negligent examination, diagnosis and treatment, defendant failed to discover that plaintiff was suffering from active tuberculosis, and that due to such negligence appellant failed to get, and was deprived of, timely treatment for said condition, and as the proximate result thereof, the disease was aggravated, the period of the treatment and cure was extended and the resultant permanent disability was increased.

Appellant had been a miner by occupation for some years. He had been employed as such commencing September, 1952, by the Sonoma Quicksilver Mines, Inc., which operated an underground quicksilver mine near Guerneville in Sonoma County. In October, 1952, appellant submitted himself to an X-ray examination of his chest by the Sonoma County Tuberculosis and Health Association. This X-ray showed no evidence of active tuberculosis on the date of examination.

Dr. Makaroff was a physician and surgeon in general practice at Guerneville. Commencing in 1942 or 1943 it was the custom of the Sonoma Quicksilver Mines, Inc., on hiring a miner, to send him to Dr. Makaroff for a chest X-ray and limited examination, the purpose being to have a record available for the protection of the mining company in the event disputes subsequently arose concerning the physical condition of the miner at the time he began working for the company. Pursuant

to this custom, the company sent plaintiff to Dr. Makaroff on March 7, 1953. Dr. Makaroff did not examine plaintiff, but a chest X-ray was taken by the office nurse. Plaintiff testified that a few days later the mine foreman orally reported to him that the X-ray was negative. The medical experts agreed that this X-ray did not show any indication that plaintiff had tuberculosis at that time.

Plaintiff testified that, beginning in January or February of 1953, he had developed a cough and had been feeling below par, and as time went on "began to lose weight, and ran a temperature" and had a "general run-down, tired feeling"; that these symptoms gradually increased, and although he continued in his employment as an underground miner, in July, 1953, he sought medical attention. Thus, on July 24, 1953, he again went to the defendant's office. Plaintiff related his symptoms to the defendant, including those mentioned above and in addition told defendant that he had a pain in his chest. He said that respondent examined him but took no X-ray of his chest nor made any laboratory tests; that defendant told him that he had sinus trouble and bronchitis which caused a nasal drip to his throat and inflammation in his bronchial tubes.

Plaintiff further testified that defendant administered a shot of penicillin and made an appointment for him to return on July 29, 1953. Defendant did not suggest that he lay off his job. He continued to work until July 28, 1953, when he gave up, because he was unable to continue. Plaintiff returned to defendant's office on the 29th when an additional shot of penicillin was administered and on subsequent visits until August 10, 1953, when nose drops, cough syrup and more penicillin shots were prescribed.

An August 10th plaintiff's weight was almost 30 pounds below normal and he was worried about his chest. At plaintiff's request defendant personally took an X-ray of plaintiff's chest and the office nurse took an electrocardiogram reading of his heart. Two days later, on August 12, 1953, plaintiff saw defendant again by appointment and was informed that he had examined the film of August 10th and that there was nothing abnormal in the chest. Defendant requested that plaintiff return on Saturday, August 15, 1953, and on that date he advised plaintiff to return to work on the following Monday, that is, on August 17, 1953.

After working on August 17th and a short time on the 18th he was too tired to continue. He then left work and consulted Dr. Harding Clegg of Santa Rosa, who, upon fluoroscopic and X-ray examination of plaintiff's chest and laboratory test, positively diagnosed a condition of active pulmonary tuberculosis. This physician recommended extensive hospitalization. Plaintiff was hospitalized from August 28, 1953 to January 19, 1955 and could not return to work until July, 1955.

Plaintiff further testified that after his visit to Dr. Clegg, he visited defendant in his office on August 21, 1953, and that during this visit he told defendant the results of his visit to Dr. Clegg; that defendant, at his request, then examined in his presence the chest films taken in defendant's office in March, 1953 and on August 10, 1953, and as to the August film defendant said it showed "quite a bit" of tuberculosis and that it was "too bad that nurse didn't catch it; I am going to have to speak to her because she can't read a wet X-ray." As to the chest film taken in defendant's office in March, he said: "Yes, there it is; it is just getting started; it is too bad we didn't catch it then; I will have to talk to the nurse; * * * very hard for anybody to read a wet X-ray."

As noted, the foregoing statement of the case is based upon plaintiff's evidence, in the main. It has been adopted to show plaintiff's theory of the case and also the theory upon which the case was tried. A careful reading of the record in the case discloses that at no time during the trial did plaintiff contend, nor did he allege in his complaint that the defendant in any manner caused plaintiff's tuberculosis.

Plaintiff contends that the reliance by the respondent upon the nurse's reading and interpretation of the X-ray films constituted negligence; that this negligence was the proximate cause of the failure to diagnose tuberculosis in March, 1953 and July, 1953, and thus the proximate cause of aggravating the tubercular condition suffered by plaintiff.

Without detailing the evidence adduced by the defendant, it is sufficient to state that his testimony was in conflict with plaintiff's in many material respects, and that other witnesses called by the defendant gave testimony in conflict with plaintiff's case.

The jury returned a verdict in favor of defendant and judgment was entered accordingly. Plaintiff appeals from the judgment.

The errors claimed on this appeal are that one instruction was erroneous and that there was an "over emphasis" in other instructions relating to the burden of proof.

The court instructed the jury at the request of the defendant as follows:

> "Unless you find from a preponderance of the evidence that the tuberculosis from which the plaintiff, Lee R. Smith, is alleged to have suffered or from which he is now suffering was proximately caused by the negligence of the defendant, William Makaroff, if any, the plaintiff cannot recover and your verdict must be in favor of defendant."

[1, 2] Since this instruction found no support either in the pleadings or the evidence, the giving of it constituted prejudicial error. Miller v. Peters, 37 Cal.2d 89, 95, 230 P.2d 803; Finley v. City and County of San Francisco, 115 Cal.App.2d 116, 251 P.2d 687; Soda v. Marriott, 118 Cal.App. 635, 5 P.2d 675; Gladstone v. Matson Nav. Co., 124 Cal.App.2d 493, 269 P.2d 37. The fact that the jury were fully and correctly instructed elsewhere and also specifically that, "if negligence on defendant's part has been a proximate cause of aggravating a previously existing disability suffered by the plaintiff, that effect should be considered * * * in fixing damages" if their decision on the question of liability required them to fix damages, in effect was only to create a conflict in the instructions. The giving of conflicting instructions on a material point is error. Finley v. City and County of San Francisco, supra, and cases cited therein. Defendant attempts to justify the giving of the erroneous instruction on the ground that it is simply "a tie-in with the allegations of the complaint". The instruction says that unless the jury found that the tuberculosis was proximately caused by the negligence of the defendant, the verdict must be in favor of defendant. Its meaning is clear and unambiguous and, obviously, does not "tie-in" with the allegations of the complaint. The complaint alleged aggravation of plaintiff's condition, not that the defendant caused plaintiff's tuberculosis. The jury were permitted to bring in a verdict based upon a matter not within the issues framed in the complaint or tried by the parties, and we feel the plaintiff necessarily suffered prejudice. Miller v. Peters, supra; Davenport v. Stratton, 24 Cal.2d 232, 254, 149 P.2d 4; Hedding v. Pearson, 76 Cal.App.2d 481, 173 P.2d 382; Aurenz v. Los Angeles Ry. Corp., 19 Cal.App.2d 401, 65 P.2d 910; Scandalis v. Jenny, 132 Cal.App. 307, 22 P.2d 545.

Since the judgment must be reversed for the reasons above stated, we do not consider it necessary to discuss plaintiff's contention that there was an "over emphasis" in other instructions relating to the burden of proof.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

149 Cal.App.2d 646

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Milo BARRY, Defendant and Appellant.

Cr. 5811.

District Court of Appeal, Second District, Division 1, California.

April 1, 1957.

Action wherein the Superior Court of Los Angeles County, H. Burton Noble, J., rendered judgment and an appeal was taken. On motion to strike appellant's brief, the District Court of Appeal held that even though the brief contained irrelevant and immaterial references to matters which were not before trial court and disrespectful references to judges other than trial judge, and though it was devoid of topical index and in many instances made no reference as to record, in view of grounds set forth for reversal, court would order brief stricken with leave to file new brief within 30 days.

Order in accordance with opinion.

Appeal and Error ⇐767

Where appellant's opening brief, in violation of rules on appeal, contained irrelevant and immaterial references to matters which were not before trial court, as well as disrespectful references to judges other than the trial judge, was devoid of topical index, and in many instances failed to make references to record, on respondent's motion to strike brief, court would, in view of grounds relied upon for reversal, grant motion with leave to file new brief within 30 days. West's Ann.Rules on Appeal, rules 13, 15(a), 18, and subd. 2.

D. Wendell Reid, Encino, for appellant.

Edmund G. Brown, Atty. Gen., Hershel T. Elkins, Deputy Atty. Gen., for respondent.

PER CURIAM.

Respondent moves that appellant's opening brief be stricken under Rule 18 of Rules on Appeal, in that said brief violates certain provisions of said rules, to wit: Rule 13, and Rule 15(a).

Rule 13 provides:

"* * * The opening brief shall contain a statement of the case, * * *. The statement shall be accurate and confined to matters in the record on appeal."

It is true that appellant's opening brief does contain much irrelevant and immaterial references to matters which were not before the trial court, as well as disrespectful references to judges other than the trial judge; and is devoid of a topical index, and in many instances no reference is made to the record.

However, in view of the points set forth in the brief upon which appellant relies for a reversal we are disposed to order the brief stricken from the files with leave to file a new brief, in accordance with the Rules on Appeal, within 30 days from and after the entry of this order, Rules on Appeal, Rule 18, subd. 2.

It is so ordered.



149 Cal.App.2d 827

Grace M. KENDALL, Plaintiff, Appellant and Cross-Respondent,

v.

R. E. SOUTHWARD and Gladys H. Southward, Defendants, Respondents and Cross-Appellants.

Civ. 9076.

District Court of Appeal, Third District, California.

April 5, 1957.

Action by lessor to have lease declared to be void. The Superior Court, Mariposa County, Thomas Coakley, J., held that lease was valid for limited period, and both parties appealed. The District Court of Ap-

peal, Warne, J. pro tem., held that under statute providing that no lease or grant of land for agricultural purposes for a longer period than fifteen years, in which shall be reserved any rent, shall be valid, lease of agricultural land for natural life of lessor at specified rental was valid for period of fifteen years from its effective date, or until death of lessor if she died before end of period.

Affirmed.

1. Landlord and Tenant ⇐30

Where the term is specified in the lease, and exceeds period permitted for lease of agricultural land, it is void per se, but where it is left indefinite and its termination depends upon contingency of death, which may happen within period of limitation, it is not void ipso facto as being made for period longer than permitted. West's Ann.Civ.Code, § 717.

2. Landlord and Tenant ⇐30

Under statute providing that no lease or grant of land for agricultural purposes for a longer period than 15 years, in which shall be reserved any rent, shall be valid, lease of agricultural land for natural life of lessor at specified rental was valid for period of 15 years from its effective date, or until death of lessor if she died before end of period. West's Ann.Civ.Code, § 717.

C. Ray Robinson, by W. E. Craven, Merced, for plaintiff, appellant and cross-respondent.

Landram & Silveira, by H. K. Landram, Merced, for defendants, respondents and cross-appellants.

WARNE, Justice pro tem.

On April 10, 1946, plaintiff Grace M. Kendall leased certain agricultural lands to the defendants, R. E. Southward and Gladys H. Southward, at a specified rental for the term of the natural life of the plaintiff. The effective date of the lease was September 1, 1946. In May of 1955, plaintiff brought an action for declaratory relief, contending that said lease is utterly invalid and void on the ground that it is in violation of the provisions of Section 717 of the Civil Code, which provides that:

> "No lease or grant of land for agricultural or horticultural purposes for a longer period than fifteen years, in which shall be reserved any rent or service of any kind, shall be valid * * *."

The defendants contended that the lease was valid, notwithstanding the statute.

The trial court accepted neither contention but held that the lease was valid for a period of fifteen years from its effective date or until the death of the lessor, if she died before the end of that period. Judgment was entered accordingly.

Both parties have appealed from the judgment, the plaintiff from the whole thereof, the defendants from that portion limiting the validity of the lease to a period of fifteen years from September 1, 1946, should lessor live so long.

We find no case in California deciding the issues presented by this appeal. There appears to be only two cases wherein Section 717 of the Civil Code is mentioned. The cases are: Mann v. Mann, 141 Cal. 326, 74 P. 995, and Coruccini v. Lambert, 113 Cal.App.2d 486, 248 P.2d 457. The statement in the Mann case in reference to the application of Section 717 of the Civil Code is obiter dictum. The Coruccini case contains nothing applicable to the issue now before us.

There is, however, a line of decisions in other states holding that leases for life or other indefinite terms are not void ab initio because of statute or constitutional provisions similar to Civil Code Section 717.

The lease in the instant case is one for the life of the plaintiff owner. No one can now determine how long the plaintiff lessor will live. She may die before the expiration of fifteen years from the effective date of the lease. She may live beyond that time. The duration of the term of the lease is, therefore, indefinite. Its ter-

mination is dependent upon a contingency which may or may not happen within the fifteen year limitation of the statute.

It is said in 32 Am.Jur., sec. 64, Landlord and Tenant, page 80:

"* * * A lease for life, although it may extend for a period longer than that specified in the prohibition, is not within the prohibition; where the term is specified in the lease and exceeds the limitation, it is void per se, but where it is left indefinite and its termination depends upon the contingency of death, which may happen within the period of limitation, it cannot be said to be void ipso facto as being made for a period longer than that permitted by the restriction. * * *" Also see note 17 A.L.R.2d 570.

[1] The case of Parish v. Rogers, 20 App.Div. 279, 46 N.Y.S. 1058, 1060, involved a lease which provided for a term for the life of the lessor and his wife with rent payable to the lessor during his life and after his death to his wife. It was contended that the instrument was void as contravening the constitutional provision against leases of agricultural land, reserving rent for more than twelve years. The lease was made in 1888, and the action was commenced in 1896, eight years later. The court, in discussing the contention, said:

"* * * Where the term is specified in the lease, and exceeds the limitation, it is void per se; but where it is left indefinite, and its termination depends upon the contingency of death, which may happen within the period of limitation, it cannot be said to be void ipso facto, as being made for a period longer than 12 years. * * * It does not appear, therefore, from the terms of the grant, that it will last longer than 12 years. In respect to whether the grant is void upon its face, the words 'longer period' should be construed * * * as not applicable to estates whose duration is wholly indefinite and uncertain. This grant is not, by its terms, a lease 'for a longer period than twelve years,' but for an indefinite time, which can only be made definite or fixed by the happening of a contingency, viz. death, which may occur within the limitation. The instrument cannot, therefore, be said to create a term for a longer period than 12 years, within the meaning of the provision. * * *"

In the case of Interurban Land Co. v. Crawford, C.C., 183 F. 630, it was held that the Alabama Statute, Code of 1907, Section 3418, which provides that no leasehold estate in land can be created for a longer term than twenty years, applied only to tenancies for terms of years and is not appropriate to or a restriction on tenancies for the life of the tenant of another. The statute, the court held, applies only to such leasehold estates as by the terms of the lease endure longer than twenty years, and has no application to those which may or may not endure that long, contingent on the happening of a future event.

In the case of Aikins v. Nevada Placer, 54 Nev. 281, 13 P.2d 1103, 1105, in a suit to quiet title, the court refused to hold a lease for five years and as long thereafter as the lessee operated the property void and in violation of a Nevada statute, which provided that a lease for a longer period than twenty years shall be void. The court, in considering this statute and the clause of the lease said:

"* * * It will be seen that the duration of this lease is dependent upon a contingency which may or may not happen within twenty years. We have found no case directly in point on the facts, but the case of Parish v. Rogers * * * is strictly analogous. * * * As it does not appear affirmatively from the lease that it will extend beyond the statutory limitation, we cannot, in view of the applicable rule of strict interpretation, declare it void. * * *"

In Anderson v. Blixt, 72 N.W.2d 799, the Supreme Court of North Dakota followed the rule laid down in the case of

Parish v. Rogers, supra, and held that a lease of agricultural land for as long as any one of the three lessors was alive was not within the statutory prohibition against lease of agricultural lands for more than ten years, where the ten years had not elapsed at the time of the decision.

[2] We feel that the law as stated in the above mentioned text and cases is sound in principle, and that it states the proper rules to be applied in the case at bar. In applying these rules, we will not be defeating the purpose of Section 717 of the Civil Code, but will be giving effect to the statute in holding that the grant or lease shall no longer be valid after fifteen years from its effective date.

The judgment is affirmed. The cost of the transcript is to be divided equally, each side to pay for its own briefs.

VAN DYKE, P. J., and PEEK, J., concur.



149 Cal.App.2d 755

Charlotte V. SWANSON, Plaintiff and Respondent,

v.

Emma C. BOGATIN and Al Huerby, Defendants and Appellants.

Civ. 8961.

District Court of Appeal, Third District, California.

April 3, 1957.

Rehearing Denied April 26, 1957.

Hearing Denied May 29, 1957.

Plaintiff motorist's action for personal injuries sustained when automobile in which she was approaching intersection was struck by vehicle being driven by defendant motorist who was making a right hand turn. The Superior Court, Sonoma County, Donald Geary, J., entered judgment for plaintiff motorist and defendant driver and owner of automobile appealed. The District Court of Appeal, Van Dyke, P. J., held that error resulting from instructing jury as to presumption that plaintiff at time of and place of accident was not guilty of any negligence of herself, even though plaintiff had fully testified as to her actions at time involved, was not prejudicial under the circumstances but judgment against defendant owner of automobile would be modified to bring it within limit of statute.

Judgment modified and as so modified affirmed.

1. Appeal and Error ⇐1064(1)

In motorist's action for personal injuries received in automobile collision, error resulting from the giving of charge that plaintiff at time and place of accident was presumed not to be guilty of any negligence herself, even though plaintiff had fully testified as to her actions at the time involved, was not, under the circumstances, prejudicial.

2. Appeal and Error ⇐1064(1)

Whether the giving of an instruction on the presumption of due care is prejudicial must be determined upon the facts of the particular case.

3. Appeal and Error ⇐1069(1)

In action for personal injuries where testimony as to plaintiff's special damages was a sharp dispute, statement of court as to maximum claimed special damages in response to jury foreman's question as to amount of such damages was not prejudicial.

4. Damages ⇐37

Impairment of earning capacity, which is an element of general damages, is not the same as actual, proved loss of wages between the time of injury and trial but if loss of wages during that period is alleged and can be proven with reasonable certainty the loss can be recovered as special damages.

5. Appeal and Error ⇐1151(2)

Where a joint judgment for personal injuries was rendered against defendant driver of automobile who had been operating same under instruction permit and

against owner of vehicle for an amount in excess of owner's statutory liability, District Court of Appeal would reduce judgment as to owner to bring it within statutory amount. West's Ann.Vehicle Code, § 402.

Geary, Spridgen & Moskowitz, Santa Rosa, and Cooley, Crowley, Gaither, Godward, Castro & Huddleson, by Augustus Castro & Frank D. Tatum, Jr., San Francisco, for appellants.

Dilley & Eymann, Santa Rosa, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment in the amount of $20,170.45 entered upon a jury's verdict in a personal injury action.

The accident occurred on a clear, dry afternoon at the intersection of Todd Road and Primrose Avenue, public roads near Santa Rosa, each of which is two-laned. Appellant Bogatin was proceeding south on Primrose Avenue toward the intersection, intending to turn right and go west on Todd Road. Respondent Swanson was driving east on Todd Road toward the intersection, intending to continue toward the east. The view of each driver was unobstructed as related to the other vehicle for more than 100 feet back from the intersection. Appellant Bogatin was an inexperienced driver operating under an "instruction permit". Vehicle Code, § 253. She was driving a Chevrolet sedan owned by appellant Hueby, whose sales manager, a Mr. O'Leary, was demonstrating the car to appellant Bogatin. She drove into the intersection and made a right-hand turn into Todd Road, but collided with the car being driven by respondent just after leaving the intersection. She testified she did not see respondent's car until a few seconds before the impact; that she did not have time to look to her right before making the turn and relied on Mr. O'Leary's assurance that it was "O. K." to turn. Appellants charged contributory negligence on the part of respondent in that she drove across the center line and so collided with their vehicle on its right side of the road. There was sharp conflict in the evidence as to which vehicle left its proper side of the road. Bogatin and Mr. O'Leary both testified that the collision occurred on their side of the road, and that respondent had crossed the center line. Respondent testified that she was on her own side of the road at the time of collision; that the appellant's car crossed over and struck her car. This was corroborated by a highway patrolman who arrived shortly after the accident while the vehicles were still where they had come to rest after the collision, and who observed the scene, including turn marks and skid marks and deposition of debris. He testified the debris was on the south side of Todd Road, and that the collision had occurred in the middle of the south side. A tow-truck driver, an arriving witness, corroborated the officer as to the marks on the pavement and as to the point where the debris was deposited.

[1, 2] Appellants contend that reversible error was committed by the trial court in that it instructed the jury as follows: "It is presumed that the plaintiff at the time and place of the accident in question was not guilty of any negligence herself, but was exercising reasonable care for the protection of her own safety." It is conceded that this was error for the reason that respondent herself had testified fully as to her actions at the time involved. Gigliotti v. Nunes, 45 Cal.2d 85, 93, 286 P.2d 809; Nunnemaker v. Headlee, 140 Cal.App.2d 666, 675, 295 P.2d 438; Verhaegen v. Guy F. Atkinson Co., 126 Cal.App.2d 442, 445, 272 P.2d 855. The issue presented on appeal is whether or not the error was so prejudicial that the judgment should be reversed. A review of the entire record has convinced us to the contrary. The jury were meticulously instructed as to the issues of negligence, contributory negligence and as to the burden of proof. The accident was thoroughly described in the testimony, and while the witnesses did not agree as to the conduct of each driver, the vital conflict was as to where the collision occurred. If respondent was negligent, it was only because she went over on the

wrong side of the center line, in which case the collision occurred there. If plaintiff was negligent, it was only because she went south of the center line, in which case the accident occurred there. In short, this case must have been decided by the jury according as their finding as to where the collision occurred, and it is highly unlikely that their resolution of that issue was influenced in any degree by the erroneous instruction. It has often been decided that the question as to whether or not the giving of such an instruction as this on the presumption of due care is prejudicial must be determined upon the facts of the particular case. See Verhaegen v. Guy F. Atkinson Co., supra, 126 Cal.App.2d at page 444, 272 P.2d at page 856, and the cases cited. In view of the constitutional mandate that no judgment shall be set aside on the ground of misdirection of the jury unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice, we cannot reverse for the error under discussion.

[3, 4] Appellants next contend that error was committed when, during the jury's deliberations, they returned to court and asked for information. The following occurred:

"Foreman: We want the amount of the doctor bills.

"The Court: Is that all?

"Foreman: That's all I think we do.

"The Court: The doctor bills or the other special damages?

"Foreman: Yes, sir; that's right.

"The Court: You want the special damages, the total of them?

"Foreman: Please.

"The Court: $5,170.45. Does that answer your query? Did you get that figure—$5,170.45?

"Foreman: Thank you, sir."

Shortly after the above occurrence, the jury returned its verdict in favor of respondent in the amount of $20,170.45. Based on the foregoing occurrence, appellants contend that error was committed in several respects. First, appellants say that it was prejudicial error to instruct the jury that they could assess special damages in the amount of $5,170.45. The special damages claimed consisted of two classifications: (1) Out of pocket expenses for doctors, hospitals, nurses, etc.; (2) Loss of wages. Appellants assert that the sum mentioned by the court included $2,170.45 for the first classification of special damages and $3,000 for loss of wages. They say that the total amount proved as to the first classification was $1,814.02, but in this they are in error as the record shows proof totaling the larger sum. They say that no part of the loss of wages could be considered as special damages. Again, we think they are in error. Impairment of earning capacity, which is an element of general damages, is not the same as actual, proved loss of wages between the occurrence of the injury and the trial; if loss of wages during that period is alleged and can be proved with reasonable certainty, the damage can be recovered as special damages. Edwards v. Hollywood Canteen, 27 Cal.2d 802, 812–813, 167 P.2d 729; Maus v. Scavenger Protective Association, 2 Cal.App.2d 624, 631, 39 P.2d 209.

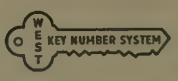
It appears that the cost of medical, hospital and nursing care reasonably required by respondent was sharply in dispute. The evidence relating to her loss of wages claimed as special damages was also sharply in conflict. The maximum shown as to both classifications of special damages was as given above. Appellants contend that by the colloquy between the court and the jury during the jury's deliberations the court in effect told the jury that the amounts they were to allow for special damages were the maximum sums. However, when the entire record bearing upon this matter is examined, we think that the jury could not have obtained that impression. By her complaint, respondent asserted she had received general damages to the amount of $50,000 and special damages for treatment in an amount as yet unascertained. She also pleaded that she had suffered loss of wages

in an amount as yet unascertained. She prayed for the sum of $50,000 general damages, for such sum as she would prove at the trial for treatment costs and for such other sum as might be shown to have been lost through loss of wages. During its instructions on the subject of damages, the trial court, in three separate instructions, mentioned the maximum sums claimed for the three items of damages by saying that the verdict could not exceed those sums. For instance, the court instructed the jury that if they found liability, they were to award respondent such damages as they might find would compensate her, the court adding "not to exceed, however, the general or compensatory and special damages alleged to have been sustained in the complaint—that is to say, not to exceed the sum of $50,000 general damages insofar as the complaint is concerned, and not to exceed the sum of $5,170.45 special damages." We think that from the three instructions which gave the jury the same directions that its award could not exceed the maximum sums mentioned, the jury must have understood that the court was not telling them that respondent was entitled to any set sum as special damages any more than it was telling them that she was entitled to the set sum of $50,000 general damages. In view of the sharp conflict in the evidence as to the items of special damages, we have no doubt that, during the argument, these matters were presented to the jury, respondent's counsel arguing for the maximum awards possible under the proof, and appellants' counsel presenting the defects in proof and conflicts in proof and asking that a much lesser sum or no sum whatever be awarded for such damages. When, therefore, the jury returned and asked the questions and received the answers it did it must have understood that once more the court was referring to the maximum sums which they could award for special damages and was not telling them that the sum mentioned ought to be the amount of their verdict.

[5] It appears from the record that a joint judgment for $20,170.45 was entered against both defendants, although appellant Huerby was the owner of the car. His liability was that of an owner under Vehicle Code Section 402, and the award against him should have been limited to $5,000. There appears to have been a stipulation at the trial that the jury could return a verdict in a single sum against both, and that the judgment against Huerby, if the award totaled more than $5,000 would be entered as against him for that sum. Respondent on appeal concedes that the judgment against Huerby should be modified to comply with the statutory limit.

The judgment against appellant Huerby is modified by reducing it in amount to $5,000. As so modified, the judgment against him is affirmed. The judgment as entered against appellant Bogatin is affirmed. Respondent is to recover costs.

PEEK and SCHOTTKY, JJ., concur.



149 Cal.App.2d 409

Frank Gideon REYNOLDS, Plaintiff, Cross-Defendant and Respondent,

v.

Marguerite Evelyn REYNOLDS, Defendant, Cross-Complainant and Appellant.

Civ. 9020.

District Court of Appeal, Third District, California.

March 25, 1957.

Hearing Denied May 22, 1957.

Action by husband for divorce. The Superior Court, San Joaquin County, Thomas B. Quinn, J., granted husband divorce and awarded custody of seven year old son to him and wife appealed. The District Court of Appeal, Schottky, J., held that trial court was justified in awarding child's custody to father.

Judgment affirmed.

1. Divorce ⇐301

Even though husband had made statement that wife acted as a mother towards minor child and only objection to wife concerning minor child's custody was fact that man wife kept company with was objectionable, husband was not precluded from contending that wife was not a fit and proper person to have custody of child and, since issue of wife's fitness was one for determination by court, court would not be bound by alleged statement. West's Ann. Civ.Code, § 138(2).

2. Divorce ⇐301

Although wife had a deep affection for child and would care well for physical wants of child, wife's attachment and close association with a man with a criminal record gave ample support to court's finding that she was not a fit and proper person to have custody of minor child in husband's divorce action. West's Ann.Civ.Code, § 138(2).

3. Infants ⇐19

Fitness to have custody of minor child requires more than affection and ability to properly feed, clothe and house child; it also requires an environment which will not be detrimental to character and morals of child. West's Ann.Civ.Code, § 138(2).

4. Divorce ⇐301

In husband's action for divorce, trial court was justified in concluding that wife, who had a close association and friendship with a man with a criminal record, would not provide an environment which would not be detrimental to character and morals of child, and therefore, did not abuse its discretion in awarding child's custody to father. West's Ann.Civ.Code, § 138(2).

McAllister & Johnson, Sacramento, for appellant.

Ira B. Langdon, Stockton, and Miller, Kroloff, Brown & Belcher, Stockton, for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment in which the plaintiff and cross-defendant, Frank Reynolds, was granted a divorce from the defendant and cross-complainant, Marguerite Reynolds, and was awarded custody and control of the parties' seven-year-old son, Bruce, the real property and automobile, and a part of the household goods and furniture. Marguerite received the sum of $500 as her share of the real property and the automobile, and the right of visitation of the child. Although Marguerite has appealed from the whole of the judgment, she states in her brief that "The sole question involved in this appeal concerns the custody of the minor child of the parties, a boy of seven."

It appears from the record that the parties had been married since 1933. In 1953 the respondent obtained employment in the Sacramento area, and brought his wife and child to West Sacramento to reside. A few months later respondent hired one Woodrow Buratti and he brought him home where he introduced him to appellant and the child. A short time thereafter respondent went to the hospital with a back injury, and Buratti called upon him frequently at the hospital and later at respondent's home.

In February, 1954, respondent and appellant separated. The respondent moved to Stockton and the appellant took a job in Sacramento. The appellant continued to see Buratti in Sacramento.

In October, 1954, the parties became reconciled, and appellant returned to Stockton. At this time Buratti was in the county jail in Sacramento serving a sentence for petit theft, and the appellant handled Buratti's business affairs for him, drove his car and visited him in the jail.

The reconciliation failed, and the parties separated for the last time in January, 1955. The appellant moved out of the family home and took the child with her. The action for divorce followed.

Buratti, who was a witness at the trial, admitted arrests and convictions for burglaries, petit theft, vagrancy and disturbing the peace in Yolo County, in Sacramento, Petaluma, San Rafael and Salinas. His

record covers a period from 1937 to 1954 and much of this time he spent in prison, including a four-year term in San Quentin.

The record shows that the association of appellant with Buratti began prior to the separation of appellant and respondent and continued up to the date of the trial. This association included regular visits by Buratti at the parties' home while respondent was in the hospital, the exchange of suspicious letters between Buratti and appellant while Buratti was in jail in which Buratti expressed his love for appellant and asked her to marry him and made other rather frank statements which tended to show that appellant and Buratti were on very friendly terms. Buratti made regular visits to appellant's apartment during the separation of the parties. The impact of Buratti upon the appellant's life is described by her in these words: "* * * I hold him in deep respect, as far as what he has been to me, to my son, to Frank when he needed him, to our friends, but as far as any marital condition, no, there is nothing." In answer to the question: "What are your feelings toward Mr. Buratti today?", appellant replied: "The same." On cross-examination of appellant the following occurred: "Q. And at that time, didn't you say in effect to your husband, regarding Buratti, 'there hasn't been near as much sex as you think there has'? A. Definitely." There is testimony in the transcript indicating that the parties had no serious domestic problems prior to Buratti's appearance on the scene.

There is also evidence in the record from which it could fairly be inferred that there were drinking parties in appellant's apartment.

[1] Appellant first attacks the finding of the trial court that she was not a fit and proper person to have the custody of said minor child. She argues that there was no evidence to support this finding and also argues that because of a statement made by respondent's counsel at the trial respondent cannot now claim that appellant is not a fit and proper person to have the custody of the child. Appellant quotes the following from the record:

> "Mr. Langdon [counsel for respondent]: Well, we will submit she acts as a mother toward Bruce. Our only objection to her on Bruce is the fact that the man she keeps company with, that is our only objection. I don't think we need take the Court's time trying to prove she has been a good mother.
>
> "Mr. Clark: If you will stipulate.
>
> "Mr. Langdon: I am not stipulating, we are raising no issue on it."

We do not regard the foregoing statements of counsel for respondent as precluding respondent from contending that appellant was not a fit and proper person to have the custody of the child, but in any event that issue was one for the determination of the court, and the court would not be bound by any statement or stipulation of counsel.

[2–4] Appellant's principal contention is that there is no substantial evidence to support the court's finding that she was not a fit and proper person to have the custody of the minor child, and that under section 138, subdivision (2), of the Civil Code she was entitled to have the custody of the child awarded to her. Said section reads as follows:

> "As between parents adversely claiming custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, custody should be given to the mother; if the child is of an age to require education and preparation for labor or business, then custody should be given to the father."

With reference to this section this court said in Phillips v. Phillips, 48 Cal.App.2d 404, at page 407, 119 P.2d 736, at page 738:

> "This section does not give the mother the *absolute right* to the custody of a child of tender years. The qualifying clause, 'but other things being equal', still leaves a large measure of discretion with the trial court. If

the court finds that other things are *not* equal, as it evidently did here, and there is any substantial evidence to support such a finding, our inquiry is at an end."

And as stated in Munson v. Munson, 27 Cal.2d 659, at page 666, 166 P.2d 268, at page 272:

"Plaintiff relies on the proposition that, as between parents adversely claiming custody, 'other things being equal, if the child is of tender years, it should be given to the mother.' (Civ.Code, § 138, which refers to actions for divorce; the proposition is equally applicable here.) The evidence above recited is clearly sufficient to support the determination of the trial court that 'other things' are not equal in this case. 'In determining whether other things are equal within the meaning of the above Code section, the trial court is necessarily allowed a wide latitude in the exercise of its discretion. In the first instance it is for the trial court to determine, after considering all the evidence, how the best interests of the child will be subserved. The question is to be determined solely from the standpoint of the child, and the feelings and desires of the contesting parties are not to be considered, except in so far as they affect the best interests of the child.' (Taber v. Taber (1930), 209 Cal. 755, 756, 290 P. 36, 37.)"

We are unable to agree with the contention of appellant that the court abused its discretion in awarding the custody of the minor child to respondent, nor can we agree with her contention that "appellant's association with a man with a criminal record is not ground for denying her the custody of a young child." As we read the record the court could well find that because of appellant's close friendship and association with Woodrow Buratti, which would bring Buratti into close association with the child, it would not be for the best interests of the child that he be awarded to appellant. And while it is no doubt true that appellant had and has a deep affection for the child and would care well for the physical wants of the child, we believe that her evident attachment for and her close association with Buratti, as abundantly shown by the record, give ample support for the court's finding that she was not a fit and proper person to have the custody of said minor child. Fitness to have the custody of a minor child requires more than affection and the ability to properly feed, clothe and house the child. It also requires an environment which will not be detrimental to the character and morals of the child. In view of the record of Buratti and the statement of appellant at the trial that her feelings toward Buratti were the same as they had always been, we think the court was fully justified in concluding that appellant would not provide such an environment.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



149 Cal.App.2d 326

Richard Douglas FURNISH, M.D., Petitioner and Appellant,

v.

The BOARD OF MEDICAL EXAMINERS of the State of California, Defendant and Respondent.

Civ. 21721.

District Court of Appeal, Second District, Division 1, California.

March 20, 1957.

Rehearing Denied April 9, 1957.
Hearing Denied May 15, 1957.

Mandamus proceeding brought for review of a Board order suspending a physician's license. The Superior Court of Los Angeles County, John J. Ford, J., entered a judgment of dismissal, and the petitioner

appealed. The District Court of Appeal, Fourt, J., held that under Business and Professions Code amendment (not affecting attorneys), felony conviction is ground for disciplinary action against a physician, without regard to whether offense involved moral turpitude.

Affirmed.

1. Physicians and Surgeons ⇐11(2)

Under applicable Business and Professions Code section, conviction of a felony and conviction of a criminal offense involving moral turpitude are separate, distinct and different grounds for disciplinary action against physician. West's Ann.Bus. & Prof.Code, § 2383.

2. Physicians and Surgeons ⇐11(2)

For purposes of disciplinary proceeding against licensed physician, record of conviction is conclusive evidence of questioned conduct, and a judgment following a plea of nolo contendere to a felony charge is expressly deemed to be a conviction. West's Ann.Bus. & Prof.Code, § 2383.

3. Criminal Law ⇐27

Under federal law, it is punishment which statute authorizes which determines whether crime is a felony or a misdemeanor.

4. Physicians and Surgeons ⇐11(2)

For disciplinary purposes, law of jurisdiction where crime was committed determines character of offense as felony or misdemeanor. West's Ann.Bus. & Prof.Code, § 2383.

5. Constitutional Law ⇐197

The constitutional prohibition against ex post facto laws relates to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively.

6. Constitutional Law ⇐197
Physicians and Surgeons ⇐2

Even though statute amendment, making conviction of felony ground for disciplinary action, against licensed physician, without regard to whether offense involved moral turpitude, was enacted after licensee's commission of offenses on which felony convictions were predicated, constitutional proscription against ex post facto laws was no bar to disciplinary action, under that amendment, predicated upon felony convictions occurring after amendment. West's Ann. Bus. & Prof.Code, §§ 2383, 2390, 2391.5.

7. Physicians and Surgeons ⇐11(3)

Extent of penalty to be imposed upon licensed physician in disciplinary action is for Board to determine; and one year suspension, imposed upon physician convicted of felonies, was well within power of Board. West's Ann.Bus. & Prof.Code, § 2372.

Murray M. Chotiner and Russell E. Parsons, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Howard S. Goldin, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of dismissal after sustaining a demurrer without leave to amend.

An accusation was filed with the Board of Medical Examiners of the State of California, hereinafter referred to as the "Board", on July 21, 1954, wherein it was alleged that Richard Douglas Furnish, hereinafter referred to as the "Doctor", had been guilty of unprofessional conduct contrary to the provisions of section 2383 of the Business and Professions Code, in that on or about May 4, 1953, in the United States District Court he was convicted of two felonies and criminal offenses involving moral turpitude, that is, two counts of violation of Title 26 U.S.C. § 145(b), 1939 Int.Rev.Code, in that he did wilfully and knowingly attempt to defeat and evade a large part of the income tax owing by him to the United States of America for the calendar years 1947 and 1948, and each of

said years.[1] A hearing was held on February 11, 1955, before a hearing officer assigned by the Board, at which time there was introduced into evidence a certified copy of the record of conviction in the case in the District Court, establishing that the Doctor, on May 4, 1953 was convicted following his pleas of nolo contendere of two counts of violation of Title 26 U.S.C., § 145 (b), Income Tax Evasion, for the calendar years of 1947 and 1948. It was conceded at the hearing that there was no evidence to establish that the convictions involved moral turpitude.

The hearing officer in his proposed decision found that the Doctor had been convicted of the two felonies and proposed a one-year suspension of his license to practice medicine and that the execution of such a penalty be suspended for three years on specified terms and conditions. The Board did not adopt the proposed decision, notified the parties accordingly and afforded to them an opportunity to file written arguments with the Board. The Board then determined the case and found that the Doctor had been convicted of the felonies in question and ordered that his license be suspended for one year. The Doctor petitioned for a rehearing, which was denied by the Board.

The Doctor then sought a writ of mandamus in the superior court in Los Angeles county, the purpose of which was to set aside the order of the Board. The administrative record was incorporated in the Doctor's first amended petition for a writ of mandate. The demurrer of the Board to the petition was sustained without leave to amend and a judgment of dismissal was thereafter made and entered. This appeal is from the judgment of dismissal.

The Doctor contends that a conviction of a felony, not involving moral turpitude, based on a plea of nolo contendere, is not a ground for disciplinary action against a physician and surgeon under section 2383 of the Business and Professions Code. The Board asserts, in this connection, that a conviction of a felony and a conviction of a criminal offense involving moral turpitude are separate, distinct and different grounds for disciplinary action. Further, that by the statute, a conviction following a plea of nolo contendere to a charge of a felony is expressly deemed to be a conviction for the purposes with which we are here concerned. The Doctor also contends that the convictions do not constitute felonies under the California law.

The Doctor further argues that the statute in question is an ex post facto law as to him, in that the offenses were committed in 1947 and 1948, and it was the 1951 amendment to the law which was applied to him. He also claims that it was an abuse of discretion for the Board to suspend his license to practice medicine for one year.

Section 2383 of the Business and Professions Code is set forth in a footnote hereto.[2] When the section was added to

1. The accusation against appellant, Richard Douglas Furnish, M.D., in paragraph III thereof, charged:

"That the respondent has been guilty of unprofessional conduct contrary to the provisions of Section 2383 of the Business and Professions Code of the State of California, as follows:

"That on or about May 4, 1953, in a proceeding then pending in the United States District Court for the Southern District of California, Central Division, entitled 'United States of America vs. Richard Douglas Furnish (charged as Richard D. Furnish)', No. 22,754 Criminal, the respondent was convicted of felonies and criminal offenses involving moral turpitude, to wit: two counts of violation of Title 26 U.S.C. § 145(b), in that he did wilfully and knowingly attempt to defeat and evade a large part of the income tax owing by him to the United States of America for the calendar years 1947 and 1948, and each of said years."

2. "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The board may order the li-

the statutes in 1937, it consisted of the first two sentences of the section as now constituted, excepting that there was no comma following the word "felony", and no comma following the word "turpitude" in the first sentence.

In 1951, the section was amended by adding the commas to the first sentence and the balance of the section.

Title 26 U.S.C. § 145(b), 1939, Int.Rev. Code, reads in part as set forth in the footnote hereto.[3]

[1, 2] In our opinion, the Doctor failed to state a cause of action warranting the issuance of a writ of mandate. The use of the disjunctive in the section in question, that is, "The conviction of a felony, *or* of any offense involving moral turpitude, constitutes unprofessional conduct" (emphasis added)—makes it abundantly clear that the legislature intended that the *conviction of a felony* in and of itself, without any qualifications, constitutes unprofessional conduct. It is also clear that "any offense involving moral turpitude, constitutes unprofessional conduct"—and such conduct does not necessarily have to be a felony. Further, for the purposes of this proceeding, the record of conviction is conclusive evidence of the questioned conduct, and by the very terms of the section itself, a "plea of nolo contendere made to a charge of a felony *or* of any offense involving moral turpitude" (emphasis added)—is deemed to be a conviction within the meaning of the section. Lorenz v. Board of Medical Examiners, 46 Cal.2d 684, 686, 298 P.2d 537.

[3] Under the federal law it is the punishment which the statute authorizes which determines whether the crime is a felony or a misdemeanor. Cartwright v. United States, 5 Cir., 146 F.2d 133, 135.

[4] For disciplinary purposes the law of the jurisdiction where the crime was committed determines the character of the offense as a felony or a misdemeanor. Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal.App.2d 476, 490, 139 P.2d 681; Karrell v. Watson, 116 Cal.App.2d 769, 771, 774, 254 P.2d 651, 255 P.2d 464; Murrill v. State Board of Accountancy, 97 Cal. App.2d 709, 710, 712, 218 P.2d 569.

The statute here clearly intended to make the conviction of a felony in the federal courts grounds for disciplinary action. The use of the words "nolo contendere" are, for all intents and purposes, meaningless, unless the legislature so intended, for there is no such plea in the California state courts, and there is such a plea in the federal courts. Had the legislature not so intended, it could, and undoubtedly would have used language such as is contained in sections 2391.5 and 2390 of the Business and Professions Code, where the restrictive term "statutes of this State" is used.

[5, 6] The contention that the 1951 amendment is an ex post facto law as to the Doctor is without merit. It it the law that "the phrase, ex post facto laws, is not applicable to civil laws, but to penal and criminal laws, which punish no party for acts antecedently done which were not punishable at all, or not punishable to the ex-

cense suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information or indictment. [Amended by Stats.1951 ch. 792, § 1.]"

3. "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

tent or in the manner prescribed." Watson v. Mercer, 8 Pet. 88, 109, 8 L.Ed. 876, 884. The Supreme Court of this state, in Foster v. Board of Police Commissioners, 102 Cal. 483, at page 492, 37 P. 763, at page 765, in substance, held to the same effect and further said, "[t]hough not an *ex post facto* law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons, as a class. Nor can we perceive why such evidence should be more conclusive of fitness, were the act done after the passage of the ordinance than if done before."

The revocation or suspension of a license is not penal, but rather, the legislature has provided for such to protect the life, health and welfare of the people at large and to set up a plan whereby those who practice medicine will have the qualifications which will prevent, as far as possible, the evils which could result from ignorance or incompetency or a lack of honesty and integrity.

The Doctor in this case was convicted in 1953, and the suspension was not based upon substantive acts which occurred in 1947 and 1948. The disciplinary action is predicated solely upon the two felony convictions in 1953, almost two years after the law was amended and was in full force and effect. Karrell v. Watson, supra, 116 Cal. App.2d 769, 774, 254 P.2d 651, 255 P.2d 464.

It is urged that in the case of In re Hallinan, 43 Cal.2d 243, 272 P.2d 768, which involved an attorney at law, the Supreme Court specifically held that a conviction of a felony is insufficient to justify disciplinary action unless there is a showing of moral turpitude. Counsel state that it is difficult for the Doctor to understand how the doctor should be treated one way and the attorney another. Suffice it to say that the law is different as to each of them and that the legislature amended the section having to do with the doctor in 1951, as heretofore set forth, and it did not amend section 6101 of the Business and Professions Code, which has to do with the attorney.

The Hallinan case, heretofore referred to, does not hold that a conviction following a plea of nolo contendere made to a charge of a felony may not be declared to be grounds for disciplinary action by statute. Under the State Bar Act a conviction without moral turpitude is insufficient for summary disciplinary proceedings, and, at the time of the first Hallinan decision, the nolo contendere plea was not designated as a conviction by statute. Under the Medical Practice Act, Bus. & Prof.Code, § 2000 et seq., a hearing is required, a conviction of a felony is an independent ground for disciplinary action without regard to whether moral turpitude was in fact involved, and a conviction following a nolo contendere plea was expressly defined as a conviction for disciplinary purposes. In In re Hallinan, 48 Cal.2d 52, 307 P.2d 1, the court held that the evidence disclosed that Hallinan had intentionally and for the purpose of personal gain filed false income tax returns and ordered that he be suspended from the practice of law in the state for three years.

[7] The remaining contention of the Doctor is that it was an abuse of discretion to suspend the Doctor's license for one year. The extent of the penalty within the Board's discretion is for the Board to determine. The penalty imposed against the Doctor was well within the power of the Board. Section 2372, Business and Professions Code; 2 Cal.Jur.2d, Administrative Law, p. 393; Fuller v. Board of Medical Examiners, 14 Cal.App.2d 734, 737–738, 59 P.2d 171; King v. Board of Medical Examiners, 65 Cal.App.2d 644, 652, 151 P.2d 282; Painless Parker v. Board of Dental Exam., 216 Cal. 285, 300, 14 P.2d 67; Black v. State Personnel Board, 136 Cal.App.2d 904, 912, 289 P.2d 863; Schneider v. Civil Service Comm., 137 Cal.App.2d 277, 285, 290 P.2d 306; Newman v. Board of Civil Service Comrs., 140 Cal.App.2d

907, 912, 296 P.2d 41; Olson v. Watson, 143 Cal.App.2d 343, 300 P.2d 35.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



149 Cal.App.2d 687

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas McPHILLIPS, Defendant and Appellant.

Cr. 3298.

District Court of Appeal, First District, Division 1, California.

April 3, 1957.

Defendant was convicted of robbery in the second degree after prior felony conviction. The Superior Court, City & County of San Francisco, C. Harold Caulfield, J., rendered judgment, and from such judgment and an order denying new trial, defendant appealed. The District Court of Appeal, Bray, J., held that the evidence was sufficient to support conviction.

Judgment and order affirmed.

1. Robbery ⇐24(1)

Evidence was sufficient to support conviction for second-degree robbery after a prior felony conviction. West's Ann.Pen. Code, § 211.

2. Robbery ⇐24(2)

In prosecution for robbery, evidence established intent to rob victim by force. West's Ann.Pen.Code, § 211.

3. Criminal Law ⇐1173(2)

Where evidence in prosecution for robbery was such as would permit of no conclusion other than that defendant intended to and did rob victim by use of force and defendant offered no instruction on intent, failure to instruct as to intent was not prejudicial to defendant. West's Ann.Pen.Code, § 211.

E. John Kleines, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of the State of California, Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from a judgment of conviction, after jury trial upon the charge of felony, robbery, and from an order denying new trial.

Questions Presented.

1. Sufficiency of the evidence.

2. Alleged error in failure to instruct on intent.

Record.

Defendant was charged with violation of Penal Code section 211, robbery of Jack Edwards, plus a prior felony conviction which he admitted. On his motion, another information charging him with grand theft was consolidated for trial. The jury found him guilty of the robbery charge. By stipulation the degree was fixed as second degree. The jury could not agree on the grand theft charge and it was dismissed on motion of the district attorney.

1. Sufficiency of the Evidence.

[1] While, as usually occurs in criminal cases, there are conflicts and contradictions in the evidence, such contradictions were matters for the jury to consider, and were not such which this court could resolve as matters of law. Nor is the testimony of Miller, as will hereafter be seen, such that we can hold it to be incredible. The evidence amply supports the conviction.

Jack Edwards, the victim, aged 75, resided at the Alta Hotel in San Francisco. He testified that in the lobby that evening,

he was engaged in conversation with four or five others. Defendant was present. Edwards had not known him prior to that occasion. About 1 a. m. Edwards decided to retire. Defendant had led Edwards to believe that defendant was also staying at the hotel. Defendant accompanied Edwards in the elevator to his room. Defendant forced himself into the room, Edwards protesting that he needed sleep. Defendant beat Edwards unconscious. Edwards had in his possession a $20 bill, four $5 bills and some silver, all of which defendant took. One of the $5 bills had a torn corner. Edwards identified it as one of the bills later found in defendant's possession.

Miller, clerk at the hotel, said that a little after 2 a. m. he saw Edwards crossing the street toward the hotel from a restaurant on the other side of the street. Defendant was walking behind Edwards. They both walked to the elevator where they held a conversation before entering. Miller heard defendant say he was going to the top floor. As there was a hotel rule against visitors after 10 p. m., Miller decided to follow. He went up in the freight elevator. Seeing no one on the top floor, he then went to the third floor. (There was some confusion in his testimony as to whether he then went to the fifth or third floor. He finally said positively it was the third.) He listened at all the doors on that floor. At Edwards' room he heard a thump and then heard Edwards say "God, don't hit me no more." Miller went down to the desk and obtained a flashlight and a billy. He instructed an assistant to call the police. Returning to the third floor he saw defendant come out of Edwards' room and go down in the passenger elevator. Miller descended in the freight elevator. When Miller reached the lobby defendant was outside the hotel. Defendant ran into an alley. Miller watched defendant until the police arrived and was present at the arrest. Officer Ryan apprehended defendant, who, on seeing the police, shoved something inside his pants. On search this proved to be the wallet of one Plumley. Additionally defendant had $65. One $5 bill was the torn one later identified by Edwards. Ryan stated that Edwards said in defendant's presence shortly after defendant's arrest that defendant was not the man who robbed him. Edwards then appeared "very groggy" and showed evidence of a severe beating in the head. (Edwards had no recollection of this statement. He could not recall anything that occurred after his beating.)

Plumley met defendant in a tavern about 1 a. m. They discussed sports. Plumley went to the men's room and as he was leaving it defendant entered. They bumped. Plumley returned to the bar and shortly defendant left the tavern. On reaching into his overcoat pocket Plumley discovered that his wallet was gone. It was the one Officer Ryan found in defendant's trousers.

Defendant testified that he came to San Francisco from Sacramento that day and that in the tavern he started to talk to Plumley. He was not sure whether or not he bumped against Plumley on entering the rest room. He returned to the bar. As he was leaving he saw a wallet on the floor which he picked up and put in his pocket. He then went to a Mexican restaurant. After approximately 30 minutes there he left, intending to look for a room. Standing on the corner he saw two police cars approaching. Feeling guilty obout the possession of the wallet he walked in the opposite direction and tried to hide the wallet. He had over $50 in his possession before he found the wallet. It contained $15. (Plumley said $17.)

Defendant denied being in the Alta Hotel, in the alley which Miller said he went through, or beating or robbing Edwards.

Inspector Dutil testified that shortly after his arrest defendant told him that he had found the wallet on the street.

[2] In spite of discrepancies in the time that Miller and Edwards stated that

the affair took place, whether defendant first met Edwards in the lobby, the fact that Edwards in his dazed condition said defendant was not the person who robbed him (at the trial Edwards was positive in his identification of defendant), and some other apparent contradictions, there is ample evidence to support the jury's finding that all of the elements of robbery were present. Defendant contends that there is no evidence as to when he formed the intent to rob. Considering defendant's conduct that night, his pretending that he had a room in the Alta Hotel, his following Edwards to his room and forcing himself into the room, his unmerciful beating of Edwards (there could have been no other motive than robbery for beating him), his taking Edwards' money, and no testimony by defendant that he formed the intent to rob only after the beating,[1] compels the conclusion that defendant intended by force to rob Edwards.

2. Instructions—Intent.

Defendant offered no instruction on intent, but contends that the court is required on its own motion to instruct upon the subject. The court read section 211, Penal Code, defining robbery. In People v. Quinn, 77 Cal.App.2d 734, 176 P.2d 404, it was urged that it was the duty of the trial court to give such an instruction even though none was offered by defendant, particularly as there the defense was that the taking of a wallet was a practical joke. The court said, 77 Cal.App.2d at page 739, 176 P.2d at page 406: "The jury was otherwise instructed that to constitute robbery there must be a felonious taking of personal property from the person of another, and that instruction necessarily included the question of intent.

"While it may be conceded that an instruction should have been given to the effect that in constituting a crime there must exist a union or joint operation of act and intent, it can not be held that any possible error was sufficiently prejudicial to justify a reversal in view of the provisions of section 4½ of article VI of the Constitution."

[3] So here assuming that such an instruction should have been given, the failure to do so could not possibly have been prejudicial. Defendant's actions that night permit of no conclusion other than that he intended to and did rob Edwards by use of force.

Judgment and order affirmed.

PETERS, P. J., and FRED B. WOOD, JJ., concur.

1. Thus distinguishing this case from People v. Carnine, 41 Cal.2d 384, 260 P.2d 16, where the defendant in a homicide case testified that it was not until after the killing that he formed the intent to rob the deceased.

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